# TOWARD A NORTH AMERICAN LEGAL SYSTEM

*Edited by*
**JAMES T. MCHUGH**

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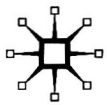



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# Toward a North American Legal System

# Preface: Contemplating a Continental Legal Foundation

*Robert A. Pastor*

Until the last decade of the twentieth century, "North America" was little more than a geographical expression, and there was even a question as to which countries fit within the definition. The decision by Canada, Mexico, and the United States to sign the North American Free Trade Agreement (NAFTA) in 1992 defined the region's boundaries and lifted the "North America idea" beyond geography and economics.

From NAFTA's inception to the present, virtually all tariff and investment barriers were gradually eliminated, and a continental market—rivaling Europe's or East Asia's—was created. The more visionary viewed NAFTA as a first draft of a continental constitution; the more fearful viewed it as a slippery slope toward the destruction of state sovereignty.

NAFTA gave the region an economic boost. From 1994 to the year 2001, North America's share of the world's gross product grew from 30 to 36 percent, while Europe's remained constant at 26 percent. Trade among the three countries tripled and foreign investment quintupled. Intra-regional exports as a percentage of total exports in North America climbed from 33 percent in 1980 to 56 percent in 2000, almost reaching the level of integration in Europe after five decades.[1] National firms became North American. At the same time that businesses forged continental ties, more and more people of all three countries toured and immigrated to their neighbors. Americans traveled more to their neighbors than to any other countries, and the same applied for Mexicans and Canadians. Perhaps, the most profound transformation, however, stemmed from those who moved permanently. Since 1970, but intensifying since NAFTA, the number of Mexican-born immigrants living in the United States increased by a factor of 17—to 12.7 million—representing about one-third of all immigrants.[2] Societies became interwoven.

Integration proceeded at such a fast pace that the governments could not keep up, and that is the principal continental dilemma today: the continental

market has enlarged, but there is no governance. Without institutions or agreed procedures, problems become crises, and that is what happened with the peso devaluation of 1994, the assault of 9/11 in 2001, and the financial meltdown of 2008, the latter of which was due to the expansion of the securities market without a similar expansion of regulations. Regardless of the origin, each crisis eventually harmed all three countries. Just as serious, though less dramatic, the failure to establish institutions of cooperation has eroded the platform of integration, causing a decline in the growth of trade and reduced competitiveness.

North America faces a quiet crisis. If it were loud, the leaders would act, but since it cannot be seen in the headlines of our papers, and since each country is preoccupied by a formidable agenda, the issues of North America—whether competitiveness, ineffectual and costly security and customs inspections at the borders, lack of infrastructure investment, or low-profile protectionism—are ignored. Over time, however, the capacity of the three countries to compete against Asia and Europe has been diminished. Moreover, the lack of leadership means that the opportunities of a deepening market and of new relationships with our neighbors are not grasped.

Imagine for a moment if the three governments were to formulate North American plans for transportation and infrastructure, the environment, education, trade, regulation, labor conditions, and health services. Progress on any of these plans would propel North America to the front of the twenty-first century. This will not happen without new institutions to propose the plans and political will to implement them. As the region integrates, there will inevitably be a host of legal and other problems. As business and society expand across borders, legal disputes are inevitable, and a smooth system is needed to expedite resolution of such disputes. To keep the North American experiment alive will require policy coordination and, eventually, a more effective way to harmonize or integrate three distinct systems.

The purpose of this volume is to encourage scholars and policy-makers to think imaginatively about ways to integrate or harmonize the three legal systems. There is considerable precedent. NAFTA itself has multiple dispute settlement provisions in which lawyers from all three countries use a unified set of legal procedures and appeal to an international panel. Other dispute mechanisms or legal procedures govern the range of trade, investment, and transnational disputes, including drug-trafficking.

There were many who believed that an integrated legal system was impossible for two reasons. First, Mexico has a civil code, and Canada and the United States have a common law. Second, federalism was strongly rooted in both the Canadian and U.S. legal systems, making it difficult for the two countries to have a national agreement let alone an international one. Mexico

sometimes used its different legal system as a barrier to prevent U.S. influence, and U.S. administrations sometimes used the federalist system to avoid international obligations. But NAFTA and other decisions have eroded both impediments.

For example, Mexico long refused any forms of extradition as a violation of its sovereignty, but in the past decade, Mexico changed its policy and began to send hardened criminals to the United States because it understood that a strict definition of sovereignty would reduce its autonomy and capacity to fight the drug cartels. Pragmatism replaced ideology, and now, all three governments are working very closely together on a wide range of judicial issues. Mexico actually is changing its legal system, adopting an adversarial process with juries and the opportunity to confront accusers in court. It is considering abandoning the delaying tactic known as the amparo. As Mexico makes those changes, the possibility of further harmonization increases.

As the volume of trade testifies, a certain amount of harmonization is occurring as a result of technology, professional mobility, and increased investment. It is also clear that there are many different paths to harmonization and cooperation. At the most basic level, legal harmonization could proceed through decree or mutual recognition. At a second level, the drive to improve competitiveness might compel different subnational or national entities to propose a convergence of procedures. In addition, lawyers, businesses, or governments could proceed by focusing on individual sectors, particularly those most in need of efficiency. Following areas are judged by legal experts to be of the highest potential: bankruptcy law, intellectual property and patents, and criminal law as it applies to major drug-trafficking, money-laundering, and terrorism.

Already, the United States and Canada are working closely with Mexico on drug-trafficking-related issues in the different judicial systems. When a suspect is arraigned, both governments consider extradition or, simply, how to make the best case. They cooperate in compiling evidence and informing counsel before and during the trials. This volume offers a long menu of ideas on how to address the divergent legal systems in a manner that would serve all three nations. The conclusion is that we have begun to open our minds to new opportunities, but we have barely begun to establish firm bonds for legal cooperation among the three countries. We hope that this will be just the first of a series of books on North America's potential.

I have been researching, writing, and trying to influence policy in the three countries on North America since 1978, when as the director of Latin American Affairs on the National Security Council, I held conversations with Mexican officials on these and other issues. A decade later, I raised the ideas of free trade in North America with Mexico's newly elected president, Carlos

Salinas, who had been my classmate in graduate school at Harvard. It was ultimately his initiative in 1990 for NAFTA that began to give substance to the North American idea. When I moved to American University in 2002, I established a Center for North American Studies to teach courses, influence public policy, and coordinate research on the subject.

Despite the emergence of North America as a formidable geo-political entity, our understanding of this largest free trade area in the world in terms of its economy and territory is inadequate, and the differences that continue to separate the countries often seem more formidable than the shared interests. That is why we are launching this series and why this book on North American law is an appropriate place to start. In February 2007, the Center for North American Studies convoked a conference led by Dr. James T. McHugh, then associate director of the center, on the questions whether a North American legal system was possible or desirable. The product of that conference is this book. I want to congratulate Dr. McHugh for organizing the conference and editing the book.

Many had hoped that deeper integration among the three countries would lead to trilateral approaches and institutions, but this has not occurred. Some believe that this is due to "September 11th" and Washington's national security response; others attribute it to historical inertia and the lack of leadership. Whatever the reason, the potential trinational relationship has not developed in a way that would have permitted the region's economy to have grown faster than that of Asia. Most of the relationships remain dual-bilateral–U.S.-Canada and U.S.-Mexico. We hope this series will help build the consciousness and develop the proposals that will allow all three countries to fulfill the promise of North America.

## Notes

1. For the data and their development, see Robert A. Pastor, *The North American Idea: A Vision of a Continental Future* (New York: Oxford University Press, 2011).
2. Pew Hispanic Center, *Mexican Immigrants in the United States, 2008* (Washington, D.C.: Pew Center, 2009).

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# Introduction

*James T. McHugh*

The adoption of the North American Free Trade Agreement (NAFTA) in 1994 advanced the cause of greater continental cooperation in trade and commerce. It also raised the possibility of even greater cooperation among the three principal countries of the North American continent: Canada, Mexico, and the United States. Indeed, since the adoption of NAFTA, indications of greater convergence among the people of these three countries have grown, including in terms of values, goals, and expectations. This process is not heading in the same direction as the European Union nor should its institutions seek to emulate that grand and decades-long supranational development. However, the deepening of North American cooperation does offer the prospect of institutional features that would facilitate this evolving relationship and converging identity and advance its economic goals of increasing prosperity, security, and happiness for all of the people of this continent and its countries. The relationship between law and policy is, therefore, unavoidable.

One development that is crucial for this sort of success can be found in the area of legal harmonization. Agreements that create some level of formal cooperation among nations (including free trade zones) require equally formal interaction among the member states in order to succeed. This theme has been a subject of intensive study and application within Europe for more than a half-century. Even without the sort of supranational agreements that have been epitomized by the European Union, it has become apparent that any relationship that crosses borders requires methods for overcoming inevitable differences in legal language and practice. International law, by itself, simply does not provide the requisite guidance to achieve a level of cooperation that is represented by close regional associations. Finding common ground in relation to domestic institutions and conduct in the law is the true key to meaningful cooperation among regional neighbors who wish to become partners as well.

Therefore, the success of the NAFTA and the ongoing development of the regional relationship of Canada, Mexico, and the United States depend, in both the short term and the long term, on discerning or creating that common legal ground. It does not require the creation of a unitary legal system—far from it. The distinct legal cultures of these three continental neighbors already have experienced a degree of cooperation that has advanced greater mutual familiarity among its respective legal professionals, policy makers, and other relevant parties. Nonetheless, greater understanding and accommodation is needed in order for this regional cooperation to become more meaningful and effective. In that way, these three sovereign countries can coordinate their shared interests in promoting their separate prosperity and security by harmonizing those institutions that are most vital toward those cooperative goals—especially that most basic institution of law.

This book seeks to explore the complexities, possibilities, and challenges of that North American legal harmonization and its consequences (both positive and negative) for future continental cooperation. That exploration occurs at different levels of legal analysis. At the macro level, it occurs at the level of public policy, broad theory, and constitutionalism. At the micro level, it occurs at the level of applied law and legal norms, particularly focusing upon categories of law that are most relevant to the economic and social goals of North American cooperation. Each author will offer a unique perspective that is, nonetheless, connected to a larger theme that already is occurring within this continent—a theme of merging norms, values, and practices. Although Canada, Mexico, and the United States are, and will remain, politically and culturally distinct and sovereign, they share a regional identity that rivals Europe and all of the other regions that are emerging in the global competition of the twenty-first century. This book will offer a critical assessment of all of these factors.

Matthew Simpson begins this exploration by assessing the parameters that a North American legal regime encompasses. He also assesses the interaction between law and business as a framework for harmonizing other legal activities and categories, including human resources and human rights. His chapter provides a broad overview of the state of law among the North American countries and the conceptual foundation upon which it is based. He surveys the scholarship and practice in this area and concludes that a meaningful understanding of this subject requires an appreciation of the complex political and cultural environment in which it occurs, including the distinct, as well as overlapping, legal ideas and values present among Canada, Mexico, and the United States.

Patrick Glenn follows this assessment with a more skeptical appraisal of the feasibility and desirability of this theme of legal harmonization at the

continental level. He identifies significant reasons that scholars, practitioners, and policy makers should not be thinking in terms of a broad North American legal system. He argues that the concept, itself, is vaguely conceived and subject to a variety of possible constructions. He notes that law in North America is not, unlike its European counterpart, systematic and lacks an orderly basis for systematic development. Furthermore, the concept of transnational legal norms is a challenge with global dimensions that requires an acceptance and understanding of the international legal institutions that already exist and already can provide a basis for a wider trend of legal harmonization, which can be undermined by regional efforts in North America. He offers many observations relating to these concerns and concludes that the absence of specific efforts of legal harmonization in North America does not, in any case, pose an obstacle to collaboration among Canada, Mexico, and the United States; its government agencies; or its businesses and that absence may avoid unnecessary future political controversy.

Michelle Egan provides a critical evaluation of the functioning of a single market within a regional context and the significant interest in the legal issues that arise as a result of the implementation of such a market and the compliance of regional parties. While using the experiences of the European Union as her model, she notes that the implications of this sort of comparison extend beyond Europe or North America into the global realm. She argues that the role played by the new modes of governance that supranational arrangements have introduced should be carefully analyzed. Furthermore, the dynamics between negative and positive integration need to be understood in order to appreciate the legal challenges that this sort of development actually entails. She observes that "negative integration" (generally in the form of legal recognition of economic freedoms) tends to trump "positive integration" (in the form of supranational regulatory policies), leading to concerns of promoting formal legal institutions over substantive social policies. The example of the European Union demonstrates, she contends, that the scale and effect of European integration increasingly affect the autonomy of member states with increasing constraints on tax, welfare, and social practices. The same consequences could, it is suggested, be experienced by a North America that is pursuing increased legal harmonization.

Jim McHugh contends that any movement toward greater legal harmonization and the development of a continental legal regime requires an appreciation of the constitutional context of the relevant sovereign countries. He notes that international agreements that create cooperative associations of one form or another, including free trade areas, require voluntary interaction among the member states under their respective constitutional regimes. He acknowledges that many factors, in addition to legal ones, can influence that

success. Nonetheless, he stresses that a relatively neglected consideration of this comparative analysis is the difference in constitutionally sanctioned and promoted institutional structures among these governments. From a broader perspective, he contends that neo-institutional theories suggest that this formal-legal emphasis is important because different governmental structures can affect rational choice decisions regarding policies, both domestic and international. His chapter uses that perspective to assert that the Canadian constitutional presence of both a parliamentary system and a strong yet decentralized federal arrangement (which differs from the constitutional provisions of Mexico and the United States) may be significant. Those constitutional differences may facilitate Canada's role in both negotiation and practical implementation of the diplomatic process of legal and policy harmonization, thus providing a constitutional foundation for further continental cooperation in this area.

Jay Westbrook shifts the focus from theory to application with his chapter devoted to the role that supranational organizations within North America may contribute to continental legal harmonization. He begins his analysis by assuming that greater legal cooperation within NAFTA is desirable (which he acknowledges to be, among some observers, a controversial proposition) and acknowledging that there are social costs connected with any move toward greater economic globalization (including at a regional level) that will prompt ongoing resistance to NAFTA. Nonetheless, he persists in asserting that a strong, integrated NAFTA is part of the solution to the problems of globalization, including through the use of supranational institutions that can define and frame specific areas of shared legal rules, principles, and values. Complicating this process is the fact that NAFTA is both less developed and more developed than generally is appreciated and is influenced by ambiguous reactions to the prospect of greater cooperation (including in terms of legal harmonization) in Canada, Mexico, and the United States. Nonetheless, he argues that greater regional cooperation of the sort that has been pursued by the European Union constitutes the only viable alternative for North America (as well as other regions of the planet) to the negative effects of a wider globalization.

Susan Karamanian continues this applied institutional emphasis by arguing that the filing of cases and the work of the arbitral tribunals in relation to disputes falling under the authority of NAFTA should be regarded as a positive development. Arbitral cases and decisions expose problems with domestic processes of Canada, Mexico, and the United States that, sometimes, violate basic principles of fairness. The legal decisions of North American tribunals offer protection to foreign investment, but they also assist NAFTA member

states in aligning their respective domestic practices with international standards of due process and fundamental fairness. That result is true even when a tribunal does not issue a judgment that is adverse to the host nation. The arbitral process, itself (particularly when it results in a published award that contains an extensive review of the host nation's conduct), elaborates and further defines relevant legal standards, both domestically and regionally, and places them within a meaningful legal and political context. In that way, arbitral tribunals are not merely an institutional product of NAFTA and its trend toward increased legal harmonization but, actually, a shaper of that development and continental legal norms.

Arthur Cockfield provides a chapter that is even more specifically applied. In particular, he focuses upon the effect that the principle of "subsidiarity," as relating to NAFTA, has, and will continue to have, upon the critical category of cross-border taxation and regulation within North America. This principle is an important component of regional and supranational development, especially as it addresses concerns of sovereignty and localized control, and it has been an essential element in the evolution of the European Union. He notes that, according to the subsidiarity principle, a supranational authority may enact laws only under circumstances in which member states agree that a particular practice or action of individual countries is insufficient to achieve an agreed regional goal. NAFTA does not expressly articulate that principle or (except in extraordinary cases) authorize institutions to promote harmonized laws among the North American governments. He applies this idea to a practical analysis by arguing that the adoption of a strict subsidiarity principle will allow NAFTA governments to continue to "compete" with their tax and regulatory regimes while reducing the risk that this competition will lead to effects that could harm their respective economic interests. He further argues that, in terms of tax policy, a strict subsidiarity principle will encourage the NAFTA governments to develop modest, centralized tax institutions to engage in heightened multilateral coordination. That effort would facilitate legal harmonization while ensuring that the harmful policy consequences of Canada, Mexico, and the United States maintaining different national tax regimes are minimized.

Jose Caballero concludes the book with an excellent overview of the legal perspective of the NAFTA from a Mexican perspective and an assessment of the prospects for the future. It is far from clear that greater North American cooperation is inevitable or even desired. However, that process has not been diminished, despite occasional political rhetoric in opposition to NAFTA and other expressions of continental cooperation. Likewise, North American legal harmonization is far from inevitable and it faces many challenges. Therefore, the concept of a formal North American legal "system" is hardly a feasible