

Juridical aspects of NAFTA

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August 12, 1992 marked the conclusion of negotiations between Mexico, the United States and Canada for a free trade agreement, which was signed by the three heads of state on December 17. A year after NAFTA negotiations were finalized, parallel accords on environmental and labor issues were signed, committing the three countries to protect and improve the environment and oversee compliance with labor laws so as to improve working conditions and living standards for workers.

The treaty and parallel agreements created a free trade zone, which Article XXIV of GATT defines as: "A group of two or more customs territories substantially eliminating customs rights and other restrictive commercial regulations with regard to trade between the constituted territories in products coming from those territories."

With this definition in mind we can state that NAFTA is a novel and highly complex treaty, given the breadth of activities it covers and the mechanisms of its application. It goes beyond the terms laid down by GATT, since it regulates not only goods but also services, intellectual property, investment, disloyal commercial practices—in fact, all relevant areas of today's commerce.

NAFTA consists of 24 chapters, organized into eight parts or sections. The first section, covering "general aspects," includes the treaty's objectives and the legal definitions necessary for its application.

The second deals with trade in goods, incorporating the basic principles of national treatment and free access to markets through gradual, step-by-step elimination of tariffs, recognizing the specific circumstances of each sector; most duties are to be removed within 10 years.

A series of rules are established allowing for uniformity and juridical security as regards application and the solution of such conflicts as the rules of origin may give rise to. Emergency measures, better known as safeguards, have been regulated; these measures may be used if a particular industry is adversely affected by the increase in

imports, so that no barriers to commerce will arise. Such measures may be applied temporarily, with compensation to the country affected by their application.

The third part sets norms relating to technical barriers to trade and normalization measures implemented by the signatory nations for promoting security and protecting human, animal and vegetable life, as well as health, the environment and consumers.

The fourth part deals with public-sector purchases. Clear rules are set forth for bids by suppliers in the NAFTA countries, respecting the principles of national treatment and most-favored nation.

The fifth sets norms for investments, trans-border trade in services, telecommunications, financial services, policies regarding competence and the temporary entry of businesspeople. In general terms, the treaty maps out a gradual liberalization in these sectors, establishing a mechanism for resolving controversies between investors and NAFTA's member countries. This consists of international arbitration, subject to the rules of the International Center for Resolution of Differences Regarding Investments or those of the United Nations Commission for International Trade Law (UNCITRAL).

The sixth section of the treaty institutes effective mechanisms for the protection and defense of intellectual property, on the basis of the principle of national treatment as well as the principles set forth in international agreements on this subject.

The following section relates to the creation and functioning of the institutions responsible for the treaty's application and procedures for resolving controversies.

The central institution established by the treaty is the North American Free Trade Commission, a trinational political-administrative body made up of the member nations' ministers of commerce. The Commission's function is to oversee the treaty's application and supervise the functioning of the committees and work groups charged with ensuring the fulfillment of NAFTA's provisions. A technical support body for the Commission is also created: called the Secretariat, it is divided into three sections, one for each country.

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It is important to stress that, unlike the situation in the European Community, NAFTA's administrative bodies—the Commission and the Secretariat—are not supranational institutions. In the free trade zone established by the treaty, each member country fully retains its autonomy in setting its trade policy towards countries outside NAFTA, and no government may grant its nationals the right to sue another member state in the first country's courts. Thus NAFTA introduced neither the principle that individuals may invoke the treaty nor any supremacy of NAFTA writ over laws of the member states.

The overall mechanism for conflict resolution negotiated as part of the treaty consists of three stages: consultation among governments, procedures undertaken before the Commission, and the formation of arbitration groups. The first two stages are conciliatory; only the third is contentious. The arbiters who will make up each panel will be chosen from a closed list of up to 30 persons, through a "crossed selection system" which prohibits the contending countries from choosing their own nationals as arbiters. In the event of non-compliance, NAFTA projects

the suspension of benefits derived from the treaty until such time as the issue is resolved.

While there is a single mechanism for conflict resolution, there are a number of special mechanisms regarding investments, disloyal practices, financial services and private trade controversies on agricultural products.

The eight and final part of the treaty includes provisions ensuring the signatory countries' ability to protect their national interests through a series of exceptions which can be invoked, such as national security, taxation, the balance of payments and culture-related industries.

NAFTA is an open treaty. It allows for other countries or groups of countries to join the free-trade zone, and any of the member countries may withdraw after six months' prior notice.

From the above we may conclude that full confidence in the trilateral Free Trade Agreement is justified on the basis that it draws upon the experience accumulated in previous bilateral and multilateral agreements and represents a significant advance in the organization of international commerce. ❧

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