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Foreword: *NAFTA as a Lesson for Globalization*

ELIZABETH TRUJILLO*

Since its enactment, NAFTA has impacted international business among its members and it has awakened concerns of the environmental and labor challenges that the participating countries face as they move toward economic integration. Among the many challenges, coping with the economic, legal, and cultural differences that exist among the partners has been difficult. The nations must continue to work together to harmonize their laws in such a way that allows for easier integration without impeding their sovereign power to enact laws that address local needs. At the conference entitled "NAFTA at Ten: Harmonization and Legal Transformation," held on June 14-15, 2003 at the University of Windsor, Ontario, the University of Detroit Mercy School of Law and the University of Windsor Faculty of Law brought together esteemed international legal scholars from Canada, Mexico, and the United States to share their extensive expertise and knowledge and discuss these important issues.

Scholars and practitioners have expressed concerns that in implementing the Agreement, common law principles have predominated the treaty with little regard for the incorporation or even recognition of the civil law tradition espoused in Mexico and Quebec.¹ NAFTA, though encouraging harmonization, has "transformed" the Mexican civil law tradition by transplanting primarily U.S. law into Mexico. Julie Mertus and Elizabeth Breier-Sharlow discuss this issue in detail in the article *Power, Legal Transplants and Harmonization*. The authors correctly argue that while multilateral trade agreements such as NAFTA are, in principle, the result of a bargaining process among the involved parties, they

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1. Osvaldo Nuñez, *Quebec's Perspective on Social Aspects and the Broadening of Free Trade in the Americas*, 11 CONN. J. INT'L L. 279 (1996) (discussing Quebec's support of free trade and its economic impact on NAFTA); Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POLICY INT'L BUS. 391 (1993) (discussing the influencing of American common law on recent reforms Mexican law).

naturally tend to promote the legal standards of the economically stronger nations to the exclusion of others. Julie Mertus and Elizabeth Breier-Sharlow give an insightful discussion of the ways in which "legal transplants" have impacted the NAFTA experience, in particular Mexico.

David Gruning continues the discussion on harmonization and legal transplants in *Bayou State Bijuralism: Common Law and Civil Law in Louisiana*. In this paper, Professor Gruning discusses the development of the legal tradition in Louisiana as an example of a civil code system that gradually incorporated principles from the common law tradition, resulting in a mixed system. He reflects on whether this process introduced a true "bijuralism," that is, a co-existence of the elements of the common law and the civil law within one legal system. If so, then perhaps NAFTA parties could learn from the Louisiana legal experience in their attempts for better harmonization. Professor Gruning first gives a short history of the civil law tradition in Louisiana, beginning with the implantation of the civil law into Louisiana by French and Spanish settlers and the enactment of the 1870 Civil Code after the Civil War which was published only in English rather than the traditional French. He explains the changes undermining the French culture that occurred in the decades after World War I. These changes included the pervasive use of English as well as the use of legal practice techniques based on common law principles rather than the civil law tradition. The article explains that as a reaction to these adjustments in the legal system, a movement by Louisiana scholars to revise the Civil Code and the Code of Practice emerged in the late 1930's and continued into the 21st century. The result was the 2003 Code which, though maintaining the structure of the 1970 and 1825 Codes, reflects the pervasive influence of the common law tradition. Gruning concludes that Louisiana today is indeed a "bijural" state in that its private law (torts, contract law) derives from the civil law tradition and its public law (criminal, constitutional and procedural law) from the common law. Through the Louisiana model, the author shows that this convergence of two legal traditions holds the promise of creating a new generation of lawyers able to approach the law from a "bijural" perspective – an example for future attorneys of international law.

The ability of the NAFTA parties to harmonize their domestic laws and regulations with respect to the environment so that the application of the environmental side agreement has a real impact on preserving the environment has been put into question by many.²

2. See Joseph F. DiMento and Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L.

This was an important point of discussion during the NAFTA Symposium. *Harmonization of Great Lakes Water Management in the Shadow of NAFTA*, by Marcia Valiante, reviews recent efforts to regulate the extraction and use of water in the Great Lakes Basin and the impact that these efforts have had on the NAFTA parties and the implementation of the Agreement. Specifically, Professor Valiante focuses on the Great Lakes Charter Annex, an initiative by the leaders of the states and provinces in the Great Lakes Basin to develop a comprehensive water management regime. There are innumerable challenges in harmonizing the regulations governing water diversion and export. In particular, Valiante expresses a need to further understand the environmental impact that removal of water from the Great Lakes may have on the ecosystem as well as on the people living within the Great Lakes-St. Lawrence River Basin. The Great Lakes Charter, adopted in 1985, recognized the Great Lakes as a single hydrological system and established that the countries consult with one another prior to supporting major water diversion proposals. The author explains that, though diversions were not prohibited, they were greatly controlled and could only occur if it would not jeopardize the long-term interests of the region. The U.S. Congress subsequently enacted the Water Resources Development Act (WRDA) which federally enforced the provisions of the Great Lakes

REV. 651 (1998) (stating that critics have noted the lack of assurances against downward harmonization and that the side agreement encouraged lax enforcement of environmental laws); Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501 (2003) (stating that the convergence of competition, trade, and investment policies in major sectors liberalized in NAFTA has not always triggered parallel efforts to harmonize environmental policies and standards in these same areas. In addition, proposing a strengthened NAFTA-type environmental framework to help ensure that free trade and environmental goals are mutually supportive); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002) (stating that environmental regulation and harmonization is possible, but less likely and less dramatic than in other areas of law); Sanford Gaines, *NAFTA as a Symbol on the Border*, 51 UCLA L. REV. 143 (2003) (indicating the inability of NAFTA to profoundly affect environmental change, although it has had some positive effects); Arie Reich, *The WTO as a Law-Harmonizing Institution*, 25 U. PA. J. INT'L ECON. L. 321 (2004) (stating animosity of environmentalists toward international trade agreements and especially with NAFTA because of Mexican "lower" environmental standards). *But see*, Ari Afilalo and Sheila Foster, *The World Trade Organization's Anti-Discrimination Jurisprudence: Free Trade, National Sovereignty, and Environmental Health in the Balance*, 15 GEO. INT'L ENVTL. L. REV. 633 (2003) (stating that NAFTA has done more in the area of environmental regulation than GATT because it has stimulated harmonization of environmental laws in the region); Marie-Claire Cordonier Segger, Maria Leichner, Nicola Borregaard, and Ana Karina Gonzalez, *A New Mechanism for Hemispheric Cooperation on Environmental Sustainability and Trade?*, 27 COLUM. J. ENVTL. L. 613 (2002) (stating that NAFTA environmental provisions have had positive effects on investments protected in Chapter 11).

Charter, requiring approval by the Great Lakes governors for diversion of waters from the U.S. side. It is interesting to note that there is no Canadian equivalent to the WRDA because of the constitutional power given to the provinces to interfere with interprovincial commerce. Despite measures to regulate the water management of the Great Lakes Basin, Valiante demonstrates the existence of several gaps. For example, being a U.S. statute, the Canadian provinces are obviously not bound by the WRDA. Moreover, it does not cover consumptive uses or groundwater removal. Also, the Charter applies only to large-scale diversions, does not apply to exports, and no sanctions are in place for jurisdictions failing to consult each other or for violating the Charter. Under the environmental side agreement to NAFTA, the three members issued a joint statement clarifying that water "in its natural state" would not be considered a good and would not be considered a part of any trade agreement unless it had entered into the stream of commerce.³ Professor Valiante explains that the purpose of Annex 2001 is to establish a uniform standard for decisions concerning all withdrawals of water from the Great Lakes Basin. Ultimately this common standard would be incorporated into the domestic standard of the domestic jurisdictions involved. The result would be the harmonization of laws regarding the Great Lakes water management. The article demonstrates the ways that NAFTA has influenced this process. On the one hand, it has stimulated the will of Basin leaders to establish a harmonized and integrated water management framework. However, it has also steered the relevant parties away from resolving some important issues such as the adjustment of local laws to comply with a uniform standard concerning water withdrawal, the dealing with possible Chapter 11 disputes in the context of water exports, and the potential scarcity of water and the preservation of the ecosystems. The Great Lakes Basin offers an extraordinary opportunity for the U.S. and Canada to harmonize their environmental laws and regulations both on a federal and local level in accordance to the initial objectives of NAFTA.

NAFTA has also had a significant affect on the development of Mexican environmental law. Professor Humberto Celis Aguilar Alvarez gives an extensive overview of the history of Mexican environmental law and its developments since the enactment of NAFTA in his article *The North American Free Trade Agreement's Impact on the Development of Mexican Environmental Law*. Mexican environmental law has primarily promoted changes in production processes and the sustainable use of natural resources. The author

3. *Statement by the Governors of Canada, Mexico and the United States*, Dec. 2, 1993, reprinted in *THE FREE TRADE OBSERVER*, No. 51, at 855.

explains that since the enactment of NAFTA, more environmental laws and regulations have emerged in Mexico in conjunction with sustainable development. For example, the Mexican government created a Comprehensive System for Environmental Regulation and Management of Industries (SIRG) to encourage companies to be active in preventing and controlling sources of pollution and to administer the reductions of emissions and pollutants. Also, environmental licenses and permits were established for industries working in Mexico as well as various incentive programs in order to encourage compliance with the administration of those laws and regulations. The challenge has been in the control of excessive regulation as well as in the harmonization of Mexican environmental laws with those of Canada and the U.S. While the North American Agreement on Environmental Cooperation (NAAEC) has fostered and promoted the compliance of environmental laws within the NAFTA territories, its lack of guaranteed remedies for violations has diminished the effectiveness of this side agreement to NAFTA. However, Professor Aguilar correctly makes the point that the fear of adverse publicity by the Commission for Environmental Cooperation which administers the NAAEC has put some pressure on the companies from the NAFTA territories to comply, at least minimally, with environmental laws and regulations. Despite the improvements of environmental standards in Mexico after NAFTA, the author stresses that the lack of financial resources, in particular for smaller Mexican companies whose parents do not comply with international standards, is one of the major challenges facing Mexico today.

Another issue explored in the Symposium was the role of NAFTA in promoting harmonization in other areas of the law that tend to affect society on a more local level such as corporate issues, labor regulations, and social justice. In *Harmonization of Securities Regulation Standards between Canada and the United States*, Professor Ruth Kuras discusses the effect that U.S. securities law has had on the development of securities regulation in Canada. She discusses globalization of the capital markets and its impact on Canadian initiatives to harmonize its securities laws with those of the U.S. The enactment of the U.S. Sarbanes-Oxley Act in 2002 has particularly pushed these initiatives forward. Generally, both countries have shared similar principles and goals underlying their securities laws. Professor Kuras explains that this similarity allowed for the creation of an international harmonization initiative in 1991 called the Multi-Jurisdictional Disclosure System. Under this scheme, both countries adapted their own disclosure rules and created a mutual recognition system so as to ensure easy compliance with disclosure requirements of each country. More recently, the Sarbanes-Oxley Act, which initially subjects Canadian companies listed on the U.S. stock

exchange to its jurisdiction, has stimulated much debate in Canada as to the direction that securities regulation should develop. In 2002, changes were made to the Ontario Securities Act promoting management accountability, auditor independence and stronger audit committees as well as the imposition of penalties. Professor Kuras emphasizes, though, that changes to Canadian securities laws reflect Canadian values while at the same time facilitates access to the U.S. capital markets.

NAFTA has also had an important role in adjusting Mexican labor laws to comply with the needs of the modern day worker. Professor Luis Miguel Diaz discusses recent initiatives in Mexico to reform its long-standing Federal Labor Law in his article, *Bill to Reform the Mexican Labor Law*. He correctly points out that since the 1930's, Mexican labor laws established protections of employee rights that go beyond some of those provided in many industrialized nations. For example, a 1970 federal statute entitles employees to mandatory profit sharing, to severance pay upon unjustified termination of employment, and to termination only under a limited number of justifiable circumstances. The Mexican Congress has constitutional authority to legislate in the area of labor, but the laws are implemented locally by the states except in some specific industries legislated solely by the federal government. Many statutes favor the Mexican labor force and the labor unions have strong political clout. Professor Diaz gives a comprehensive summary of the major labor laws protecting the Mexican worker. The author explains background events leading to the creation of the legislative Bill of 2002 to amend the Federal Labor Law and then discusses the Bill itself. He states that the Bill purports to modernize the current Federal Labor Law by promoting employment, eliminating corruption, and providing for legal certainty. The Bill addresses many issues affecting the modern-day worker such as discrimination in the workplace, broader hiring options for employees, better training programs, and improved procedures for payment of wages. Professor Diaz gives a detailed description of the ways that the Bill reinforces the rights of labor unions through adherence to trade union statutes and effective legal counsel representation. Perhaps one of the most important innovations of this Bill is the emphasis on demanding accountability and expeditious procedural processes from labor officials involved in legal proceedings. Penalties have been put into place to ensure the proper execution of such legal processes. Professor Diaz ends the article doubtful as to the need to reevaluate the bill in terms of political ideologies and stresses that the bill is a response to a perceived need for modernization of Mexican labor laws in the midst of active national and international market forces.

Professor Sukanya Pillay's article, *AND JUSTICE FOR ALL? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections*, offers an interesting discussion on the effect that globalization has had on multinational corporations and their impact on human rights. This article examines the legal recourses currently available to individuals whose rights have been violated by multinational corporations. Professor Pillay demonstrates a need for stronger enforcement of human rights standards against multinational corporations directly responsible for such violations. The author discusses the economic and corporate factors shaping globalization as factors that traditionally have been regarded as difficult to reconcile with the protection of human rights. Globalization through the creation of trade agreements for the most part has encouraged liberalization of markets as a means of maximizing profits rather than as a proponent of human rights. Even NAFTA in its Preamble recognizes the importance of improving the working conditions and living standards of the NAFTA territories. However, as Pillay correctly points out, it does so only as a consequence of the advancement of free trade rather than as an objective in itself. The author stresses that the failure of the promoters of globalism to recognize the interconnectedness of global economic needs with international human rights standards has contributed to the failure of the emergence of a truly globalized civil society. She states that the more traditional economics-centric approach to globalization is not necessarily antithetical to the human rights-centered approach which seeks to equally ensure the protection of human rights along with economic rights. If both approaches were applied together, the benefits of globalization would be maximized.

Since international human rights standards have been crafted to bind sovereign states in enforcing them as a matter of international law, these standards do not legally bind multinational corporations since they are not states. However, Professor Pillay emphasizes that the rise of these entities as powerful "non-State" actors that are as influential as States in the enjoyment of individual human rights requires a universal understanding that the protection of individual human rights is an integral part of the success of globalization. Among the standards needed to ensure such protection is a requirement for uniform legal accountability from the multinational corporations operating in industries that can affect negatively the environment, health standards and labor standards or cause several human rights violations such as forced labor, war crimes, and even assassinations. The author explains that there is some redress in domestic courts through the use of the Alien Tort Claims Act; however, jurisdictional obstacles as well as disagreement as to the

substantive scope of the Act make it difficult to bring all human rights violations under it. Recognition by international institutions, including the World Trade Organization and the United Nations, and the recent adoption by multilateral corporations of human rights policies is allowing for more awareness and acceptance of human rights as an integral part of globalization and not a disparate concept. Specifically, Pillay correctly looks to the European Union's incorporation of human rights protections into its political mechanisms as an example for the rest of the world trying to integrate trade markets. While NAFTA recognizes some human rights objectives, particularly in the area of labor laws, it does not provide an appropriate forum for plaintiffs. Professor Pillay concludes with a call for the creation of an international legal framework in order to effectively enforce human rights standards upon multinational corporations and disperse into the global community the idea that compliance with those standards is in fact an important part of globalization.

A little more than ten years after its enactment, NAFTA has proven to be both a success for economic integration among the participants as well as an awakening into the need for domestic reform of domestic laws in order to truly reap the benefits of the Agreement. It naturally has allowed for more understanding of the laws and cultures of the three partners. More importantly, though, it has raised the awareness of the participants on the importance of harmonizing domestic laws rather than imposing those laws on each other.⁴ Though NAFTA is a regional free trade agreement, it has had an impact on traditional understandings of globalization as a purely economic phenomenon. To fully satisfy the NAFTA objectives, the parties must also address other related issues such as the environment, labor rights, legal and social reforms, immigration issues, and human rights.⁵ "NAFTA" does not just represent the first

4. Zamora, *The Americanization of Mexican Law*, *supra* note 1 (describing the use of Mexico as a "laboratory for U.S. legal ideas"). *But 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 (1995) (stating that the harmonization of domestic laws in NAFTA countries is more likely to result indirectly from the NAFTA exercise, through formal and informal Channels that may give rise to efforts to bring about coordinated legal reform).

5. *See generally*, Michael Gordon, *Economic Integration in North America – an Agreement of Limited Dimensions but Unlimited Expectations*, 56 MODERN L. REV. 157 (1993) (explaining that NAFTA is more than a treaty intended to assist in economic development; it also was intended to address a perceived immigration problem between the U.S. and Mexico as well as other global issues); Gaines, *supra* note 2 (indicating the inability of NAFTA to profoundly affect environmental change, although it has had some positive effects). *See* AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 1-21 (Doubleday 2003) (2002) (explaining that the economic impacts of

regional treaty for free trade in North America; it has become a force propelling America into the future – a future marked by a call for greater respect of disparate economic and social needs among nations in the integration of their markets.

globalization, along with development, has also contributed to a rise in violence resulting from an unwillingness to address the social, ethnic, and economic disparities existing among nations entering into free trade agreements).
