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Beatrice Prati

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NAFTA: ITS LEGAL EFFECTS--THE BROAD STROKES: A MEXICAN PERSPECTIVE

Beatrice Prati*

I heard other comments about the United States looking to Mexico. This is not what I am going to be talking about but I have to mention it. The United States looking to Mexico we heard first. Then there is Canada looking to the United States. Allow me thirty seconds of Canadian and gringo-bashing by Mexicans. My thirty seconds are in a reply to one proposal about NAFTA courts. The United States always uses it, then they pay for it. That is my first one.

The second one is about the three lenses. Give us a break. We have gone a long way. We have done a lot of things. We have changed a lot of laws. There are a lot of poor people out there who are seeing the effects. I think the country is doing just fine. It picked itself up from a disaster, but give us a break. That is my kind of rebuttal.

Now, I am going to go into what I want to talk about for ten minutes because really all the philosophical points have been taken. I really do not have anything else to add. I just want to talk to you from a practical point of view. I practice Mexican law looking into foreign investments, looking into trade, looking into the environment. We generalize a lot. There are more specializations in the United States. But I see a lot of things, and a lot of people are interested in Mexico.

I thought it would be very appropriate for me to share with you a few points. I guess I have four, and I hope I can squeeze them in, that answer this only question: Has anything really changed in my practice as a Mexican lawyer now that NAFTA has been in place for three years? Has it changed? And the answer I give you is an answer that Mexican, American, and Canadian lawyers know how to answer very well, which is, well, yes and no. Let me qualify that one so you do not start throwing tacos at me.

Why yes, why no? I am going to take four areas of practice that I look at. What I am going to describe will answer why I am saying yes

* Beatrice Prati is with the New York office of the Mexico City law firm of Bryan, Gonzalez, Vargas Y Gonzales Baz. She specializes in international trade matters.
to some and no to others. Let us start with the environmental area. Has anything changed? Yes, but it was not because of NAFTA. I do not care what anybody says, that we were scrambling for laws and trying to convince the Congress of the United States to pass NAFTA because we were being really bad environmentally. That was not the case. Environmental laws were in effect way before NAFTA was even a thought in anybody’s mind. They were perfected in 1988. They have been in place ever since then and, therefore, we have standards.

During the course of these years, the effect of rubbing elbows with environmental specialists from the United States and from other countries has brought a greater specialization in what kind of laws and standards we have. That is just finesse, that is refining the thing. Environmentally speaking, the area was already in place before NAFTA, no matter what critics say.

In this case it has helped to bring a continued focus on the environmental concerns. Why? Because, since we have a lot of investors coming to Mexico acquiring companies, buying and selling. Now the transposition of this concept is, of course, in the United States, the due diligence, environmental due diligence has already brushed into our areas of work.

American companies, because they always have the spectrum of something back in the United States haunting them with a lawsuit, expect a Mexican lawyer to give certain protections and reassurances about the environmental liability of a site, of a plant, of its staff. This is just the practice. As far as the law is concerned, it was there a long time before.

I think this is one of the veterans that has withstood very well the scrutiny of NAFTA in spite of some understaffing and problems that, of course, everybody will start pointing out. But it has worked, and it was there before.

The second area is customs. Has anything changed in customs? Yes. A big yes. It is for better and for worse. The good is that we have two big brothers watching from all sides. So it is no longer possible, thank God, as practitioners, we do see it and we are thankful for it, to watch a customs agent say, “I woke up in a bad mood this morning, so I am just not going to let your stuff go through.”

At least now, and this is what you all wanted, we all wanted, Mexico, the United States, and Canada, at least now there is a reason. If you do not have a permit, then yes, it is a convoluted thing and it is very crazy. But because NAFTA asked me to have that kind of standard in place for the protection of products and for the quality of my products, now I am going to expect you, the United States, Japan, anybody com-
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ing to my border to have that piece of paper and have that proof of compliance with my law because you are bringing a product into my country. So in that respect, we see you as slowing down. People have thought, okay, NAFTA, yes, I am impressed about it, and then here goes my merchandise. Not quite, not quite.

I do not know if anybody is familiar with the border crossing of goods. But there is some kind of system of traffic lights, and it is like that light is more often red than green. When the red light comes on, then there is a lot of verification going on. That was not going on before. Before it was very likely that you could go, like the Japanese clients say, with their 10,000 dollar bills attached to their head and off goes their merchandise. That is no longer the case. But that is a good change in the system that was brought about by NAFTA. Yes, it slows down. Yes, you have to be prepared. Yes, you have to have your permits. But, that is the price you pay for having a trade partner that gives you a lot of benefits once you are in compliance with whatever is being requested.

So in that respect, in customs, again, one thing that is becoming common, and it is a joy, I think, for the Mexican side to see, is the audit of plants in the United States for verification purposes. I am not aware if it is coming also the other way, if the United States and Canada are doing the same to Mexican companies, but that started some time ago in Mexico. I do not know if it is because someone wants to take a nice trip to Cleveland, Ohio or because really there is an interest, but those are happening. That is something that is inconceivable to any Mexican, to think that they could go and step into the jurisdiction of another country and be able to verify and expect compliance with certain rules. So in that respect, yes, again, customs areas have been dramatically changed.

In this area as well, I know from experience, just because we have a framework that is common, do not assume that because you are reading NAFTA that that is what you are going to find in Mexico. What we have is a Mexicanization of what NAFTA is all about. There will be rules. If you go to NAFTA, and I do that and argue a lot with counterparts from other countries, well, NAFTA says, wait a second. If you are coming into Mexico, there will be legislation that is mirroring that provision, and you will be surprised how often some of the things are being changed. Maybe there is one provision that says just sixty days. We do not have to say that there is sixty days. We just say that you have a right to do something, but they do not say sixty days. At that point, it is up to the people who are dealing with that specific matter to go and argue with the authorities in Mexico that this is not what
NAFTA really says. But do not assume that it is automatic, because most of the time it is not.

Another big difference that I encounter all the time is, and I know that it is very common in North American practice, faxing and phone calls. We are not used to that; if you want something, you come and get it. I want to see a face. I want to see a piece of paper. I have to stamp that piece of paper. I have to touch that piece of paper. It cannot be a fax; it has to be an original. And it is not just because we are crazy or we like to touch or whatever; it is because you do need to meet the Mexican formalities. In Mexico, a fax is not enough. You need a valid original. If it is not an original, it has to be a certified copy, certified by a Mexican notary public.

So do not be surprised if you show up and you think you have all the documents and all the evidence to do something and they boot you out of the room because they are only copies. We like to have records, and for your protection also, I like to have records. I do not like to go in and say, well, I talked to your cousin some time ago. They will not remember, and I will not remember. You have to have it in writing. And that is a big mistake that a lot of people will encounter.

Another area is the corporate area. Has anything changed here? Yes, but we have kept a lot of the good traditions, which I was referring to right now. Formalities are still there. If you are going to buy the assets of a company in Mexico, you cannot just have an asset agreement drafted. You can draft it under U.S. law and tell each other anything you want about liabilities, especially for the foreign companies that are outside of our jurisdiction. But if the assets are in Mexico, you do not buy anything. You do not buy land with that contract. You need to stick to the formalities of Mexican law. You need to know that you have to have a notary public and a deed upon which the transfer of the land is being made, and that deed has to be registered.

So in that sense, yes, we borrow a lot of NAFTA or a lot of U.S. traditions. The due diligence is there. Nobody will buy anything anymore without going through piles of public documents and deciding the good legal standing of the company. But still there is injection of Mexican formalities that stay. If you buy Mexican property, the laws and the rules that regulate such a purchase, such transfer are Mexican. So you need to be aware of those, and it is for sure that formalities prevail.

If you have a contract that this person signed in the United States, and this person is legally entitled to sign on behalf of a corporation, if you do not have a power of attorney, that contract is invalid under Mexican law. And you will probably never buy anything again. There are a lot of little cases and things that we start seeing with these techni-
calities that show up because people are not aware that in Mexico we are different, even though we have accepted NAFTA, and we are part of NAFTA, or part of a big picture.

The last thing I want to say in another area, with pride and joy, and I hope it will never change, although it does much hurt to the legal profession in Mexico, has anything changed as far as ambulance-chasing is concerned? The answer is no.

We answer tons of phone calls from people who slipped and fell in Cancun. Whether or not they were drunk, they do not say. They ask if they can sue a Mexican corporation under those bases. The answer is no, you recover nothing. We have no intention of going into the litigious background which the United States and other countries have. We like the civil system. If you want to recover, you will recover maybe a thousand dollars. If not, the stock answer is go back to the United States because that is where the money is. You are not going to get any in Mexico.

So that is something that might hurt the profession in that respect. But we really feel that the culture, the tradition of the civil law system is too engraved in that. We will never go into any kind of litigation, no matter what we are being told. And there are other people seeking opportunities in that respect, but it is always going to be brought back to the United States, always going to be in a U.S. court. It is not something that can be conceived of in Mexico.

To wrap it up, has anything changed globally? Yes, you can tell. We are talking about good changes. There has been a liberalization of things. I think you can really get fast food in Mexico now. So there are other good changes in that respect. But traditions remain. Legal provisions that pertain to Mexican law and are enforceable under our court, those remain as well, and they also are being adjusted and adapted right now to meet the criteria of the global framework which is NAFTA.

The bottom line in this one is that we share a common framework of legislation, but we are a different civil system, we have a different set of laws, and we think differently. As we already mentioned before, we are not used to certain procedures, so it might take a little bit longer to catch up. But in the end, I think that what matters and what should be remembered is that we are committed to this kind of framework and to this kind of work and there will be no turning back.