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THE CURRENT STATUS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

JUDITH H. BELLO, ESQ.*

If you listened to the NAFTA debate in the United States last year, you might mistake it as simply an agreement about jobs. Jobs are very important and I am prepared to make the case that NAFTA will in effect create jobs in Mexico, the United States and Canada. Yet I think we will all readily agree that NAFTA is about much more than just jobs. NAFTA has overarching implications that extend far beyond its job effects.

First, I stress that the U.S.-Mexico aspect of NAFTA exemplifies a reciprocal, mutually advantageous cooperation between a developed and a developing country. This is a critical issue with respect to NAFTA and an important component for NAFTA's implementation by the United States. The global arena in which NAFTA occurs is very much a post-Cold War world. The focus will no longer be so exclusively East-West, but increasingly will be returning to North-South. NAFTA is a good news story that shows how the developing and developed worlds can cooperate with each other to their mutual benefit.

Second, NAFTA will encourage global as well as regional trade liberalization. We probably would not have been able to conclude the Uruguay Round of GATT talks in December 1993 if NAFTA had been defeated. Moreover, many of the GATT contracting parties appreciate that if we cannot liberalize world markets through a multilateral forum such as the General Agreement on Tariffs and Trade (soon to be rechristened the World Trade organization), those who most ardently champion trade liberalization will seek to do so whichever way they can—plurilaterally, bilaterally or otherwise.

Third, NAFTA establishes for the first time, a truly world-class legal regime for protecting intellectual property. It is important to give credit to Mexico, which unilaterally improved its protection of intellectual property prior to obtaining any reciprocal concessions by the United States. Even so, NAFTA enshrines these unilateral reforms in a trilateral agreement and is the first agreement to create a comprehensive, truly first-tier system for protecting intellectual property.

Fourth, NAFTA clearly opens the door to closely integrating the treatment of trade, labor, and environmental issues. Fifth, NAFTA symbolizes

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what is happening, whether we like it or not, in the post-Cold War era: the internationalization of the domestic agenda. Issues that we once thought of as internal, political, or domestic are no longer the case in the modern global economy connected by information highways, 24 hour news reporting, and jets that criss-cross the world.

Finally, NAFTA serves to cement the historic, much-improved new relationship between Mexico and the United States. These overarching implications were often disregarded by NAFTA opponents who would have had the United States reject NAFTA simply on the claim (which of course the facts do not support) that NAFTA will cause that giant "sucking sound" of jobs from the United States to south of the border.

With all this great promise, NAFTA still faced strong opposition in the Congress of the United States. This opposition was due to many factors, but I would like to place the issue in a geo-political context. During the last presidential election, then-President Bush and his team were able to conclude the negotiation of NAFTA—an immense achievement for that administration—and Governor Clinton was called upon to take a position with respect to it. Meanwhile, Ross Perot had already taken a strongly anti-NAFTA position.

Governor Clinton apparently was urged by some of his political advisors to take the Perot line. At that point, Democratic polls showed that Clinton needed only two of three states in order to clinch the election. The three states at issue—Michigan, Ohio, and Pennsylvania—are staunchly anti-NAFTA states. It must have been tempting to take the prize readily within his grasp by taking the Perot line in opposition to NAFTA. But Governor Clinton, to his great credit, did something far more responsible; albeit with great qualifications, he endorsed NAFTA because he appreciated that it is overwhelmingly in the best interests of the United States. He also had other political interests at that time and it was not within these interests to endorse NAFTA without qualification. A blanket endorsement would have been too great a pat on the back for President Bush. Therefore, in Raleigh, North Carolina, on October 4, 1992, Governor Clinton said he would support NAFTA provided he first improved it.¹

Once elected, President Clinton made two fundamental miscalculations. First, Clinton misjudged how long it would take to "improve" NAFTA through the negotiation of the side accords. This was after all, a negotiation with two sovereign states—Mexico and Canada—who did not regard the United States proposals as improvements. Therefore, it took twice as long to conclude those negotiations than the administration initially calculated.

Second, the Clinton Administration miscalculated the nature of this foreign policy exercise. It was a mistake to assume that NAFTA would pass in the same way as prior bills implementing trade agreements ne-

1. Mitchell Locin, *Clinton Gives Trade Pact a Conditional OK*, CHICAGO TRIB., Oct. 5, 1992, at 5.

gotiated by the United States have passed. The administration did not anticipate the change in the geo-political sea in foreign policy-making. In the past, the American public freely delegated to a very small group of elites the power to make foreign policy for the United States. The simple explanation for this is the conduct of the Cold War. Many Americans recall civil defense drills in elementary school; the civil defense siren would sound and everyone would crouch under the school desks—as if they provided shelter against Soviet missiles. Nikita Khrushchev pounded his shoe on the table and reminded us that the intent and design of the Soviet Union was to bury the United States of America.

In this bipolar Cold War environment, overshadowed by the possibility of nuclear annihilation, the general public was readily prepared to trust the leader of the western world to establish foreign policy for the United States. The president of the United States relied on the elites—"the Establishment." It was a very small group dominated by East Coast Ivy Leaguers who made foreign policy for this country, which the public supported largely without question, out of fear of the Soviet menace (with one notable exception: the Vietnam War). While the world is a better place now that the Soviet Union-United States confrontation is over, we can appreciate that the world is still a very dangerous place. Yet, with the demise of the Soviet threat, many Americans are no longer willing to delegate to the elite policy makers the determination of what the foreign policy of the United States ought to be. The sea change in attitudes about foreign policy is driven also by the breakdown of a clear division between international and domestic policies; the internationalization of the domestic agenda that I discussed earlier. While NAFTA did not cause this attitudinal sea change in foreign policy making, it personifies the change.

Furthermore, the Clinton Administration did not understand that it had to do something that predecessor administrations, Republican and Democratic, did not have to do. That is, the Clinton Administration had to convince the public of NAFTA's importance to this country. It seems, however, President Clinton felt he could not fully support NAFTA until it was *his* NAFTA. It was not *his* until it was "improved" by Clinton, which took until September 1993.

Like nature, politics abhors a vacuum. When President Clinton did not fully support NAFTA on the Hustings,² NAFTA opponents made the case against it. Among the opponents were organized labor, Ross Perot, Pat Buchanan, Jesse Jackson, and the Black caucus. Ross Perot is clearly a political genius. While I believe he has used NAFTA to achieve negative results, Perot perceived that there was pervasive insecurity among the American people, regarding NAFTA. Perot recognized this

2. The President gave his support to NAFTA, provided it was improved, in a major address in February 1993. *Split Goal on Trade; President's Speech Tries to Reconcile Open Markets with Help for Industry*, N.Y. TIMES, Feb. 27, 1993, at 6. However, neither he nor his administration undertook a marketing effort to sell NAFTA to the public beyond the Washington, D.C. beltway.

insecurity and, to paraphrase his general argument, asked, "Do you agree with me that America is in danger of decline? Do you share my concern that our children and grandchildren will not necessarily have a better life as we did? Well, it is NAFTA's fault." This argument is a complete *non sequitur*, but nonetheless it appealed to a large number of Americans who had not in the past paid much attention to foreign policy, and particularly to NAFTA.

The Agreement went into effect, as scheduled, on January 1, 1994.³ Government agencies of the United States and Mexico issued interim rules to implement NAFTA, at least on a temporary basis. Both also sought public comments on proposed rules regarding NAFTA.⁴ NAFTA "Help" telephone assistance was offered to perplexed importers and exporters, who in the transition period had difficulty understanding or even obtaining copies of the new tariff schedules and customs-related forms.

Currently, Canada, Mexico and the United States are devoted to providing resources to implement NAFTA with success. For example, commissions have been established among governments to assist in the implementation process.

Surely, there will be problems and setbacks. While integrating the North American market, each member government retains national interests that can conflict with those of the other members. Moreover, NAFTA's opponents are unlikely to fade away. Indeed, as *Washington Post* cartoonist Herblock predicted on November 18, 1993 (the day after the passage of NAFTA implementing legislation by the United States House of Representatives) NAFTA is likely to be blamed for job loss, loss of income, business loss, loss in poker games, loss of luggage on plane trips, loss of socks in laundry, loss of hair, loss of air in tires, burnt toast, no cold beer, and any other malady imaginable.

NAFTA is strong enough to withstand such assaults. As the Agreement yields dividends for each member government's national interests, including the overarching implications discussed above and, of course, jobs, such assaults will diminish over time. The history books of tomorrow will present NAFTA as a big step forward for all North Americans and perhaps, indeed, the world.

QUESTIONS AND COMMENTS

QUESTION, *Frederick Hill, Los Angeles*: With respect to the trilateral commissions that have been set up by the NAFTA side accords, how can we address the criticism that these commissions will simply create more bureaucracy?

3. With respect to United States implementation, see Proclamation To Implement the North American Free Trade Agreement, and for Other Purposes, 58 Fed. Reg. 66,867 (1993).

4. See, e.g., United States Customs Service North American Free Trade Agreement Interim Regulations, 58 Fed. Reg. 69,460 (1993); Rules for Determining the Country of Origin of a Good, 59 Fed. Reg. 110 (1994).

ANSWER, *Ms. Bello*: My own view is that there is too much government bureaucracy. Having said that, I think it is necessary for the implementation of NAFTA in this country, and I think NAFTA is crucial for all the reasons that I have already given. I also think that one can make too much of the new bureaucracy that will be established. I do not believe the commissions are going to function as runaway, unaccountable, supernational bureaucracies. They have been carefully reigned in by the drafting of the NAFTA side accords.

QUESTION, *Tom Schernbaum, University of Georgia*: You made the statement that NAFTA will encourage global agreements as well as regional trade agreements, which implies that NAFTA will have a positive impact on the GATT multi-level trading system. Can you reconcile this impact with some of the more protectionist elements of NAFTA that have not been mentioned this morning. For example, I am speaking about the rules of origin, the yarn forward rule of origin, which is understandable from a political standpoint but not from an economic standpoint. The general rule of origin under NAFTA, which is the change and customs classification rule, is a tremendous advance over the substantial transformation test. But added to that rule in certain sectors, such as autos, are North American domestic content rules, which amount to 62.5% for automobiles and auto parts. Moreover, the Clinton Administration used Japan as the scapegoat to sell NAFTA. I would like your comment on this.

ANSWER, *Ms. Bello*: Your question allows me to elaborate on a point that I really did not mention earlier. I would not call the rules of origin in NAFTA protectionist, but stringent. There is a political reality we have to recognize: the United States, Mexico, and Canada all want to make sure that the benefits of NAFTA are received by North Americans and are not exploited by non-North Americans. Whether for better or worse, it was politically necessary to have some of these stringent rules.

In fact, the yarn forward rule is generous compared to the fiber forward rule. According to the latter, if the cotton is not grown in North America, nothing made from it is entitled to NAFTA tariff benefits. I agree that this is an example of a stringent rule. These rules, however, are still allowed by GATT because it is important to promote a free trade area.

In response to the second question you posed, a Japanese government official reportedly remarked that NAFTA was "sneaky protectionism."⁵ NAFTA will have some trade diversionary effects and, in the short term, this will not be good for non-North Americans. But if NAFTA fails, then United States leadership on trade liberalization also fails. If that happens, it is much less likely that multilateral trade liberalization will occur because it has always been led by the United States. Politically speaking, trading partners such as Japan who are legitimately concerned

5. Michael K. Fisby, *Clinton's Crusade for NAFTA Includes Arm-Twisting, Citing Threats to U.S.*, WALL ST. J., Oct. 26, 1993, at A24.

about NAFTA's likely short-term trade diversionary effects want NAFTA to succeed.

QUESTION, Joanne Stark, Phoenix, Arizona: The Canada-United States Free Trade Agreement opened up certain business immigrant visa possibilities for Canada. The Bush Administration attempted to downplay the immigration implementing provisions in NAFTA because of the mounting paranoia regarding labor issues. What is your view of the immigration components of NAFTA?

ANSWER, Ms. Bello: NAFTA is not fundamentally an agreement on the movement of labor; it does not alter the immigration laws of any of the three member governments. There are some useful—yet modest—provisions on the temporary entry of business persons, which will make it easier for investors, traders, sellers, and other business persons to have easy entrance into North American countries.

That possibility has provoked some concern. NAFTA allows up to 5,500 Mexican professionals entrance into the United States annually.⁶ In my judgment, it is quite a modest provision but, nonetheless, has provoked some concern. For example, the American Medical Association has raised questions regarding whether or not unqualified Mexican professionals will be allowed to practice medicine in the United States.

6. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., app. 1603(D)(4)(1) H.R. Doc. No. 103-159 (effective Jan. 1, 1994).