THE IMPACT OF INTERNATIONAL TRADE AGREEMENTS IN THE LEGAL SYSTEMS OF THE AMERICAN CONTINENT*

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I. INTRODUCTION

This article explores the impact of international trade law on the legal systems of the American continent, particularly those of Latin America. My principal argument is that formal legal systems and culture, in general, are undergoing a substantial transformation process. This is a result, in part, of the demographic growth, industrialization and urbanization, and

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the changes in the models of economic development and globalization.[1] In this process, international trade agreements at the multilateral or regional level play a key role and are centrally placed to observe the change. This process generates a growing tension between traditional practices and new social expectations regarding the law. The result of this process remains uncertain.

My argument has two parts. First, I discuss the changes produced by new economic development models and the role of the legal instruments of economic integration. Second, I focus on some of the innovations introduced by these instruments and the problems created by their implementation.

It is inevitable that in an exposition of this nature, generalizations are utilized that do not acknowledge the specificity of processes in each country or region. On the other hand, I frequently refer to the experience obtained from the North American Free Trade Agreement (NAFTA).[2] I justify the foregoing because the NAFTA is an excellent example to demonstrate the problems resulting from the interaction between the civil and common law systems.[3] This interaction is increasingly frequent and arises from the importance and influence of countries belonging to common law tradition in the American continent, specifically the United States and Canada.

II. THE "NEW FACE" OF FREE TRADE

At the end of the seventies, Latin America experienced a series of "crises" as a result of complex dynamics, both national and international. The closed, "self-sufficiency" model followed by most of the Latin American countries, which focused on export substitution, reached its limits during this decade—resulting in external debt, high inflation, public deficit, and a lack of international competitiveness.[4] Beginning in the eighties, with a variety of nuances in each country, the politics and strate-

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1. *See generally* DAVID H. BLAKE & ROBERT S. WALTERS, THE POLITICS OF GLOBAL ECONOMIC RELATIONS (1976) (considering the political issues of a changing global marketplace); Geoffrey R.D. Underhill, *Introduction* to POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER 17 (Richard Stubbs & Geoffrey R.D. Underhill eds., 1994) (discussing the evolving dynamics of the global political-economic order).

2. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 605 [hereinafter NAFTA].

3. This interaction is not only limited to rules, processes, and legal institutions, but also to the means of action of the legal operators in specific environments.

4. The Comisión Económica para América Latina y el Caribe [Economic Commission for Latin America and the Caribbean (CEPAL)] ideas played a significant role in this period. Pursuant to the theories of economist Daniel Prebisch, it was "necessary to strengthen the industrial sector with protection mechanisms while a strengthened productive structure was being created to compete at a Latin American level, in markets that would be opened by means of integration and later in international markets." Gustavo Vega Cánovas, *México en las Nuevas Tendencias de la Economía y el Comercio Internacionales*, 28 FORO INT'L 60, 66 (1987) (editor's translation).

gies of economic development were revised. This resulted in the liberalization of economies, sale of public enterprises, deregulation, and trade liberalization.[5] In addition to democratization and respect for the human rights movements, these policies converged to create a modification of the role of the state.

As a result of changing economic models and increased trade liberalization, Latin American countries began to gradually integrate into the international trade and economic system. At the same time, they were competing to attract external capital flows. Currently all the countries of the continent are members of the World Trade Organization (WTO) along with various agreements and organizations for multilateral economic cooperation.[6] Simultaneously, regional integration ceased to be merely rhetoric, as demonstrated through the different agreements that have been created or revived in recent years.[7] The substitution of the Latin American Association of Free Trade (ALALC)[8] by the Latin American Integration Association (LAIA)[9] was the prelude to a greater process. Today, the free trade zone of North America (NAFTA), the Common Market of the South (MERCOSUR),[10] the Andean Group,[11] the free trade zone of the Group of

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5. *See* MERILEE SERRILL GRINDLE, CHALLENGING THE STATE: CRISIS AND INNOVATION IN LATIN AMERICA AND AFRICA 1–3 (1996). *See generally* Werner Baer & Melissa Birch, *Privatization and the Changing Role of the State in Latin America*, 25 N.Y.U. J. INT'L L. & POL. 1 (1992) (discussing the future economic role of the government in Latin America in light of increased privatization). This process was paralleled in other parts of the world. *See* GRINDLE, *supra*, at 1–2.

6. For membership of Latin American countries to international economic organizations, see BERNARD COLAS, GLOBAL ECONOMIC COOPERATION: A GUIDE TO AGREEMENTS AND ORGANIZATIONS (1994).

7. *See* Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: "A Work in Progress,"* 14 NW. J. INT'L L. & BUS. 493, 494–95 (1994); Roberto Pizarro, *Renovación y Dinamismo de la Integración Latinoamericana de los Años Noventa*, 28 ESTUDIOS INTERNACIONALES 198–222 (1995).

8. Treaty of Montevideo Establishing a Free-Trade Area and Instituting the Latin American Free-Trade Association, Feb. 18, 1960, 2 B.D.I.E.L. (CCH) 549.

9. Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672, 672 ("The Governments . . . AGREE to subscribe this Treaty which shall substitute . . . the Treaty which created the Latin American Free Trade Association."). The signatory members of LAIA are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela. *See id*. The object of the LAIA is to "continue the integration process oriented toward promoting the socioeconomic, harmonious and equitable development of the region . . . . The long range objective of this process shall be the gradual and progressive formation of a Latin American common market." *Id.* art. 1, at 673. The Treaty of Montevideo admits flexible integration mechanisms by establishing "an area of economic preferences consisting of a regional tariff preference, agreements of regional scope and agreements of partial scope." *Id*. art. 4, at 673.

10. Treaty Establishing a Common Market, Mar. 26, 1991, 30 I.L.M. 1041. Tariffs began to be lowered in January of 1995. *See* James Stamps, *Free Trade Area for the Americas*, 5 No. 10 MEX. TRADE & L. REP. 7, 9 (1995); *see also* Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127, 143 (1995) (claiming MERCOSUR is one of the most successful subregional arrangements).

Three,[12] the revitalized Central American Common Market,[13] and the Caribbean Community[14] are a reality in the hemisphere.

In addition to these larger regional agreements, a number of bilateral agreements are already in force or in the process of negotiation. For example, Mexico has bilateral trade agreements with both Costa Rica[15] and Bolivia.[16] The United States also has bilateral trade and commerce agreements with various countries of the region.[17] Chile has signed a trade agreement with Canada,[18] in addition to recently joining MERCOSUR.[19]

Without a doubt, the most ambitious initiative is the proposed Free Trade Agreement of the Americas (FTAA), which seeks to create a free trade zone encompassing all of the countries in the American continent.[20] The recent Ministerial Declaration of Cartagena in March of 1996 reaf-

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11. Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910 [hereinafter Cartagena Agreement]. For an updated version of the Andean Pact, incorporating four principal modifications of the original agreement, see Andean Pact: Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol, *published* July 26, 1988, 28 I.L.M. 1165. The Andean Group was formed to establish a free commerce zone with a common external tariff. *See* O'Hop, *supra* note 10, at 140. Venezuela joined the Andean Group in 1973. *See* Final Act of the Negotiations on the Entry of Venezuela into the Cartagena Agreement, Feb. 13, 1973, 12 I.L.M. 344.

12. The Group of Three includes Mexico, Colombia, and Venezuela. *See Mexican, Columbian & Venezuelan Presidents Sign "Group of Three" Trade Agreement*, SOURCEMEX. ECON. NEWS & ANALYSIS ON MEX., June 22, 1994, *available in* 1994 WL 2237293. The agreement establishing free trade between these three countries was signed on June 13, 1994. *See id*.

13. General Treaty on Central American Economic Integration, Dec. 13, 1960, 455 U.N.T.S. 3.

14. Treaty Establishing the Caribbean Community, July 4, 1973, 12 I.L.M. 1033.

15. On April 5, 1994, Mexico and Costa Rica signed a trade agreement scheduled to take effect on January 1, 1995. *See Mexican & Costa Rican Presidents Sign Bilateral Free Trade Agreement*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., Apr. 13, 1994, *available in* 1994 WL 2237362.

16. The free trade agreement between Mexico and Bolivia was signed on September 9, 1994. *See Bolivia Signs Free Trade Accord with Mexico & Seeks Closer Trade Ties with Peru & Chile*, CHRON. LATIN AM. ECON. AFF., Sept. 15, 1994, *available in* 1994 WL 2242157.

17. *See, e.g.*, Investment Treaty with Trinidad and Tobago, Sept. 26, 1994, S. TREATY DOC. NO. 104-14 (1995); Treaty Between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, Feb. 4, 1994, S. TREATY DOC. NO. 103-35 (1994); Investment Treaty with the Republic of Ecuador, Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (1994); Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1992).

18. *See Canada, Chile Sign Deal*, CALGARY HERALD, Dec. 6, 1996, at A16, *available in* 1996 WL 14387491.

19. *See* Gustavo Gonzalez, *Economy-Chile: Integration with Latin America's Most Dynamic Bloc*, Inter Press Serv., Sept. 30, 1996, *available in* 1996 WL 11625605.

20. *See* Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808, 811 (declaring as an outgrowth of a meeting in Miami the specific goal of creating a "Free Trade Area of the Americas" no later than 2005).

firmed this goal, in spite of the enormous political and technical difficulties entailed.[21]

This overview confirms the process of major transformations in trade and economic relations on the continents. There are numerous studies on the economic, political, social, and even cultural consequences of this "globalization" of the economy. Reflection on its consequences on the legal system, however, has been insufficient.

We can assume a correlation between the economy and the legal system.[22] If the economy changes and becomes global, the law must be modified. But in what manner and to what extent? I have four observations in this matter.[23]

First, the law is an instrument of economic exchange. This is required if changes are to be regular and permanent. However, the general role of the law in such economic relations, and the degree and depth of its jurisdiction, remains to be investigated.

We can hypothesize that the extent and complexity of the rules and legal proceedings is directly related to the intensity and magnitude of commercial exchange, the type of commercial agents engaged in those exchanges, and the likelihood of conflicts with no political solution. In other words, the greater complexity of the exchange, the greater the necessity for legal rules that serve to permit predictable operation of the system and that provide efficient mechanisms for resolving disputes.

Most North and South American regional trade agreements can be considered deliberate efforts to infuse legality into the economic integration process, adding the permanency and safety of the law. However, this is a weaker process of legalization when compared with the European model.

Second, in the international context of open markets, the proliferation of commercial exchanges, their legalization through international agree-

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21. *See* Summit of the Americas Second Ministerial Trade Meeting, Mar. 21, 1996, Joint Declaration (on file with the *Houston Journal of International Law*); *see also Regional Trade Ministers Review Progress in Construction of Hemispheric Free Trade Area*, CHRON. LATIN AM. ECON. AFF., Mar. 28, 1996, *available in* 1996 WL 7980191. ("'[W]e reaffirm our commitment to conclude the negotiations by the year 2005 at the latest, and we are committed to achieving substantial progress in that direction by the end of the century . . . .'").

22. For discussions of this correlation, see generally WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS (1988); DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (discussing the relationship of institutions and economic growth); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989); Claude Fluet, *L'analyse économique du droit*, 43 ECONOMIE APPLIQUÉE 53 (1990) (applying microeconomic theory to the law); Nicholas Mercuro, *Toward a Comparative Institutional Approach to the Study of Law and Economics*, L. & ECON. 1, 1–26 (1989).

23. These four lines of observations were originally discussed in Héctor Fix-Fierro & Sergio López-Ayllón, *El Tratado de Libre Comercio de América del Norte y la Globalización del Derecho: Una Visión Desde la Sociología y la Política del Derecho*, *in* 1 EL TRATADO DE LIBRE COMERCIO DE AMÉRICA DEL NORTE: ANÁLISIS, DIAGNÓSTICO Y PROPUESTAS JURÍDICOS 36–37 (Jorge Witker ed., 1993).

ments, and the establishment of common institutions—whether applied to relations between states or individual transactions—necessarily leads to communication between different legal systems and cultures. The cumulative effect of these exchanges will eventually generate an authentic transnational law that will affect the manner in which current national legal systems operate.

Even in situations where supranational institutions in charge of developing and applying a "common law" are not established, the exchanges can approximate different legal systems. Additionally, the continuous communication process between agencies and officials of different systems can contribute to this approximation without the necessity of enacted uniform and binding regulations.

Third, the transformation from a closed to an open economy is possible only through the global substitution of legal instruments applicable to trade. This obliges countries undergoing a liberalization process to use legal institutions comparable to that of countries that have historically operated with open or semi-open market conditions. Thus, trade interaction creates a favorable atmosphere for the reception of principles, institutions, and proceedings common to market economies. However, foreign influences cannot be incorporated completely intact into the national legal systems, since they must be adapted and harmonized with existing domestic law. In many instances, these influences are revised to acquire their own unique subtlety.

Fourth, the rules and proceedings of a market economy are subject to greater external scrutiny, driven by the interest of external agents in the efficient operation of goods and service markets. Judgments over the operation of rules and internal proceedings are subject to intervention by external agents who press to achieve greater rationality in the operation of legal systems in which they operate.

Applying these reflections to the American continent may help in understanding its current transformations in both economic and trade law, in addition to legal practices. In this process, the instruments and institutions of regional integration play a central role. Specifically, they attempt to stabilize economic exchanges between commercial partners through the introduction of complex legal mechanisms that, through different means, are incorporated into domestic legislation. At the same time, they stimulate internal processes of change that once faced internal resistance—such as, in democratic regimes, respect for human rights or the environment. It is in this respect that the experience of the NAFTA provides significant insight.

Conceived mainly as an economic agreement, the NAFTA represented a major legal challenge. The existence of a common language—the economy—permitted communication on economic interests. Similar communication, however, did not happen with respect to the law. The drafting, and particularly the implementation, of the NAFTA assumed a

permanent interaction between agents that operate under different legal conditions, both formal and cultural.

In fact, the extension and the detail of the NAFTA brought together the common law and civil law systems—two legal traditions whose structure, concepts, and practices differ. The result of the merging of these two legal systems permeates the agreement and finds clear manifestation in certain institutions which, due to the manner by which the treaties are incorporated into domestic law in Mexico, were introduced directly into the Mexican legal system.

The NAFTA has brought two different legal cultures into contact. The differences between them are apparent, and the practical interactions which will develop from the way the agreement and its institutions operate should be fascinating to observe. This scenario exists, obviously with different nuances, in multilateral regional or bilateral trade agreements. To a significant degree, the legal instruments resulting from the Uruguay Round, in concept as well as structure, are a response to a covenant between different legal concepts. In a lesser, but not negligible degree, regional trade agreements face similar problems. It is interesting to compare the extent, detail, and language of various agreements affecting regional integration on the American continent—for example, those formulated in terms of general principles, such as Mercosur, to the NAFTA, which addresses even the smallest details.

In spite of the differences, all instruments generally share certain common elements which have direct consequences when incorporated into each of the national legal systems. Some of these elements are discussed below.

III. THE SPECIFIC IMPACT OF FREE TRADE AGREEMENTS

It is not possible in an article of this nature to describe in detail all the institutions which will require changes in the operations of the national legal systems. Accordingly, I will limit my discussion to some of them.

A. Transparency

Most of the free trade agreements contain rules related to transparency, justified by the necessity of preventing conflicts and assuring a predictable system. Such rules seek to ensure adequate communication between authorities and individuals subject to commercial regulations. They ensure predictability in economic exchange, while at the same time favoring the participation of the parties involved in drafting regulations.

In the legal cultures where the authorities and individuals are accustomed to a high degree of discretion in applying regulations, rules of transparency are absolutely irrelevant. However, in a culture oriented toward conditions of strict application that is guided toward the foreseeable regulation of the market, transparency is an obvious and essential element.

The texts of the Uruguay Round and the NAFTA, among others, introduce this type of regulation into national legal systems, allowing for different methods of administration and application of legislation.

B. Reducing the Discriminatory Character of the Regulation

A closed system necessarily operates on the basis of discrimination between internal and external agents, the former having advantages over the latter. The introduction of the principle of national treatment removes *a priori* this distinction, at least between nationals of constituent countries of regional integration agreements. There is also, however, a less obvious but extremely important effect. The external frame of reference expands internal rights because the rights granted to the non-national are necessarily extended to internal agents as well. This is the case, for example, of rights regarding expropriation or arbitration on investment matters between private individuals and the state.[24]

C. Generating Common Interpretations

Integration agreements generally establish a significant number of institutions—such as committees and working groups—charged with administering the agreements. These committees intensify contact between officials responsible for implementing and executing the treaties. This generates an exchange of information, resulting in permanent modifications of internal administrative practices to ensure compliance with the contracted commitments and with the opinions of external agents.

D. Internal Proceedings

With the modalities of each agreement, the international trade agreements establish disciplines in domestic administrative proceedings—for example, customs matters, safeguards, technical standards, intellectual property, procurement, and trade remedy laws. Upon close examination, these new procedures frequently reveal reduced discretion in favor of greater harmonization of rules and actual behavior. In the long run, it is possible that domestic administrative practices will be modified as a result of the disciplines introduced by international trade agreements. This is most apparent in the administration of technical standards and trade remedy laws. New disciplines in service, investment, and protection of intellectual property also reinforce the argument that international agreements can introduce modifications in domestic legal systems.

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24. These types of institutions are found in the bilateral treaties on investment. They also can be found in some free trade agreements, such as Chapter 11 of the NAFTA covering investment. *See* NAFTA, *supra* note 2, ch. 11, at 639.

E. Harmonization

It is hotly debated whether, in the long term, the dynamic of the exchanges of goods and services and the increasing number of bilateral or regional agreements will necessarily lead to harmonization of internal rules and regulations. This harmonization could involve matters such as technical standards and antitrust regulations to avoid distortions in the regional integration areas. There are, however, other fields where this harmonization is appropriate, such as investments and the protection of intellectual property.

F. Dispute Settlement

Finally, commercial trade agreements require independent, effective, and reliable mechanisms to resolve disputes. Generally, the reticence of the states to create authentic supranational courts has led to the creation of mechanisms which, in spite of their innovations and distinctive characteristics, are fundamentally patterned on international commercial arbitration.[25]

Conflicts arising from the interpretation and application of international trade agreements are the responsibility of arbitral panels. On occasion, as is the case of the NAFTA, the arbiters are designated through sophisticated and original proceedings. It is important to emphasize the following aspects: 1) in spite of their limitations, these panels are one of the most effective mechanisms for the solution of international disputes; 2) these panels create institutional dimensions for the interaction of legal agents; and 3) their decisions frequently have important internal consequences with respect to the countries that abide by them.

Chapter 19 of the NAFTA is particularly noteworthy among the dispute settlement mechanisms.[26] Its structure was taken almost in its entirety from the analogous mechanism of the Free Trade Agreement between the

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25. For commentaries on the evolving dispute settlement mechanisms, see Harry B. Endsley, *Dispute Settlement Under the CFTA and NAFTA: From Eleven-Hour Innovation to Accepted Institution*, 18 HASTINGS INT'L & COMP. L. REV. 659, 659–711 (1995); Gary N. Horlick & F. Amanda DeBusk, *Dispute Resolution Under NAFTA: Building on the US-Canada, GATT, and ICSID*, 27 J. WORLD TRADE 21, 22–24 (1993); Andew Kayumi Rosa, Note, *Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution*, 15 MICH. J. INT'L L. 255, 305 (1993).

26. *See* NAFTA, *supra* note 2, ch. 19, at 682. Chapter 19 governs review and dispute settlement in antidumping and countervailing duty matters. *See id*.; *see also* JAMES R. CANNON, JR., RESOLVING DISPUTES UNDER NAFTA CHAPTER 19 (1994); Guillermo Aguilar-Alvarez et al., *NAFTA Chapter 19: Binational Panel Review of Antidumping and Countervailing Duty Determinations*, *in* TRADING PUNCHES: TRADE REMEDY LAW AND DISPUTES UNDER NAFTA 24 (Beatriz Leycegui et al. eds., 1995); Jorge Witker & Susana Hernández, *Resolución de Controversias en Materia de Antidumping y Cuotas Compensatorias en el TLCAN*, *in* EL TRATADO DE LIBRE COMERCIO DE AMÉRICA DEL NORTE: ANÁLISIS, DIAGNÓSTICO Y PROPUESTAS JURÍDICAS 231–69 (Jorge Witker ed., 1993).

United States and Canada.[27] In this mechanism, binational panels replace the domestic legal review of the national investigating authority's antidumping and countervailing duties final determinations. In other words, Chapter 19 is a "hybrid system under which the panels are international, but the law and standard of review applied are national."[28] Chapter 19 has experienced relative success thus far,[29] but remains at the center of intensive debate. An examination of its consequences in the domestic legal systems is, unfortunately, beyond the scope of this discussion.

IV. CONCLUSION

I would like to conclude with two ideas. The first, independent of whether or not international trade law can be articulated as an autonomous legal order, is that international trade law establishes an essential normative framework. This framework is a product of the states that created it, but it obliges them and modifies the operation of the domestic legal systems. From this perspective, it is worthwhile to rethink the role of international law and its relation to national law. Second, the reality of interchanges in the contemporary world reveal the necessity of a legal order that aligns itself on a common horizon. This is the challenge, and it will require the exercise of creative and imaginative legal insight to rethink the new problems of a world in a process of transformation.

27. Canada-United States Free Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, 27 I.L.M. 281.

28. Aguilar-Alvarez et al., *supra* note 26, at 24.

29. As of October 1996, a total of 72 requests for binational panel review had been filed—49 under the Canada-United States Free Trade Agreement and 23 under the NAFTA.