

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

Stephen ZAMORA¹

SUMMARY: I. Introduction. II. NAFTA and U.S. Hegemony. III. Regional Integration, Legislative Authority and the Calvo Doctrine. IV. Notes from the front. The early experience of NAFTA and the assertion of legislative competence. V. Conclusion.

I. INTRODUCTION

In July, 1995, the late Ron Brown, Secretary of Commerce, and Mickey Kantor, then-U. S. Trade Representative, hosted an historic meeting, a Hemispheric Trade Summit that brought together, in Denver, Colorado, the trade ministers of every country in the hemisphere except Cuba. 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 2005.² Cognizant of the need to enlist broad support for this agenda, the trade leaders invited 1,000 representatives from business, the academic professions 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 25 years to U. S. lack of interest in the region. Latin American governments, on the other hand, have followed policies that were intended to insulate themselves from the overwhelming economic, political and military might of the United States. It was unique in my experience to

¹ Dean and professor of law University of Houston Law Center.

² The Denver meeting was an outgrowth of the Miami Summit of hemispheric leaders, held in Miami in December of 1994. See Comment, "Examining the Foundation for a Free trade Zone in the Americas", *3 J. Int'l Law & P.*, 521 (1994).

attend a meeting of high-level trade officials and business leaders in which these attitudes were laid aside, in a relatively euphoric state of optimism for the benefits of free trade and economic integration.

In addition to a sense of optimism over the heightened interest in the Americas, I left the Denver Trade Summit with a healthy respect for the complexity of this ambitious project. We have seen how complicated the negotiation, entry into force, and implementation of NAFTA has been, even though only three countries are involved, and even though the U. S. Canada Free Trade Agreement existed as a partial template. Riddled with reservations and annexes, the NAFTA Agreement looks like it was designed in the Rube Goldberg school of legislative drafting. Imagine the number of special rules and arrangements that would have to be concluded to make a 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. A second meeting took place in Cartagena, Colombia, in March, 1996, and a third meeting was held in Brazil. The early results of these meetings show that there are many obstacles to hemispheric free trade; perhaps the predominant obstacle is a resistance on the part of governments in the region to accept a single legal paradigm for organizing regional free trade. At the base of this resistance is an unwillingness of national governments to cede authority—to relinquish a portion of their supposed sovereignty—over subjects that were once thought to be regulated only at the national level. The burden of this paper is 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 NAFTA—will have on the allocation of legislative competence and regulatory power throughout the hemisphere. Should a Free Trade Agreement for the Americas be established, it will have repercussions beyond the sphere of imports and exports. In the late 20th 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 influence our societies on multiple levels—public and private, national and international, centralized or 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); to regulatory standards or performance criteria; to rules affecting trade in information services that impinge upon cultural integrity. Put more succinctly, we are living in an age in which decisions at the international level may have immediate local implications, and the mechanisms at the local level to create and enforce rules may have global implications.³

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 out local concerns from national concerns, and national concerns from international concerns. We will begin to see, on a hemispheric level, an increase in the 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 —NAFTA, MERCOSUR and the like— 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.⁴

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

II. 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. As noted by Professor Wiegand,⁵ U. S. legal models have influenced the devel-

³ This phenomenon differs from the dissemination of rules from imperialistic powers, from Rome to the present day. During periods of imperial hegemony, rules are imposed from the imperial power to localities in the periphery. The present day phenomenon of internationalization of local law is not so simple. As discussed below, there is no single source of rule-creation, but rather a layering of rules caused by increased contact between groups in different societies.

⁴ See Trachtman, Joel, “Reflections on the Nature of the State: Sovereignty, Power and Responsibility”, 20 *Can. - U. S. L. J.* 399 (1994); George Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States”, 94 *Col. L. Rev.* 332 (1994); Joel Trachtman, “L’Etat, C’Est Nous: Sovereignty, Economic Integration and Subsidiarity”, 33 *Harv. Int’l L. J.* 459 (1992).

⁵ Wiegand, *Am. J. Comp. L.* [the article was published in the late 80’s or early 90’s].

opment of law in many nations, due to the spread of U. S. economic influence after the Second World War. The exportation of U. S. legal models has also come about through a phenomenon that is related to economic power: the tendency for foreign lawyers to pursue advanced degrees at U. S. law schools, and to return to their home countries with a briefcase full of U. S. legal theories. This form of influence of U. S. law 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 and government agencies. One may expect that an increase in economic integration in the Americas will provide an even greater opportunity for U. S. agencies —government agencies, multinational corporations, NGO's— to influence legal developments in the region. The attendance and interest at the Denver Summit of CEOs of major U. S. corporations shows 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 as a vehicle for greater U. S. influence in the region is a marked departure from the experiences of the past 100 years. The American republics resisted U. S. influence and U. S. legal models for many years, and yet even within the hemisphere these models — franchising, forms of financing, environmental regulation — have taken hold. In many instances, the American republics used doctrinal theories to oppose the incursion of U. S. legal models: since most of the other countries of the region follow the civil law tradition, it was easy to oppose the replication of U. S. legal models by asserting that they were bound to a common law foundation and would not operate effectively in the world of neo-romanist or civil law. The failure of the law and development school in the 1960's to spread U. S. invented legal doctrine can be attributed in part to such resistance.⁶

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

6 David Trubek, Richard Gardner *et al.* The relevant works are actually cited in Wippman's paper.

States and elsewhere, or created externally, by a supranational authority —a NAFTA Commission, for instance.

If regional integration should result 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. Although there is considerable resistance outside Latin America to the Doctrine, especially by commentators in the United States, the Calvo Doctrine has had an important influence in Latin American law, and on the development of Latin American notions of sovereignty. The Calvo Doctrine, named after Argentine jurist Carlos Calvo (1822-1906), espouses two notions that are based on variations of the sovereignty principle.⁷ First, like the principle of National Treatment incorporated into the GATT and NAFTA, the Calvo Doctrine espouses equality of treatment between foreign citizens and citizens of the host country. However, unlike the National Treatment clause, the Calvo Doctrine was to address the perceived *favoritism* granted to foreigners, rather than *discrimination* against them. In other words, the Calvo Doctrine is to bring foreigners down to the level of nationals, and the National Treatment clause is to raise them up to the level of nationals.

Second, the Calvo Doctrine holds that foreign investors must submit to the national laws of the host country, and the doctrine 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. This concept is clearly based on an extension of the sovereignty principle the notion that a state has absolute authority over activities within its borders, and extensions of authority into national territory, whether they be by foreign governments acting individually or under the mantle of international law, are inadmissible. The Calvo Doctrine might thus be seen 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.

⁷ See Calvo, Carlos, *Tres ensayos mexicanos* (SRE, 1974); see also Daly, Justine, "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).

As an increasing number of Latin American governments have adopted the "Washington consensus" prescribing free trade and openness to foreign investment,⁸ the Calvo Doctrine has been weakened as a guiding principle. Nevertheless, the doctrine still holds some power. For instance, the Mexican Constitution still contains a Calvo clause requiring foreigners to submit to national law,⁹ the Grupo Andino still maintains vestiges of Calvo,¹⁰ and Calvo clauses are still written into agreements in the region.

The question arises whether regional economic arrangements such as NAFTA will spell the end of the Calvo Clause. According to one commentator, the investment provisions in Chapter 11 of NAFTA—specifically, the commitment in Article 1110 for prompt payment of fair market value on expropriation of foreign-owned property, and the referral of investment disputes to international arbitration—"raise many critical questions about the continued validity of the Calvo Clause."¹¹ As the American republics vie for foreign investment, the Calvo Doctrine might be 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. For example, at the present time, the Mexican Supreme Court is getting ready to rule on a case involving an arbitral decision by a bi-national panel under the Chapter 19 of NAFTA. The losing party in the dispute has instituted an *amparo* action, a constitutionally guaranteed right of review in Mexico of any public act. The Supreme Court's consideration of the case would appear to contradict the provisions of NAFTA chapter 19, in which decisions by NAFTA panels are final on the parties, subject only to an extraordinary challenge procedure that itself involves deference a special "tri-national" tribunal.¹² The decision has caused great interest in Mexico, due to

⁸ 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 [article in *Foreign Affairs* or *Foreign Policy*, published in the last three years].

⁹ Political Constitution of the United Mexican States, article 27.

¹⁰ Wiesner, "ANCOM: A New Attitude," 24 *U. Mia. Inter-Am L. Rev.* 435, at.

¹¹ Daly, Justine, "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, 1181 (1994).

¹² NAFTA Article 1904.9, 1904.11, and Annex 1904.13, para. 3. 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."

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 then refined in 1896 —that is, in the latter part of a century in which Latin America suffered repeated invasions by foreign powers. Between 1820 and 1914, Great Britain alone engaged in 40 armed interventions in Latin America. One Mexican commentator, sensitive to U. S. intervention in Mexico, calculates the United States has been guilty of several hundred illegal incursions in Mexico.¹³ 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 undertakings like the Monroe Doctrine, for securing the maintenance of peace.”

Today, the Calvo Doctrine may be in decline, but 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 19th century, 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 economy and over social welfare. It thus becomes problematic for Latin American governments to espouse the Calvo Doctrine, requiring foreign entities to submit to national law, when the governments are unable to assert their full authority over their economies.

This is not to say, however, that the reasons for the original invention of the Calvo doctrine —the abuse of economic power by foreign governments or by foreign corporations— are not still with us. The financial operations and short-term capital movements that characterize our post-modern international banking system contribute periodically to the destabilization of national economies in the Americas. 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.

¹³ Cite Garcia Cantu — his book is cited in my article “The Americanization of Mexican Law”.

1. *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. Both from above (supranational influences) and from below (regional or local influences), numerous institutions are injecting their influence into areas that were once considered the exclusive concern of the central government. 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.¹⁴

In his book *Toward a New Common Sense*,¹⁵ Boaventura de Souza Santos, a Portuguese Professor of law and sociology, writes of the “transnationalization of nations-state regulation.”¹⁶ Transnational forces —supranational agencies, technologies, multinational corporations, etc.— have led to a “decentering of the nation-state as an actor in the world system.”¹⁷ 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.¹⁸

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

¹⁴ Cite article by Claudio Grossman and Dan Bradlow, in the *American U Journal of Int'l Law*, from the early 1990's.

¹⁵ Souza Santos, Boaventura de, *Towards a New Common Sense* (1995, Routledge, New York and London).

¹⁶ *Idem*, at 274 et seq.

¹⁷ *Idem*, at p. 279.

¹⁸ *Idem*, at 281.

the Sierra Club or Americas Watch— it becomes paradoxical to argue that the national government (which may be threatening the individuals' 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—a foreign NGO, an international agency, etc.

2. *The Positive Value of Sovereignty The Example of Mexico*

Just as an affluent person has a hard time understanding the problems of hunger, in the U. S. we have a hard time understanding sovereignty precisely because we have never lacked it. We have never been invaded, rarely threatened. Our issues have to do with curtailment of the extension 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 intervention. 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.

Mexico provides a good example of this notion of sovereignty According to a recent book by political scientist Julie Erfani,¹⁹ a powerful domestic state sovereignty has been a shibboleth as a necessary protection from foreign intervention.²⁰ As Erfani notes, Mexican political ideology is based on myths of a strong state that will prevent Mexico from being overrun by foreign powers that conceive of themselves as superior, culturally, economically and politically, to Mexico. Mexico is as sensitive as any Latin American nation to foreign intervention—there is even a Museum to Foreign Interventions in Mexico City.

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 *soberanía* (sovereignty) that ultimately resided in the people. The myth of a strong, sovereign state was exploded with the debt crises and economic woes of the 1980's, and the architects of the current

¹⁹ Erfani, Julie, *The Paradox of the Mexican State: Rereading Sovereignty from Independence to NAFTA* (1995).

²⁰ *Idem*, p. 10.

Mexican model of government —President Carlos Salinas de Gortari and his Finance Minister Pedro Aspe— created a new model based on strengthening the role of the private sector and opening the economy to foreign investment and trade.

The opening of the Mexican economy from the late 1980's to the present (post-GATT accession), and Mexico's drive to become part of NAFTA represent extreme departures for Mexican foreign policy. The Mexican *apertura económica*, which dramatically reduced the government's overwhelming role in the economy, has weakened both the government's role and its image as the protector of the people. The current President, Ernesto Zedillo, faces a crisis of confidence in the weakened government model, as the Mexican economy continues in cycles of recession and inflation.

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.

The current scenario leaves Mexico with a weakened central government; with a population that increasingly questions the ability of the central government to provide the social welfare that it has customarily provided; with centrifugal forces within Mexico pulling away from the center, as various groups (political parties like the PAN, industrialists, Sandinista rebels) in the northernmost and southernmost states attempt to wrest power from the PRI-dominated central government; and in the uncomfortable NAFTA embrace of the United States and Canada. As we shall see, NAFTA provides the U. S. and Canadian governments, and groups centered in those countries, to influence Mexico —and to influence each other— to an extent that was previously impossible. It is no wonder that the state-centered legislative model seems increasingly like a nostalgic fiction from the past.

3. *Allocating legislative power*

As the effectiveness of the nation state as the center of legislative power weakens in the face of advancing economic integration, the question becomes how such power should be distributed most effectively to promote social and economic welfare. Put more broadly, the question is —what is the best model for the present, a model for legislative action that can preserve the legitimate interests of persons at the local, regional, national and international levels of activity?

One model that has been frequently discussed in the context of European legislative competence is *subsidiarity*. According to George Bermann, "Subsidiarity expresses a preference for governance at the most local level consistent with achieving government's stated purpose."²¹ 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.²² 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."²³ 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 is no doctrinal or institutional effort to identify an allocation of power.²⁴

4. *Effective sharing of legislative power in a heterogeneous system*

If one believes in the growing heterogeneity of regulation, discussed above,²⁵ 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. Perhaps 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 I will try to show in the following section, in a number of instances involving the application of 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. To my knowledge, we have not as yet devised a theory or model for accommodating these diverse interests in a transnational setting.

²¹ Compare Bermann, George, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States", 94 *Col. L.Rev.* 331, 339 (1994).

²² *Idem*, at 403-404.

²³ *Idem*, at 404.

²⁴ *Idem*, at 406-407.

²⁵ See text accompanying notes *supra*.

In the context of NAFTA, or of U. S. Latin American relations in general, a second issue deserves our 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 a long time. In the 1970's, proponents of multinational corporations, like George Ball, saw the MNC as the answer to this question. If he were still with us today, George Ball would be pleased at the promised expansion of MNC activities in the hemisphere. Of course, the opponents of MNC's are still with us as well —labor union activists, environmentalists, and many others who distrust the power of corporations and question the ability of national governments to hem in that power. As I have stated, the nation state's power to regulate has been weakened, and 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 NAFTA AND THE ASSERTION OF LEGISLATIVE COMPETENCE

Having broadly outlined some of the concerns surrounding the allocation of legislative competence under NAFTA, I now turn to consider the early experience of NAFTA in the assignment or assertion of that competence.²⁶ The starting point is the general understanding that, while NAFTA requires federal, state and provincial authorities to abide by the provisions of the NAFTA Agreement,²⁷ NAFTA provides little institutional structure or basis for displacement of domestic law by supranational "NAFTA" law.²⁸ Even so, when NAFTA was under consideration in the U. S. Congress, the federal executive had to reassure those who were worried about the continued vitality of states' rights that NAFTA would not give free reign to a supranational authority, working in concert with the federal government, to curtail state laws.²⁹ State authorities appear to be concerned lest even a single NAFTA provision, enforced through the binational dispute settlement mechanisms of

²⁶ I have addressed some of these issues in Zamora, "The Harmonization of Domestic Legal Systems: The Side Effects of Free Trade", *Ariz. J. Int'l and Comp. L.* (1995).

²⁷ NAFTA Article 105.

²⁸ See Zamora, *supra* note 25.

²⁹ The issues surrounding states' interests in the NAFTA implementation, and the federal government's response (embodied in the NAFTA Implementation Act) are discussed in Note, "GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States", *45 Duke L. J.* 216, 247, 253 (1995).

NAFTA, make inroads into state law. 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 states' sovereignty was being compromised.³⁰

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

1. NAFTA-related creation of "partial legal orders"

As previously noted, Boaventura de Souza Santos identifies the development of a post-modern, heterogenous state in which " 'semi-autonomous legal fields' seem to be developing *inside* state law."³¹ Several good examples of such semi-autonomous legal fields are beginning to appear in North America. For instance, under the North American Agreement on Environmental Cooperation (often referred to as 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. Either individuals or non-governmental organizations may lodge such complaints.³² The Secretariat of the Commission may then look into the substance of the allegation, and may require a response from the Party under investigation.³³ This 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 non-governmental agencies. 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 Coopera-

³⁰ *Idem*, at 242-247. See also the paper by Christine Milliken, a staff member of the National Association of State Attorneys General, published in *American Society of International Law, Proceedings of the Annual Meeting* [I think it was the April 1995 meeting — the panel on WTO Dispute Settlement].

³¹ Souza Santos, Boaventura de, *supra* note at 281. See the discussion at text accompanying notes *supra*.

³² North American Agreement on Environmental Cooperation, Articles 5, 14.

³³ *Idem*, Article 14.2.

tion 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 of NAFTA as a control on state action. Nevertheless, it is important to note that, as an increasing matter, the public and private agencies and individuals who deal with environmental issues are comfortable crossing boundaries. 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,³⁴ and energy law.³⁵ 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.

2. NAFTA dispute settlement mechanisms and the assignment of legislative power

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 the NAFTA parties. This is not to say, however, that NAFTA will not affect the ways in which legislation is adopted, or the balance of power between states, or between 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 NAFTA.

³⁴ Labor law has resisted transnationalization, but this may change. The North American Agreement on Labor Cooperation will increasingly put labor law experts in the NAFTA countries—from government, unions and business—into contact with each other. The Agreement itself provides for dispute settlement mechanisms to insure the enforcement of labor laws.

³⁵ 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 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.

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.³⁶ In a three-to-two decision, the panel of arbitrators (3 U. S. experts and 2 Mexicans) ruled in favor of the U. S. complainants. The case proved unusual not for the result, however, 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—concluded that SECOFI lacked authority to levy the antidumping duty. Rather than 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. Consequently, under Article 16 of the Mexican Constitution, any act undertaken by the Mexican agency lacked the force of law. The panel interpreted the NAFTA agreement and Chapter 19 rules of procedure³⁷ to require it to judge the case in the same way that a Mexican court—in this case, the *Tribunal Fiscal de la Federación*—would decide it. 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. Most of the panel's decision was taken up with a discussion of Mexican constitutional law. The panel did not even consider the substantive issue whether the antidumping duty was proper, but instead remanded the matter to SECOFI with orders to dismiss the duty. Reluctantly, SECOFI complied.

This case has more to do with process than with substance. If the majority was correct in *Cut-to-Length Plate Imports* in its interpretation of Mexican constitutional law, then the decision is not remarkable for its content. (The two dissenting panel members—a Mexican political scientist, and a U. S. law professor—disagreed with the majority on this basis of the decision, and would have remanded the case to SECOFI on substantive rather than constitutional grounds, leaving SECOFI the ability to correct errors in its investigation or duty determination.) The important point is that a non-Mexican dispute settlement panel, a majority of whose members were not trained in Mexican law, provided an important interpretation of Mexican constitutional law. The decision may not formally count as judicial precedent in Mexico—indeed, under Mexican law, the opportunity for courts to create judicial

³⁶ *Cut-to-Length Plate Imports Antidumping Investigation*, commenced December 4, 1992, and decided August 30, 1995. [check to see if panel report available in ILM or elsewhere].

³⁷ See NAFTA Article 1904.3 and Annex 1911.

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. In this case, an arbitral panel composed of private citizens—a majority of whom are not even Mexican—has determined that the government must strictly follow the law.

As Mexican political scientist Luis Rubio predicted at the outset of the NAFTA exercise,³⁸ one of the most important and lasting features of NAFTA may be the external scrutiny that NAFTA brings to Mexican governmental affairs. This external scrutiny—of the type administered in *Cut-to-Length Plate Imports*—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.

3. *Legislative pressures from below, Federal/State relations and NAFTA*

The adoption of 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. Regulation of international trade has begun to incorporate many subjects that were once thought to lie well outside the concern of trade regulation: human rights, protection of intellectual property rights, environmental quality, labor concerns, social welfare concerns, etc. This trend will probably continue. For this reason, more and more subjects that were once considered to be a local monopoly—such as the taxation of local enterprise—are now brought into scrutiny in the international arena.

Because international trade law can be expected to intrude increasingly into state matters, state authorities in the United States have negotiated an arrangement with the federal government to incorporate state viewpoints and state

³⁸ See the cite at the end of my "Americanization" article.

interests both in the dispute settlement process (to the extent state laws are involved in a dispute), and in the legislative process (to determine if states' interests will be compromised by action at the international level). In the implementing legislation to NAFTA,³⁹ and in the administration's Statement of Administrative Action (SAA)⁴⁰ containing the federal government's approach to implementation of NAFTA, the federal agencies that administer our trade policy must follow a complicated web of procedures that are intended to allow the states' interests to be defended and represented. Similar provisions are included in the Uruguay Round Agreements Act and its Statement of Administrative Action.⁴¹

As stated in a report by Texas Attorney General Dan Morales, through the SAA and the implementing legislation to 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.⁴²

Attorney General Morales went on to point out that NAFTA introduced a new parameter to the state legislative process—in addition to being consistent with the U. S. Constitution, they must also be consistent with international commitments that have become more pervasive.

This is the clearest example yet of the complexities that increasingly characterize legislative action in the 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

³⁹ Section 102(b) of the Implementation Act requires the President to consult broadly with the States for the purpose of achieving conformity of state laws with NAFTA, and to allow the states to influence the positions taken by the federal government that may influence state laws. North American Free Trade Agreement Implementation Act, Pub. L. 103-182 of Dec. 8, 1993, Section 102 (b), codified at 19 U. S. C. Sec. 3312(b). Section 102 (b) (2) 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.

⁴⁰ [cite]

⁴¹ [cite]

⁴² Morales, Dan, *The Evolving Protection of State Laws and the Environment: NAFTA from a Texas Perspective*, U. S. - Mexican Occasional Paper No. 5, U. S. - Mexican Policy Studies Program, LBJ School of Public Affairs, The University of Texas at Austin (June 1994), at p. 38.

informal ways. In all cases, however, the process of legislation becomes a distended one.

4. *Legislative pressures from above —the World Bank and Interamerican Development Bank*

During the 1980's, the international financial institutions fostered structural adjustments in many countries suffering under the burden of external debt. In the 1990's, these same institutions (the International Monetary Fund, the World Bank, the Interamerican Development Bank 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. According to a recent report of the International Section of Law and Practice,

With this new outlook, the World Bank, IDB and others are beginning to take a slightly more active stance in promoting legal reforms. 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. Both the IDB and the World Bank have become interested in reforms of such basic institutions as the courts and the notaries public in Latin American countries. There is a growing realization within the international financial institutions that Mexico will not reap the benefits of increased investment from Canada and the United States, as facilitated by NAFTA, unless there is a certain level of confidence in legal institutions.

Again, 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.

V. CONCLUSION

Economic and social integration in the Americas is bound to continue. Integration is being driven by many forces: migration patterns; heightened competition for markets and for sources of supply; improved technology that allow

expanded communications and transportation between countries; and the conscious policies of governmental and intergovernmental agencies. As an "integrationist" —as someone who believes that 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 messy; it is a confusing exercise that occurs on many levels and in unpredictable ways. Insofar as the subject of this article is concerned —the distribution of legislative competence between local, national, regional and international groups, and between private and public agencies— I would venture to conclude only one thing. We have yet to develop the proper theories, or the proper structures, for accommodating the legitimate interests of people in all levels of rule creation and rule enforcement.

Finally, I would address one special challenge that increased hemispheric integration poses. Our educational systems are woefully inadequate to the task of creating a Free Trade Agreement for the Americas. Integration without increased cross-cultural awareness and understanding will not be a pretty sight. Increased contacts will bring increased opportunities for misunderstandings. Yet our educational institutions continue to ignore the relevance of hemispheric studies, even while our business leaders 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 schools rarely teach courses in the history and culture of other countries in the region. With a few exceptions, our law schools have ignored comparative legal studies of other countries in the Americas.