ALLOCATING LEGISLATIVE COMPETENCE IN THE AMERICAS: THE EARLY EXPERIENCE UNDER NAFTA AND THE CHALLENGE OF HEMISPHERIC INTEGRATION*

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TABLE OF CONTENTS

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I. INTRODUCTION

In June 1995, the late Ron Brown, Secretary of Commerce, and Mickey Kantor, U.S. Trade Representative, hosted the historic Hemispheric Trade Summit in Denver, Colorado.[1] This meeting brought together the trade ministers of every country in the hemisphere except Cuba.[2] The meeting was historic because of the agenda: the trade ministers and their delegations were assembled to promote an ambitious goal that would have been unthinkable a decade ago—the creation of a Free Trade Agreement for the Americas (FTAA) by the year 2005.[3] Cognizant of the need to enlist broad support for this agenda, the trade leaders invited representatives from business, academia, and other fields to engage in discussions of the institutional and other mechanisms that would be needed to make economic integration a reality.

In Denver, the enthusiasm for increased economic integration—indeed, for the eventual creation of a hemispheric free trade zone—was truly remarkable. As one who has specialized in U.S.-Latin American relations, I have grown accustomed over the past twenty-five years to the United States' relative lack of interest in the region. Latin American governments, traditionally, have followed policies intended to insulate themselves from the overwhelming economic, political, and military might of the United States.[4] It was unique in my experience to attend a meeting of high-level trade officials and business leaders in which these attitudes were laid aside in a relative state of optimism for the benefits of free trade and economic integration.

The optimism generated by the Denver Trade Summit was tempered by a healthy respect for the complexity of this ambitious project. We have seen how complicated the negotiation, entry into force, and implementa-

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1. *See Trade Issues Regarding Chile and Other Latin American Countries in Light of the NAFTA Experience: Hearing Before the Subcomm. on Int'l Econ. Policy and Trade and the W. Hemisphere Comm. on Int'l Relations*, 104th Cong. 77–78 (1995) (prepared statement of Ira Shapiro, special negotiator for Japan and Canada, Office of the U.S. Trade Representative).

2. *See* Riordan Roett, *Trends of the Trade: Free Trade Agreements Signal Economic Integration for Latin America*, LATIN FIN., Sept. 1995, at 1, *available in* LEXIS, News Library, Latfin File.

3. *See id*.; *see also* Summit of the Americas Trade Ministerial, June 30, 1995, Final Joint Declaration (on file with the *Houston Journal of International Law*). The Denver meeting was an outgrowth of the Miami Summit of hemispheric leaders, held in Miami in December of 1994. *See Hemispheric Trade Summit to Bring Private, Public Leaders Together*, 12 Int'l Trade Rep. (BNA) No. 20, at 861 (May 17, 1995); *see also* 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 the meeting in Miami the specific goal of creating a "Free Trade Area of the Americas" no later than 2005).

4. *See* GUY POITRAS, THE ORDEAL OF HEGEMONY: THE UNITED STATES AND LATIN AMERICA (1990) (discussing the rise and decline of United States hegemony in Latin America).

tion of the North American Free Trade Agreement (NAFTA)[5] has been—even though only three countries are involved, and the United States-Canada Free Trade Agreement[6] served as a partial template. Riddled with reservations and annexes, the NAFTA looks like it was designed in the Rube Goldberg school of legislative drafting. Imagine the number of special rules and arrangements that might have to be concluded to make a comprehensive hemispheric agreement a reality.

The Denver Trade Summit established seven working groups to carry out the task of devising a model for establishing a free trade agreement.[7] A second meeting took place in Cartagena, Colombia, in March 1996, and a third meeting will be held in Brazil in 1997.[8] The early results of these meetings show that there are many obstacles to hemispheric free trade. Perhaps the predominant obstacle is resistance by governments in the region to the use of a single legal paradigm for organizing regional free trade. At the base of this resistance is the unwillingness of national governments to cede authority—to relinquish a portion of their sovereignty—over subjects that were once thought to be regulated only at the national level. The purpose of this article is to show that increased economic integration will distribute legislative competence more broadly, dispersing authority once monopolized at the national level both above, to supranational agencies, and below, to state, provincial, and local actors. My interest is less in regional free trade per se, and more in the implications that a regional trade agreement—especially an agreement as comprehensive as the NAFTA—will have on the allocation of legislative competence and regulatory power throughout the hemisphere.

Should a FTAA be established, it will have repercussions beyond the sphere of imports and exports. In the late twentieth century, the term "trade law" is another name for general rule-making. As more and more subjects are brought into the sphere of international trade negotiation, the adoption of rules that affect trade in goods and services influences our societies on multiple levels: public and private, national and international, centralized and local. It is increasingly difficult to identify a sphere of legislative or quasi-legislative jurisdiction that is not concurrent: from rules on environmental quality (once a purely local concern),[9] to regulatory standards or

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

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

7. *See Fast-Track Renewal Will Be Hard Sell, GOP Staffer Says*, 13 Int'l Trade Rep. (BNA) No. 32, at 1276 (Aug. 7, 1996).

8. *See The Summit of the Americas Second Ministerial Trade Meeting Joint Declaration Adopted March 21, 1996 in Cartagena, Columbia*, 13 Int'l Trade Rep. (BNA) No. 13, at 538 (Mar. 24, 1996).

9. *See, e.g.*, North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter Environmental Side Agreement].

performance criteria,[10] to rules affecting trade in information services that impinge upon cultural integrity.[11] Put more succinctly, we are living in an age in which decisions at the international level can have immediate local implications, while the mechanisms at the local level, which exist to create and enforce rules, can have global implications.

If we do achieve a Free Trade Agreement for the Americas, with a much greater degree of economic and social integration, it will be even more difficult to separate local concerns from national concerns, and national concerns from international concerns. It would create, on a hemispheric level, an increase in conflicts between the preservation of local identity and the promotion of a regional standard—the same issues that have been debated vigorously within the United States under the rubric of "states rights." The movement towards regional free trade areas brings with it a need to consider how we should go about mediating the conflict between the desire in democratic societies for local legislative power, and the need for authorities at the national and international levels to avoid the subversion of legitimate goals that can only be achieved through broadly applicable legal rules. The issue has sometimes been referred to as *subsidiarity*—an examination of the reasons to assign legislative authority over particular subjects to different levels of rule-making or rule-enforcing in a multi-level system.[12]

I will focus my attention primarily on the NAFTA, although I will try to place the NAFTA in a broader historical and regional context.

II. THE NAFTA AND U.S. HEGEMONY

Any discussion of the assignment of legislative jurisdiction in the Americas, North or South, must account for one overwhelming political and economic fact: the political hegemony and economic power of the United States.[13] U.S. legal models have influenced the development of law in many nations due to the spread of U.S. economic influence after the

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10. *See, e.g.*, NAFTA, *supra* note 5, ch. 7, at 368–83 (Agriculture and Sanitary and Phytosanitary Measures).

11. *See, e.g., id*. ch. 13, at 653–57 (Telecommunications); *see also* Jonathan Graubart, Comment, *What's News: A Progressive Framework for Evaluating the International Debate Over the News*, 77 CAL. L. REV. 629, 629–30 (1989) (discussing Third World efforts to restructure the international flow of information because of complaints that the United States and other Western nations dominate the media).

12. *See* Joel P. Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L L.J. 459, 468–69 (1992) (describing the concept of subsidiarity as "a methodological guide to reconciling the continued existence of the state with the rise of transnational society"); *see also* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 336 (1994) (advocating a "procedural" rather than a "jurisdictional" approach to subsidiarity in the European Community).

13. *But see* ANTHONY TUO-KOFI GADZEY, THE POLITICAL ECONOMY OF POWER 1–2 (1994) (arguing that the end of U.S. hegemony coincided with the end of the Cold War).

Second World War.[14] The exportation of U.S. legal models has also come about through a phenomenon related to economic power: the tendency for foreign lawyers to pursue advanced degrees at U.S. law schools and return to their home countries with a briefcase full of U.S. legal theories.[15] This form of influence does not result from the voluntary allocation of rule-making authority to the United States, but from the operation of de facto rule-making powers by U.S. corporations[16] and government agencies.[17] One may expect that an increase in economic integration in the Americas will provide an even greater opportunity for U.S. entities—government agencies, multinational corporations, and NGO's—to influence legal developments in the region. The attendance and interest at the Denver Summit of CEOs of major U.S. corporations show how eager U.S. businesses are to expand into the region, once the proper legal regimes and institutional assurances are in place.

The prospect of an FTAA, with its potential for greater U.S. influence, is a marked departure from past experience in the region. The Latin American republics resisted U.S. influence and legal models for many years.[18] Yet even within the hemisphere these models—franchising, forms of financing, and environmental regulation—have taken hold. In many instances, the Latin American republics have used doctrinal theories to oppose the incursion of U.S. legal models; because most of the other countries of the region follow the civil law tradition, it was easy for each country to oppose the replication of U.S. legal models by asserting that they were not bound to a common law foundation and such legal models would not operate effectively in the world of neo-romanist or civil law.[19] The failure of the Law and Development school in the 1960s to spread U.S.-invented legal doctrine can be attributed in part to such resistance.[20]

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14. *See* Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 236–46 (1991) (discussing a series of American business and legal concepts adopted by European countries in the post-war era).

15. *See* Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401, 424 (1995) [hereinafter Zamora, *Free Trade*].

16. *See* JAMES A. NATHAN & JAMES K. OLIVER, FOREIGN POLICY MAKING AND THE AMERICAN POLITICAL SYSTEM 227–35 (3d ed. 1994) (discussing the role of multinational corporations in U.S. foreign policy).

17. *See id.* at 9–28 (discussing the post-World War Two development of an increasingly powerful "foreign policy bureaucracy," including the Department of State, Central Intelligence Agency, National Security Agency, National Reconnaissance Office, Defense Intelligence Agency, and other government agencies).

18. *See id.* at 406–07 (contrasting the legal influence of the United States on Canada and Mexico with the experiences of European Community member states).

19. *See* JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 53-54 (1980). For an overview of the civil and common law systems and their differences, see Fernando Orrantia, *Conceptual Differences Between the Civil Law System and the Common Law System*, 19 SW. U. L. REV. 1161 (1990).

20. *See* GARDNER, *supra* note 19, at 53; *see also* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN

With the recent wave of neo-liberal economics in the hemisphere and the increased openness to foreign investment and trade, there may be even greater opportunity for the dissemination of U.S. legal models, whether or not we achieve the creation of a Free Trade Agreement for the Americas. While this may not involve, per se, the formal assignment of legislative competence to the United States, it is nevertheless relevant to keep in mind the sheer weight of U.S. influence in the eventual allocation of rule-making authority in the Americas. The adoption of open-market, free-enterprise regimes in the Americas has a profound effect on rule creation and enforcement whether those regimes are legislated locally, based on models imported from the United States and elsewhere, or created externally, by a supranational authority such as a NAFTA commission.

If regional integration results in increased extraterritorial influence over domestic rule creation—whether through the operation of supranational regimes or through de facto imposition of foreign legal models—it will represent a departure from the experience of the past century. An examination of the notorious Calvo Doctrine will show the extent of this departure.

III. REGIONAL INTEGRATION, LEGISLATIVE AUTHORITY, AND THE CALVO DOCTRINE

The international law doctrine most easily associated with Latin America is the Calvo Doctrine.[21] Although there was considerable resistance outside Latin America to the doctrine, especially by commentators in the United States, the Calvo Doctrine has had an important influence on Latin American law and on the development of Latin American notions of sovereignty.[22]

The Calvo Doctrine, named after Argentine jurist Carlos Calvo, espouses two notions that are based on variations of the sovereignty principle.[23] First, like the principle of national treatment incorporated into the GATT[24] and the

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AMERICA (2d ed. 1985) (discussing differences between the "American style" of legal scholarship and the predominantly civil law system of Latin America). For a critique of the law and development movement, see David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1975) (discussing the moral dilemma of law and development scholars and the "crisis" of the movement) and David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972) (discussing the role of Western ethnocentrism in the Law and Development movement).

21. For a discussion of the origins and development of this doctrine, see DONALD R. SHEA, THE CALVO CLAUSE (1955).

22. *See id.* at 20–21 (discussing the failure of the doctrine in Europe and the United States while noting its enthusiastic reception in Latin America).

23. *See* Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After the NAFTA*, 25 ST. MARY'S L.J. 1147, 1150 (1994).

24. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. 3, 61(5) Stat. A-3, A18–19, 55 U.N.T.S. 194, 204–08.

NAFTA,[25] the Calvo Doctrine espouses equality of treatment between foreign citizens and citizens of the host country.[26] Unlike concepts of national treatment, however, the Calvo Doctrine was created to address the perceived *favoritism* granted to foreigners, rather than *discrimination* against them.[27] In other words, the purpose of the Calvo Doctrine is to bring foreigners down to the level of nationals, while the purpose of national treatment is to raise them up to the level of nationals.

Second, the Calvo Doctrine requires foreign investors to submit to the national laws of the host country, and prohibits the intervention of the foreign citizen's home law or the intervention, diplomatic or otherwise, of the foreign state in protecting the foreigner's interests.[28] This concept is based on an extension of the sovereignty principle—the notion that a state has absolute authority over activities within its borders and that extensions of authority into national territory, whether they be by foreign governments acting individually or under the mantle of international law, are impermissible.[29] The Calvo Doctrine may thus be viewed as a super choice-of-law rule—an inescapable allocation of legislative jurisdiction to the home forum whenever the local rights of foreign nationals are concerned.

As an increasing number of Latin American governments have adopted the "Washington consensus" prescribing free trade and openness to foreign investment,[30] the Calvo Doctrine has been weakened as a guiding principle.[31] Nevertheless, the doctrine still holds some power. For instance, the Mexican Constitution still contains a Calvo clause requiring foreigners to submit to national law,[32] the Andean Common Market

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25. *See* NAFTA, *supra* note 5, art. 301, at 299–300.

26. *See* Daly, *supra* note 23, at 1150.

27. *See* SHEA, *supra* note 21, at 18–19.

28. *See id*. at 19.

29. *See* Joel P. Trachtman, *Reflections on the Nature of the State: Sovereignty, Power and Responsibility*, 20 CAN.-U.S. L.J. 399, 402–03 (1994) (discussing the theoretical evolution of the sovereignty principle and its role in modern international law). *But see* Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685, 1695–96 (1995) (noting that modern notions of sovereignty require the state to submit to international norms to increase the security of the state and individual).

30. The "Washington consensus" refers to economic, social, and political policies promoted by the U.S. government and its agencies, using Washington-based institutions such as the World Bank and the International Monetary Fund as vehicles for promoting structural and policy changes, particularly in the Third World. For a criticism of the Washington consensus, see Paul Krugman, *Competitiveness: A Dangerous Obsession*, FOREIGN AFFS. Mar.-Apr. 1994, at 29–30 (arguing that a "whole industry of councils on competitiveness, 'geo-economists' and managed trade theorists has sprung up in Washington" and that their concerns about global competitiveness and international competition are "almost completely unfounded").

31. *See* Daly, *supra* note 23, at 1181–82.

32. *See* CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS art. 27.

(ANCOM) still maintains vestiges of Calvo,[33] and Calvo clauses are still written into agreements in the region.[34]

Do regional economic arrangements such as the NAFTA spell the end for Calvo clauses? According to one commentator, international developments such as the NAFTA "raise many critical questions about the continued validity of the Calvo Clause . . . ."[35] Specifically, the investment provisions in Chapter 11 of the NAFTA—the commitment in Article 1110 for prompt payment of fair market value on expropriation of foreign-owned property[36] and the referral of investment disputes to international arbitration[37]—challenge the vitality of the Calvo Doctrine. As the American republics vie for foreign investment, the Calvo Doctrine is expected to weaken.

Despite such admonitions, the roots of the Calvo Doctrine are planted very deeply in Latin America, and they can be expected to complicate the development of law in the region.[38] For example, at the present time, a Mexican federal court is preparing to rule on a case involving an arbitral decision by a binational panel under Chapter 19 of the NAFTA.[39] The losing parties in the dispute—two major U.S. steelmakers exporting coated sheet steel into Mexico—instituted an *amparo* action, a constitutionally guaranteed right of review in Mexico of any public act.[40] The federal court's consideration of the case would appear to contradict the provisions of the NAFTA Chapter nineteen, in which decisions by the NAFTA panels

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33. *See* Eduardo A. Wiesner, *ANCOM: A New Attitude Toward Foreign Investment?*, 24 U. MIAMI INTER-AM. L. REV. 435, 436–37 (1993) (concluding that foreign direct investment in ANCOM member states has been impeded by the continuing vitality of the Calvo Doctrine).

34. *See* Dr. James C. Baker & Lois J. Yoder, *ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LDCs*, 5 OHIO ST. J. ON DISP. RESOL. 75, 89–95 (1989) (explaining the role and effects of Calvo clauses in international transactions under ICSID).

35. Daly, *supra* note 23, at 1181.

36. *See* NAFTA, *supra* note 5, art. 1110, at 641–42.

37. *See id*. arts. 1119–38, at 643–47.

38. *See* Christopher K. Darymple, Note, *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 CORNELL INT'L L.J. 161, 181–89 (1996) (arguing that the Calvo Doctrine deters Latin American nations from becoming signatories to the Multilateral Investment Guarantee Agency and concluding that this effect will slow the further development of foreign direct investment in Latin America).

39. *See* In re *Antidumping Investigation of the Gov't of Mex. into Imports of Flat Coated Steel Prods. from the U.S.* (Mex. v. U.S.), 1996 WL 590532 (1996).

40. *See* Nancy E. Kelly, *Mexican Case Seeks to Clear Sheet Duties; U.S. Coated Sheet Steel Producers Fighting Duty Orders*, AMER. METAL MKT., Nov. 13, 1996, *available in* LEXIS, News Library, Indnws File. For a discussion of the history, function, and procedural aspects of the *amparo* action, see Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of* Amparo, 9 CAL. W. INT'L L.J. 306 (1979). The Mexican *amparo* has been called "among the most comprehensive procedural instruments of our time" and "the guardian of the entire Mexican judicial order." *Id*. at 348. For a discussion of *amparo* in the context of Binational Panel Review under Chapter 19, see Gilbert R. Winham & Heather A. Grant, *Antidumping & Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and Beyond*, 3 MINN. J. GLOBAL TRADE 1, 20–22 (1994).

are binding upon the parties[41] with no domestic power of review,[42] subject only to an "Extraordinary Challenge Procedure" that itself involves deference to a special "tri-national" tribunal.[43] The decision has caused great interest in Mexico due to a reluctance—hardened through a century of the Calvo Doctrine—to defer to foreign authority in cases of intense local interest.

To understand the lingering vitality of the Calvo Clause—indeed, to understand Latin American notions of sovereignty—one must view the Calvo Clause against a background of historical practice. The Calvo Doctrine was first espoused in 1868, and later refined in 1896.[44] The doctrine was developed in the latter part of a century in which Latin America suffered repeated invasions by foreign powers.[45] One Mexican commentator, sensitive to U.S. intervention in Mexico, calculates that the United States has been guilty of several hundred illegal incursions in Mexico.[46] Even the Covenant of the League of Nations, while espousing the concepts of sovereignty and territorial integrity, gave de facto recognition of a right of intervention in Article 21: "Nothing in this Covenant shall be deemed to affect . . . regional understandings like the Monroe doctrine, for securing the maintenance of peace."[47]

Today, although the Calvo Doctrine may be in decline, the problems that gave rise to it are still evident. Foreign intervention in Latin American countries is more common today than it was in the nineteenth century,[48] but it is also more complicated and more insidious. Rather than military invasions, governments in the Americas are facing cultural and economic invasions, along with a significant weakening of state power over the

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41. *See* NAFTA, *supra* note 5, art. 1904(9), at 683 ("The decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.").

42. *See id*. art. 1904(11). Article 1904(11) states:

> A final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set out in this Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts.

Id.

43. *See id*. annex 1904.13, at 688.

44. *See* SHEA, *supra* note 21, at 17.

45. *See id.* at 13. From 1838 to 1904, Latin America was plagued by American, French, German, British, and Italian interventions. *See id.*

46. *See* GASTÓN GARCÍA CANTÚ, LAS INVASIONES NORTEAMERICANAS EN MÉXICO 125–301 (1974).

47. LEAGUE OF NATIONS COVENANT art. 21.

48. *See* POITRAS, *supra* note 4, at 1–20 (labeling the twentieth century the "U.S. century in the Western Hemisphere" and tracing the roots and development of U.S. hegemony in Latin America).

economy and social welfare.[49] It thus becomes problematic for Latin American governments to espouse the Calvo Doctrine, requiring foreign entities to submit to national law, when these governments are unable to assert full authority over their economies.

This is not to say, however, that the reason for the original invention of the Calvo Doctrine—the abuse of economic power by foreign governments or foreign corporations—is not still with us. The financial operations and short-term capital movements that characterize our post-modern international investment system contribute periodically to the destabilization of national economies in the Americas.[50] The problem is that an assertion of the exclusive application of national law to offset this power is futile. National governments have lost much of their effectiveness as counterweights to foreign economic domination. As national economies become more intertwined, the state loses its monopoly over the regulation of economic activity, and must instead begin to share authority with international, regional, sub-regional, and local entities, both public and private.

A. The Weakening of National Governmental Authority

Latin American national governments may be fighting a losing battle to protect sovereignty against foreign influence. Long considered bastions of protection from foreign governments and foreign business, national governments have suffered inroads into their prescriptive and enforcement authority. Numerous institutions are injecting their influence into areas that were once considered the exclusive concern of the central government, both from above (supranational influences) and from below (regional or local influences). On a doctrinal level, international law is no longer perceived as a body of rules applicable only to state-state relations, but rather containing rules that have direct application to individuals and localities.[51]

In his book *Toward a New Common Sense*,[52] Boaventura de Sousa Santos, a Portuguese professor of law and sociology, writes of the "transnationalization of nation-state legal regulation."[53] Domestic and international political forces, combined with the practices of supranational

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49. *See* Zamora, *Free Trade*, *supra* note 15 (discussing the non-trade and cultural aspects of the NAFTA, and the tension between "harmonization" of laws in the Americas, and the individual states' control over their economic and social systems).

50. *See* Stephan Haggard & Sylvia Maxfield, *The Political Economy of Financial Internationalization in the Developing World*, 50 INT'L ORG. 35, 50–56 (1996) (discussing debt crises in Chile and Mexico resulting from financial internationalization).

51. *But see* Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 24 (1993) (warning that this evolving people-centered international legal order "provides no obstacle to stronger states or social groups interested in making an unjustified intervention in the internal affairs of weaker states or social groups").

52. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE (1995).

53. *Id*. at 274–81.

agencies, technologies, and multinational corporations, have led to a "relative decentering of the nation-state as an actor in the world system."[54] He continues:

> As research on this type of legal transnationalization progresses, the somewhat sterile debate on the relative weight of transnational and national factors will yield to a more promising one on the increasing internal heterogeneization of state regulation . . . . We may be witnessing the emergence of a new form of plurality of legal orders: partial legal fields constituted by relatively unrelated and highly discrepant logics of regulation coexisting in the same state legal system. As it loses coherence as a unified agent of social regulation, the state becomes a network of microstates, each one managing a partial dimension of sovereignty (or of the loss of it) with a specific regulatory logic and style.[55]

In the following section, I will provide examples of this heterogeneization in the context of the NAFTA.

As individuals within Latin America turn to international intervention to protect their interests—to intergovernmental agencies such as the Inter-American Commission on Human Rights, or the North American Commission on Environmental Cooperation, or non-governmental agencies (NGOs) such as the Sierra Club or Americas Watch—it becomes paradoxical to argue that the national government (which may be threatening individual interests to begin with) must protect the citizenry from foreign intervention. Foreign intervention is now a fact of life in many countries, and increasingly the key to counterbalancing foreign intervention is not the protection provided by one's national government, but rather foreign intervention from another source—for example, a foreign NGO or an international agency.

B. The Positive Value of Sovereignty—The Example of Mexico

Just as an affluent person has a difficult time understanding the problems of hunger, in the United States we have trouble understanding the concept of sovereignty precisely because we have never lacked it. We have never been conquered, and seldom threatened. Our issues concern curtailing extensions of our immense economic and military power in other countries, rather than vice versa. Therefore, it may be difficult for many people in the United States to understand the sensitivity of Latin Americans to the value of sovereignty as a shield against foreign influence. In the past, it has been the duty of the nation-state to protect the polity against undue foreign intervention, even intervention in the guise of the well-meaning efforts of international agencies.

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54. *Id.* at 279.
55. *Id.* at 281.

Mexico provides a good example of this notion of sovereignty. According to a recent book by political scientist Julie Erfani,[56] a powerful domestic state sovereignty has served as a necessary protection from foreign intervention.[57] As Erfani notes, Mexican political ideology is based on myths of a strong state that will prevent Mexico from being overrun by foreign powers which see themselves as superior to Mexico culturally, economically, and politically.[58] Mexico is just as sensitive as any Latin American nation to foreign intervention.[59]

During most of this century, the Mexican federal government assumed authoritarian control of much of the economy, along with the political and social structure. Foreign companies and governments were kept at bay, and the state was seen as the defender of the *soberanPa* (sovereignty) that ultimately resided in the people.[60] The myth of a strong, sovereign state exploded with the debt crises and economic woes of the 1980s.[61] The architects of the current Mexican model of government, President Miguel de la Madrid and his budget secretary Carlos Salinas de Gortari, created a new model based on strengthening the role of the private sector and opening the economy to foreign investment and trade.[62]

The opening of the Mexican economy from the late 1980s to the present (post-GATT accession), and Mexico's drive to become part of the NAFTA, represent extreme departures from traditional Mexican foreign policy.[63] The Mexican *apertura econ∴mica*, which dramatically reduced the government's overwhelming role in the economy, has weakened both

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56. *See* JULIE A. ERFANI, THE PARADOX OF THE MEXICAN STATE: REREADING SOVEREIGNTY FROM INDEPENDENCE TO NAFTA (1995).

57. *See id*. at 10 (noting that many twentieth century Mexicans "demanded a state with the power to defy foreign governments and investors").

58. *See id.* at 1–11 (explaining that Mexico has long been dominated by foreign powers despite the mythology surrounding the "popular sovereignty" of the Mexican people). "As a mere legal status backed up by a revolutionary myth about inflated state capabilities, Mexican state sovereignty in the twentieth century has ensured neither mass socioeconomic well-being nor freedom from foreign domination." *Id*. at 2.

59. There is even a museum of foreign interventions in Mexico City. *See* Dan Williams, *Mexico's Obsession with 'Foreign Intervention' Enshrined in Museum,* L.A. TIMES, June 5, 1986, pt. 1, at 21,

60. *See* ERFANI, *supra* note 56, at 57 (arguing that the expropriation of foreign-owned petroleum companies and subsequent reorganization of the official party in 1938 were "great culminating events" which represented to the Mexican people strength to defy foreign powers and protect their sovereignty and socio-economic well-being).

61. *See id.* at 151 (concluding that as a result of the debt crises the conception of Mexican sovereignty as a strong administrative order "was soon replaced by the notion that Mexican sovereignty was a matter of the Mexican economy's world market competitiveness rather than of an administratively efficient and strong state"). For a general discussion of the events surrounding the 1981–82 Mexican economic crisis, see *id*. at 143–49.

62. *See* ERFANI, *supra* note 56, at 162–63 (describing privatization efforts which began in December 1982 and have continued ever since).

63. *See id*. at 174.

the government's role and its image as the protector of the people.[64] The current President, Ernesto Zedillo, faces a crisis of confidence in the weakened government model, as the Mexican economy continues to be plagued with cycles of recession and inflation.[65]

The Mexican experience may be a more pronounced example of a phenomenon that is occurring in other countries in the hemisphere: the weakened role of the central government after the adoption of neo-liberal economic reforms.[66] The current scenario leaves Mexico with a weakened central government. Its citizens increasingly question the ability of the central government to provide the social welfare it has customarily provided.[67] Furthermore, Mexico is beset by centrifugal forces as various groups (political parties like the PAN, industrialists, and Chiapas rebels) in the northernmost and southernmost states attempt to wrest power from the PRI-dominated central government.[68] Finally, Mexico finds itself through the NAFTA in the uncomfortable embrace of the United States and Canada. As we shall see, the NAFTA allows the U.S. and Canadian governments, and groups centered in those countries, to influence Mexico, and each other, to an extent that was previously not possible. It is no wonder that the state-centered legislative model seems increasingly anachronistic.

C. Allocating Legislative Power

The effectiveness of the nation-state as the center of legislative power is weakening in the face of advancing economic integration. The issue created by this trend is how the remaining power should be distributed most effectively to promote social and economic welfare. Put more broadly, the question is: What is the best model for present legislative action that can preserve the legitimate interests of persons at the local, regional, national, and international levels of activity?

One model frequently discussed in the context of European legislative competence is subsidiarity. According to George Bermann, "[s]ubsidiarity expresses a preference for governance at the most local level consistent

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64. *See id.* at 176–77 (stating that the Mexico of the 1990s is in "political limbo" because of the uncertainty and cynicism surrounding the substitution of an economically interventionist state for "a new, mass faith" in the private sector). "Mexicans are expected to embrace the economic, trade, and investment policies of First World countries while Mexico itself is still mired in the socio-economic problems typical of semi-industrial, poor countries." *Id*. at 176.

65. *See* Mark Fineman, *Zedillo Unveils Optimistic '96 Blueprint for Ailing Mexico*, L.A. TIMES, Nov. 15, 1995, at D1.

66. *See The New Agenda—Reform of Civil Servants,* FIN. TIMES, July 15, 1994, at 4.

67. *See* ERFANI, *supra* note 56, at 176–77. "In fact, in . . . the 1990s, nominal legal entitlements provided no guarantee that most human beings would benefit from Mexico's new legal status." *Id*. at 176.

68. *See, e.g.*, ERFANI, *supra* note 56, at 170; James G. Samstad & Ruth Berins Collier, *Mexican Labor and Structural Reform Under Salinas: New Unionism or Old Stalemate?*, *in* THE CHALLENGE OF INSTITUTIONAL REFORM IN MEXICO 9, 16–17 (Riordan Roett ed., 1995).

with achieving government's stated purposes."[69] While often espoused as a goal for the allocation of legislative power in the European Union, subsidiarity, with its apparent predilection for local control, has not been a guiding principle in the United States.[70] Rather, according to Bermann, U.S. federalism is based on a balance of power that, in application, has not preferred state or local power over federal power: "[A]lthough federalism conveys a general sense of a vertical distribution, or balance, of power, it is not generally understood as expressing a preference for any particular distribution of that power, much less dictating any particular inquiry into the implications of specific governmental action for that distribution."[71] In practice, the U.S. Congress tends to take state and local interests into account in deciding whether and how to regulate activities; but despite the admonitions of states rights political groups and others, there exists no doctrinal or institutional effort to identify an allocation of power.[72]

D. Effective Sharing of Legislative Power in a Heterogeneous System

If one believes in the growing heterogeneity of regulation, a clear allocation of legislative power in the vertical hierarchy of local, state, national, and international authority may be important, but it is not dispositive in the optimal regulation of economic and social activities. More important is the accommodation by legislative and enforcement institutions at all levels, from city councils to international agencies, of the legitimate interests of persons and groups within the hierarchy. As will be shown in the following section, in a number of instances involving the application of the NAFTA, both legislative power and law enforcement activities in an integrated North America take place on a complex grid of private and public, state and federal, local and international planes. We have not as yet devised a theory or model for accommodating these diverse interests in a transnational setting.

In the context of the NAFTA or U.S.-Latin American relations in general, a second issue deserves attention: How can the allocation of legislative competence most effectively mediate the overwhelming differences of economic power that exist in the region? In other words, who will represent the poor, the weak, the less-well-connected elements of our societies?

This question has been with us for quite some time. In the 1970s, proponents of multinational corporations (MNCs), like George Ball, saw the MNC as the answer to this question.[73] If he were still with us today,

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69. Bermann, *supra* note 12, at 339.

70. *See id*. at 403–04 (contrasting subsidiarity of the European Community with the entrenched federal system of government in the United States).

71. *Id*. at 404.

72. *See id*. at 406–07.

73. *See, e.g.*, George W. Ball, *Introduction*, *in* GLOBAL COMPANIES 1, 2 (George W. Ball ed., 1975) (describing the multinational corporation "not merely as a convenient industrial or commercial device but as an instrument that men can use in harmony with their political

George Ball would be pleased at the promised expansion of MNC activities in the hemisphere. Of course, the opponents of MNCs are still with us as well: labor union activists, consumers, and many others who distrust the power of corporations and question the ability of national governments to hem in that power.[74] As we examine the future of economic regulation in the Americas, we need to devise a model that can supplement the nation-state as the guarantor of social welfare.

IV. NOTES FROM THE FRONT—THE EARLY EXPERIENCE OF THE NAFTA AND THE ASSERTION OF LEGISLATIVE COMPETENCE

Having broadly outlined some of the concerns surrounding the allocation of legislative competence under the NAFTA, let us consider the early experience of the NAFTA in the assignment or definition of that competence.[75] The starting point is the general understanding that, while the NAFTA requires federal, state, and provincial authorities to abide by its provisions,[76] it provides little institutional structure or basis for displacement of domestic law by supranational "NAFTA law."[77]

Nonetheless, when the NAFTA was under consideration in the U.S. Congress, the federal executive branch had to reassure those who were worried about the continued vitality of states rights that the NAFTA would not give free reign to a supranational authority, working in concert with the federal government, to curtail state laws.[78] State authorities appear to be concerned lest even a single NAFTA provision, enforced through the bi-national dispute settlement mechanisms of the NAFTA, make inroads into

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institutions to help meet the urgent requirements of a world of limited abundance where men must efficiently use the resources provided by nature if civilization is to survive"); Jacques G. Maisonrouge, *How a Multi-national Corporation Appears to Its Managers*, *in* GLOBAL COMPANIES, *supra*, at 12 (labeling the multinational corporation as "a prophetic forerunner of a better world" and contending that "no better tool has been devised" to allow the inhabitants of our world to "live decently, with dignity and in peace").

74. *See* Peter Hansen & Victoria Aranda, *An Emerging International Framework for Transnational Corporations*, 14 FORDHAM INT'L L.J. 881, 885 (1990-1991).

75. For a previous discussion of some of the issues surrounding the early experience of the NAFTA, see Zamora, *Free Trade*, *supra* note 15.

76. *See* NAFTA, *supra* note 5, art. 105, at 298 ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.").

77. *See* Zamora, *Free Trade*, *supra* note 15, at 409 (noting that the relatively few NAFTA provisions that set forth domestic law standards are so broadly drafted that little or no major effort in redrafting domestic laws is necessary).

78. *See* Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 247–53 (1995) (discussing the issues surrounding states' interests in the NAFTA implementation and the federal government's response as embodied in the NAFTA Implementation Act).

state law.[79] Thus, the GATT *Beer II* panel report, in which certain state tax laws were found to violate the GATT, elicited a vigorous response from state authorities who felt that state sovereignty was being compromised.[80]

The following discussion gives several specific examples from the early experience under the NAFTA that show the complexities surrounding legislative competence.

A. NAFTA-Related Creation of "Partial Legal Orders"

As previously noted,[81] Boaventura de Sousa Santos identifies the development of a post-modern, heterogenous state in which "'semi-autonomous legal fields' seem to be developing *inside* state law."[82] Several good examples of such semi-autonomous legal fields are beginning to appear in North America. For instance, under the Environmental Side Agreement, a private citizen in Canada, Mexico, or the United States may lodge a complaint with the North American Commission on Environmental Cooperation when it appears that one of the NAFTA governments has failed to enforce its environmental laws.[83] Either individuals or non-governmental organizations may lodge such complaints.[84] The Secretariat of the Commission may then look into the substance of the allegation and may require a response from the Party under investigation.[85]

This side agreement thus brings into play a supranational entity, the North American Commission on Environmental Cooperation, national agencies (the national environmental agency in each country), and private persons or NGOs. The simple dichotomy of national agency versus regulated party has been distended into a multi-level approach to regulation within a specific area of activity. While this involves enforcement, rather than legislative competence, it nevertheless demonstrates the layering of competence within specific fields of interest and the potential weakening of central government autonomy of action. Furthermore, it is not hard to imagine that the North American Commission on Environmental Cooperation may eventually give rise to legislative or quasi-legislative projects that influence the development of environmental regulation in the NAFTA countries.

In alleging the rise of a "semi-autonomous legal order," I am aware that this is not, in a doctrinal sense, a transnational legal regime. In the field of North American environmental law, laws are still made at the traditional levels of federal, state, and local government, with the overlay

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79. *Cf. id*. at 245 (discussing concerns expressed by 42 state attorneys general in the context of the Uruguay Round Agreement debates that the states need "a formalized process and guaranteed right to defend their laws from adverse DSB panel decisions").

80. *See id*. at 245–46.

81. *See supra* text accompanying notes 52–55.

82. SANTOS, *supra* note 52, at 281.

83. *See* Environmental Side Agreement, *supra* note 9, art.14(1), at 1488.

84. *See id.*

85. *See id.* art. 14(2).

of the NAFTA as a control on state action. Nevertheless, as an increasing matter, the public and private agencies and individuals who deal with environmental issues are comfortable crossing borders.[86] In so doing, it will not be surprising to detect a tendency, over time, to define environmental law without regard to neat jurisdictional boundaries.

We may eventually discover similar, semi-autonomous legal orders in other fields as well, such as labor law[87] and energy law.[88] The convergence of actors from different levels—state, federal, local, public, private—each with specialized knowledge, and each dedicated to furthering the specialized legal order, may well bring about pressures against confining legislative competence to one level alone.

B. NAFTA Dispute Settlement Mechanisms and the Assignment of Legislative Power

The NAFTA does not allocate legislative power to a supranational authority, nor does it affect—at least in theory—the allocation of legislative power to subdivisions within NAFTA parties. This is not to say, however, that the NAFTA will not affect the ways in which legislation is adopted, or the balance of power between states or federal and local governments. One way in which this may occur is through the increased scrutiny provided by the system of binational dispute settlement panels under Chapters 19 and 20 of the NAFTA.[89]

The first binational panel decision under NAFTA Chapter 19 involved a proceeding instituted by U.S. steel producers to review the final determination by the Mexican Trade Ministry (SECOFI) of antidumping duties levied against them on steel products imported into Mexico.[90] In a three-to-

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86. *See* Grossman & Bradlow, *supra* note 51, at 15–16 (asserting that it is this "blurring of the distinctions between domestic and international issues" that fosters the increased desire to participate in formulating and implementing environmental standards).

87. Labor law has resisted transnationalization, but this may change. The North American Agreement on Labor Cooperation will increasingly bring labor law experts in the NAFTA countries, from government, unions, and business, together. *See* North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499.

88. Lawyers, economists, and other experts on energy development and regulation form a discreet community in North America. In the United States, energy professionals migrate back and forth between the private sector and government regulation. Increasingly, such professionals are venturing beyond the borders of their home country. For instance, in March 1995, the Energy Institute of the University of Houston sponsored a workshop for federal and state energy regulators of Canada, Mexico, and the United States. The purpose of the meeting was to discuss optimal conditions for energy regulation, given significant Mexican changes and privatizations in the area.

89. *See* NAFTA, *supra* note 5, chs. 19–20, at 682–98.

90. *See* In re *the Mexican Antidumping Investigation into Imports of Cut-to-Length Plate Prods. from the United States* (Mex. v. U.S.), 1995 WL 869723, at *2–*3 (1995) [hereinafter *Cut-to-Length Plate Prods.*].

two decision, the panel of arbitrators (three U.S. experts and two Mexicans) ruled in favor of the U.S. complainants.[91]

The case proved unusual not only for the result, but for the grounds on which the panel based its decision. The majority—a U.S. law practitioner, a U.S. law professor, and a Mexican lawyer expert in customs law[92]—concluded that SECOFI lacked authority to levy the antidumping duty.[93] Rather than undertake a substantive examination of SECOFI's determination, the majority held that the office within SECOFI that carried out the investigation was not properly constituted under Mexican law.[94] Consequently, under Article 16 of the Mexican Constitution, any act undertaken by the Mexican agency lacked the force of law.[95] The panel interpreted the NAFTA and its Chapter 19 rules of procedure[96] to require it to judge the case in the same way that a Mexican court—in this case, the *Tribunal Fiscal de la Federaci*∴*n* (Fiscal Tribunal)—would decide it.[97] The majority held that the *Tribunal Fiscal* would have determined that SECOFI's determination was null and void, since the office conducting the investigation and assessing the duty was not established in strict accordance with Mexican procedural law.[98] The panel did not even consider the substantive issue of whether the antidumping duty was proper, but instead remanded the matter to SECOFI with orders to dismiss the duty.[99] Reluctantly, SECOFI complied.

This case has more to do with process than substance. If the majority was correct in *Cut-to-Length Plate Products* in its interpretation of Mexican constitutional law, then the decision is not remarkable for its content.[100] The important point is that a non-Mexican dispute settlement panel, a majority of whose members were not trained in Mexican law, handed down a significant interpretation of Mexican constitutional law. The decision may not formally count as judicial precedent in Mexico. Indeed, under Mexican civil law, the opportunity for courts to create judicial

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91. *See id.* at *3 & n.7.

92. The majority opinion was signed by Harry B. Endsley, Robert E. Lutz, and Jose Othón Ramírez Gutièrrez. *See id*. at *44.

93. *See id*. at *28 (concluding that the subunits of SECOFI that carried out the antidumping investigation did not have the authority to do so and that their actions must therefore be "nullified").

94. *See id.* at *35–*36.

95. *See id.* at *15–*16, *28.

96. *See* NAFTA, *supra* note 5, art. 1904(3), at 683 ("The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.").

97. *See Cut-to-Length Plate Prods.*, *supra* note 90, at *6–*7.

98. *See id.* at *35–*36.

99. *See id.* at *44.

100. The two dissenting panel members—Mexican political scientist Gustavo Vega Canovas and U.S. law professor John Barton—disagreed with the majority on the basis of the decision, and would have remanded the case to SECOFI on substantive rather than constitutional grounds, giving SECOFI the ability to correct errors in its investigation or duty determination. *See id.* at *44–*46.

precedent is severely circumscribed. Nevertheless, the case brings to light an important fact about Mexican political and economic life. In an authoritarian regime such as that which has characterized Mexico for most of this century, the executive branch of government, including SECOFI, has operated without close scrutiny by the courts.[101] In this case, an arbitral panel composed of private citizens—a majority of whom were not even Mexican—determined that the government must strictly follow the law.

As Mexican political scientist Luis Rubio predicted at the outset of the NAFTA exercise, one of the most important and lasting features of the NAFTA may be the external scrutiny that the NAFTA brings to Mexican governmental affairs.[102] This external scrutiny—of the type administered in *Cut-to-Length Plate Products*—tends to underscore the obligation inside Mexico to conform to rules of law, rather than to follow the expediencies dictated by an authoritarian regime dominated by highly centralized, federal government agencies.

This external scrutiny of Mexican legislative and regulatory process is another example of the breakdown in neat divisions concerning legislative authority. Once legislative or regulatory action at a national level becomes a subject of close scrutiny at another level—in this case, international—a fluidity is injected into the formerly distinct structures of international, state, federal, and local legislation. Should this continue, we will find increased attention devoted to legislative matters occurring at all levels in our societies.

C. Legislative Pressures from Below—Federal/State Relations and the NAFTA

The adoption of the NAFTA has brought pressures against the U.S. federal government from state authorities who have begun to recognize the increasing intrusiveness of international trade law into local matters.[103] Regulation of international trade has begun to incorporate many subjects once thought to lie well outside the concern of trade regulation, such as human rights, protection of intellectual property rights, environmental quality, labor concerns, and social welfare concerns.[104] This trend will probably continue. For this reason, more and more subjects that were once considered to be a

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101. *See* Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391, 449 (1993) [hereinafter Zamora, *Mexican Law*] (noting that for most of its history Mexico has been centrally governed according to authoritarian models).

102. *See id.* at 457.

103. *See* A.J. Tangeman, Comment, *NAFTA and the Changing Role of State Government in a Global Economy: Will the NAFTA Federal-State Consultation Process Preserve State Sovereignty?*, 20 SEATTLE U. L. REV. 243, 243–44 (1996).

104. *See, e.g.*, Kenneth W. Abbott, *"International Economic Law": Implications for Scholarship*, 17 U. PA. J. INT'L ECON. L. 505, 508–09 (1996) (noting that worker rights and labor standards, along with environmental protection, have recently been addressed as international trade issues).

local monopoly—such as the taxation of local enterprise—are now brought into scrutiny in the international arena.[105]

Because international trade law can be expected to intrude increasingly into state matters, state authorities in the United States, in the implementing legislation to the NAFTA,[106] have negotiated an arrangement with the federal government to incorporate state viewpoints and interests both in the legislative process (to determine if states interests will be compromised by action at the international level), and in the dispute settlement process (to the extent state laws are involved in a dispute).[107] The federal agencies that administer our trade policy must follow a complicated web of procedures designed to allow the states' interests to be defended and represented.[108] Similar provisions are included in the Uruguay Round Agreements Act.[109]

As stated in a report by the Texas Attorney General, through the implementing legislation to the NAFTA:

> the states are now committed to unprecedented involvement in matters of international trade. While their involvement guarantees them important protections in the event of challenges to their laws and standards, their newly-enhanced role carries with it considerable obligations. States now must be aware of a whole new realm of international trade matters, ranging from procedures to resolve disputes over alleged trade barriers, to provisions for financing international enforcement projects, to the policies of international commissions that monitor the impact of free trade.[110]

The Attorney General went on to note that the NAFTA introduced a new parameter to the state legislative process—in addition to being consistent with

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105. *See, e.g.*, Francisco de P. Carral Puccio, *Market Access: NAFTA's Impact on Trade and the Acceleration of Regional Integration in Latin America—Mexico Country Update*, 9 FLA. J. INT'L L. 25, 27 (1994) (discussing the heightened focus on taxation issues in the context of U.S.-Mexican trade).

106. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301–3473 (Supp. II 1997)).

107. *See* 19 U.S.C. § 3312(b) (1994). The NAFTA Implementation Act requires the President to consult broadly with the states for the purpose of achieving conformity of state laws with the NAFTA, and to allow the states to influence the positions taken by the federal government that may influence state laws. *See id.* § 3312(b)(1)(A). The NAFTA Implementation Act also provides that no state law may be declared invalid unless the United States brings an action to declare such law or application of law invalid. *See id.* § 3312(b)(2).

108. *See id.* § 3312 (b)(1)(B).

109. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102, 108 Stat. 4809, 4814–19 (1994) (codified at 19 U.S.C. § 3512 (Supp. II 1997)).

110. GREGG A. COOKE & AMANDA ATKINSON, TEX. ATT'Y GEN., THE EVOLVING PROTECTION OF STATE LAWS AND THE ENVIRONMENT: NAFTA FROM A TEXAS PERSPECTIVE 37–38 (1994).

the U.S. Constitution, state laws must also be consistent with international commitments that have become more pervasive.[111]

This is the clearest example yet of the complexities that increasingly characterize legislative action in NAFTA countries. We see here that interests at different levels—international, national, and state—are injected into the legislative process. The approach of the United States—a highly bureaucratic, legalistic culture—is to invent a process for rationalizing the different interests that wish to be served. In Mexico and Canada, the same may happen in more informal ways. In all cases, however, the process of legislation becomes distended.

D. Legislative Pressures from Above—The World Bank and Interamerican Development Bank

During the 1980s, the international financial institutions fostered structural adjustments in many countries suffering under the burden of external debt. In the 1990s, these same institutions (the International Monetary Fund, the World Bank, the Inter-American Development Bank (IDB), and other regional development banks) have realized the need for legal reforms to accompany the structural economic reforms—privatization, open economies, enhanced competition—that were adopted.

With this new outlook, the World Bank, IDB, and others are beginning to take a slightly more active stance in promoting legal reforms.[112] For instance, in early 1995, the World Bank made a technical assistance loan to Mexico to fund, among other things, reforms of the banking and securities laws.[113] Both the IDB and the World Bank have also become interested in judicial reform in Latin America.[114] There is a growing realization within international financial institutions that Mexico will not reap the benefits of increased investment from Canada and the United States, as facilitated by the NAFTA, unless there is a certain level of confidence in legal institutions.

While these activities do not involve an assignment of legislative power per se to a supranational authority, they show how legislative competence becomes distended by the influence of agencies beyond the central government. In Mexico, which is under severe pressure to stabilize the economy through increased trade and investment, the international financial institutions appear almost like a fourth branch of government, influencing the course of economic regulation in ways that most people in the United States would find completely inappropriate.

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111. *See id.*

112. *See* Zamora, *Free Trade*, *supra* note 15 at 419 (noting the formation of "technical units" within the World Bank and the IDB that recognize and promote the enhanced role that legal reforms should play in restructuring).

113. *See id.*

114. *See id.* at 420.

V. CONCLUSION

Economic and social integration in the Americas is bound to continue. Integration is driven by many forces: migration patterns, heightened competition for markets and for sources of supply, improved technology which allow expanded communications and transportation between countries, and the conscious policies of governmental and intergovernmental agencies. As an "integrationist"—someone who believes that our society has much to gain from interaction with other societies—I find the current interest in hemispheric integration a welcome and positive step.

Unfortunately, integration is a messy, confusing exercise that occurs on many levels and in unpredictable ways. The confusion extends to the distribution of legislative competence between local, national, regional, and international groups, and between private and public agencies. We have yet to develop the proper theories or structures for accommodating the legitimate interests of people in all levels of rule creation and enforcement.

One possible place to look for structural solutions—for the development of institutions and processes to mediate the conflicts in legislative jurisdiction—is the university. Unfortunately, our educational systems have not yet responded to the task of creating a Free Trade Agreement for the Americas.[115] Integration without increased cross-cultural awareness and understanding should be avoided, as increased contacts bring increased opportunities for misunderstandings. Yet, our educational institutions largely ignore the relevance of hemispheric studies, even while our business leaders consistently search for employees with language and cross-cultural skills.

This is especially true in the United States, the largest and most affluent country in the hemisphere. Our law schools have generally ignored comparative legal studies of other countries in the Americas. Even if we find the Rosetta Stone of legislative jurisdiction, it will be of little use if those engaged in the process of integration in different countries lack an understanding of each other. The teaching of comparative law topics should become more of a standard in law school curriculum if we are to prepare for a more highly integrated region that is not tied in knots over misunderstandings.

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115. For an earlier and more comprehensive statement on legal education and its role in hemispheric integration, see *id*. at 423–25.