

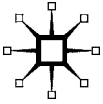
Toward a North American Legal System

This page intentionally left blank

Toward a North American Legal System

Edited by James T. McHugh

palgrave
macmillan



TOWARD A NORTH AMERICAN LEGAL SYSTEM

Copyright © James T. McHugh, 2012.

Softcover reprint of the hardcover 1st edition 2012 978-1-137-26949-2

All rights reserved.

First published in 2012 by
PALGRAVE MACMILLAN®
in the United States—a division of St. Martin's Press LLC,
175 Fifth Avenue, New York, NY 10010.

Where this book is distributed in the UK, Europe and the rest of the World,
this is by Palgrave Macmillan, a division of Macmillan Publishers Limited,
registered in England, company number 785998, of Houndmills,
Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan is the global academic imprint of the above
companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United
States, the United Kingdom, Europe and other countries.

ISBN 978-1-349-44397-0 ISBN 978-1-137-26950-8 (eBook)

DOI 10.1057/9781137269508

Library of Congress Cataloging-in-Publication Data

Toward a North American legal system / edited by James T. McHugh.

p. cm.

ISBN 978-1-349-44397-0

1. Law—North America—International unification.

2. Law—North America. I. McHugh, James T., 1961—

KDZ88.T69 2012

349.7—dc23

2012017705

A catalogue record of the book is available from the British Library.

Design by Integra Software Services

First edition: November 2012

10 9 8 7 6 5 4 3 2 1

Contents

| | |
|---|-----|
| List of Tables | vii |
| Preface: Contemplating a Continental Legal Foundation <i>Robert A. Pastor</i> | ix |
| Introduction <i>James T. McHugh</i> | 1 |
| 1 Assessing the Prospects of North American Legal Harmonization <i>Matthew T. Simpson</i> | 7 |
| 2 How to Think About Law in North America <i>H. Patrick Glenn</i> | 39 |
| 3 The Constitutional Presence within North America <i>James T. McHugh</i> | 57 |
| 4 Legal Integration of NAFTA through Supranational Adjudication <i>Jay Lawrence Westbrook</i> | 79 |
| 5 NAFTA Chapter 11 and the Harmonization of Domestic Practices <i>Susan L. Karamanian</i> | 89 |
| 6 The Strict Subsidiarity Principle under NAFTA Law and Policy: Implications for North American Tax Policy <i>Arthur J. Cockfield</i> | 125 |
| 7 Single Market Governance: Lessons from the European Experience <i>Michelle Egan</i> | 149 |

| | | |
|---|---|-----|
| 8 | Conclusion: The NAFTA Region—a View from the Current Mexican Agenda <i>José Antonio Caballero Juárez</i> | 175 |
| | Contributors | 183 |
| | Bibliography | 187 |
| | Index | 207 |

List of Tables

| | | |
|-----|--|-----|
| 7.1 | Combines the free movements/free establishment (vertical axis) and the four market failures (in columns 2–5), which would have to be addressed for the IM to function properly (This table is adapted from Pelkmans (2006).) | 152 |
| 7.2 | EU policy instruments | 155 |
| 7.3 | Measures to improve implementation and compliance | 162 |

This page intentionally left blank

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).