RETHINKING NORTH AMERICA: WHY NAFTA’S LAISSEZ FAIRE APPROACH TO INTEGRATION IS FLAWED, AND WHAT TO DO ABOUT IT

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There is no doubt that European states are much stronger proponents of international law and institutions than is the United States. In the European Union, member states have created a new legal order that is not quite a state, but more than just a new legal order in international law. It is a new legal order, moreover, whose law, in case of conflict with national law, enjoys supremacy. . . . Such limitations on sovereignty are simply an inconceivable prospect to most Americans.

The reasons that such limitations on US sovereignty are inconceivable to most Americans are many and varied. In some part they are based on US attitudes of triumphalism, exceptionalism, and provincialism. . . . More fundamentally, they reflect an historical distrust of power, especially of centralized power. This distrust of centralized power in the purely U.S. context is even more pronounced when it comes to power centers outside US territory.1

IN his book The United States and the Rule of Law in International Affairs,2 John Murphy, whose career this symposium honors, dissects the many uses (and abuses) of international law that may be attributed to U.S. agencies. His perceptions reflect the education born of fifty years of experience in international law, as a State Department lawyer, private practitioner, and legal scholar. Half a century of study and experience permits someone of John Murphy’s caliber to draw our attention to fundamental elements of international law and international relations. The trenchant comment contained in the quote above is a useful opening for this Essay, which examines the haphazard integration of North America that is taking place in with little guidance or cooperation by North American governments.

The entry into force of the North American Free Trade Agreement (NAFTA) on January 1, 1994, launched a new era of North American eco-

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2. See id.
nomic relations. Many Canadians, Mexicans, and U.S. citizens would disagree with the previous sentence as an overly dramatic characterization of what NAFTA represents. But if we view the creation of a comprehensive free trade agreement in the context of North American history, the conclusion of a (presumably) permanent trilateral agreement to promote the integration of the Canadian, Mexican, and U.S. economies was a major departure from the past. Diplomatic relations in North America have been dominated by the bilateral relations between North American states. When peaceful, these relations have been characterized by apathy; when conflictive, the United States has used its superior military and economic power to settle differences.

With NAFTA, the governments of Canada, Mexico, and the United States formed a limited partnership of sorts. The three countries became committed to the long-term integration of their economies by dramatically removing barriers to the movement of goods, services, capital, and ideas (intellectual property) across their borders. In geopolitical terms, however, the commitments made by the Canadian, Mexican, and U.S. governments were extremely limited. While promising to adhere to NAFTA’s rules liberalizing trade and promoting investment, the NAFTA governments made virtually no meaningful commitments to extend cooperation beyond that which was barely essential. NAFTA’s governments were careful not to create even inchoate trilateral institutions that could mature into a supranational. NAFTA’s scope was broad but shallow—it covers most of the economic terrain, but it leaves unregulated, or unattended, the geopolitical dimensions of North America’s future.

This view of NAFTA as a partnership limited to economic matters and insulated from domestic geopolitics is a short-sighted distortion of what NAFTA represents. Regional trade agreements such as NAFTA have become important intermediate steps in the gradual process of globalization resulting from the growth of a liberal, open-world economy in the second half of the twentieth century. Technological advances alone would not have brought about the dramatic rise in world trade and investment, international communications and travel, and cross-border exchange of ideas if the foundation of international economic law regimes (GATT/WTO, IMF, World Bank, WIPO, etc.) had not been laid to provide the necessary conditions of stability and certainty in international economic affairs. GATT/


4. The term “U.S. citizen” is less melodious but more accurate than the term “American,” the term used to describe citizens of the United States since our nation’s independence. Citizens of other nations of the “Americas”—whether North or South Americans—can justifiably complain that the United States usurped a term that applies to them as well as to U.S. citizens. Canadians, Mexicans, and U.S. citizens are all “North Americans,” in fact, because we inhabit the same continent, although the term norteamericano has often been used as an adjective or noun to identify a person or thing from the United States.
WTO-sponsored trade liberalization has played an important role in the dissemination of products and ideas.\(^5\)

Mexican, Canadian, and U.S. officials saw NAFTA as a strategic response to the regional economic groupings that were proliferating in Europe, Asia, and Latin America, and by the rapid industrialization of China and other newly industrialized countries (NICs). But in contrast to ambitious regional economic pacts in Europe, the architects of North American integration have been extremely reluctant to foster trilateral cooperation of any definite character. A widely recognized abhorrence by North American leaders of supranational (e.g., trilateral) governance continues to hold sway over what, for a better word, might be called an oxymoron—"NAFTA diplomacy." As Professor Robert Pastor has observed:

> The style of NAFTA’s governance is laissez-faire, reactive, and legalistic. Problems are defined by plaintiffs and settled by litigation. There is no mechanism for defining problems in a proactive way or addressing them from a continental perspective.\(^6\)

This statement, published before the 2001 World Trade Center tragedy, is truer today than when Professor Pastor made it. President George W. Bush’s “War on Terrorism” drove the United States government to protect our national security by taking unilateral measures, rather than pursuing multilateral cooperation. While President Barack Obama has expressed the desire to promote multilateral over unilateral solutions, this expression has not been translated into concrete actions in U.S. diplomacy.\(^7\) This is particularly the case in North American affairs. Diplomatic and strategic questions under NAFTA are still dealt with as bilateral, not trilateral, issues.\(^8\) With minor exceptions,\(^9\) even bilateral issues are ad-

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5. See generally Francis Snyder, The EU, the WTO and China: Legal Pluralism and International Trade Regulation (2010). “WTO law is a cause as well as a consequence of globalisation, and it has reinforced aspects of globalisation which already have a profound impact on EU policy and law.” Id. at 153-54.


7. See Barack Obama, Renewing American Leadership, FOREIGN AFF., July-Aug. 2007, at 2, 12; see also Ruud Lubbers, Finding Multilateral Solutions: Global Cooperation in Nuclear Non-Proliferation, 31 HARV. INT’L REV., no. 2, 2009, available at http://hir.harvard.edu/agriculture/finding-multilateral-solutions. “When discussing the interconnected economies of the world, Obama has voiced his wish to find multilateral solutions to global problems, therefore giving credence and substance to the idea of a multipolar world.” Id.


9. The United States and Mexican governments have established a number of border commissions, with limited funds and modest authority, to address specific
dressed in an ad hoc manner as they arise—whether through dispute settlement mechanisms available under NAFTA or the WTO—rather than through formal intergovernmental initiatives designed to achieve lasting goals.\textsuperscript{10} Political leaders in North America differ over many things, but there is surprising agreement on this aversion to trilateral, or even bilateral, cooperation in a concerted and organized fashion—let alone “tri-lateralism,” which could be defined as an attempt to establish supranational agencies. Whether Democrats or Republicans, liberals or conservatives, PRIistas, PANistas, or PRDistas, political leaders in North America generally profess opposition to the creation of supranational structures to guide North America’s economic development.\textsuperscript{11} At the same time that Canadian, Mexican, and U.S. government leaders were taking steps that would lead to an integrated North American economy, for political reasons they were careful to protest that integration (a worrisome word, for reasons alluded to John Murphy’s quote at the beginning of this Essay) was not the goal of NAFTA. I will return to this reluctance to address integration as a goal of NAFTA at the end of this Essay.

\textsuperscript{10} See Robert A. Pastor, The North American Idea: A Vision of a Continental Future 149 (2011). “Since NAFTA came into effect in January 1994, all three governments have settled back into the relationships that had existed before, which was a dual-bilateral relationship—the United States and Canada and the United States and Mexico.” Id.; accord Pastor, supra note 6.

\textsuperscript{11} See Book World: Vicente Fox’s ‘Revolution of Hope’, WASH. POST, Nov. 6, 2007, http://www.washingtonpost.com/wp-dyn/content/discussion/2007/11/05/DF2007110501135.html (transcript of interview with Former Mexican President Vicente Fox). Former Mexican President Vicente Fox (2000-2006) is a notable exception to the general opposition to structured North American integration. In a 2007 interview, President Fox stated: “Why can’t we be not only partners in the long term, but a North American Union?” Id.
I. ARE INSTITUTIONS NECESSARY TO ECONOMIC INTEGRATION?
CONTRASTING NORTH AMERICAN AND EUROPEAN APPROACHES

This reluctance to address issues of common concern trilaterally, or even to address economic issues arising out of NAFTA through a formal trilateral institution—whether related to or disassociated from NAFTA—reflects a profound difference between North American integration and the European model of programmed economic union. The European Union is a behemoth, as successful in forming institutional structures as it has been criticized for the growth of a faceless bureaucracy easily identified with the simple expression “Brussels.” As a result, many analysts, including Europeans, see the “institutionalization” of Europe as a major weakness of European integration. The number of institutions and forums for coordination has grown exponentially, to the extent that the European Union has even come up with a new word—comitology—to describe the process by which the EU Commission forms committees to implement Community legislation.\(^\text{12}\) NAFTA’s critics extol the contrast between North America and Europe, seeing the latter’s approach to integration as inappropriate to the individualistic and competitive nature of North Americans. Even proponents of greater institutionalization of North American integration decry the epidemic of supranational bureaucratization—the name “Brussels” is a short-hand term for bloated bureaucracy—that has taken place to support EU integration. But NAFTA errs in the opposite extreme. Robert Pastor notes that “[t]he European Union established too many supranational institutions; NAFTA made the opposite mistake of establishing almost none that are serious.”\(^\text{13}\)

The Cross-Border Trucking Services\(^\text{14}\) dispute between Mexico and the United States is a glaring example of the North American bias against coordinated intergovernmental approaches to solve problems connected with North American integration. NAFTA’s architects shared a vision of North American production of goods in an integrated economy without barriers to the free movement of goods necessary to create production networks that would allow NAFTA products to compete effectively in world markets. Obviously, the free movement of goods must encompass the most efficient, economical means to transport goods. Transshipment of goods from one carrier to another at the border is expensive and time-consuming, and for that reason, the United States agreed in NAFTA to a gradual opening of its borders to Mexican trucks and truck drivers, to be accomplished according to a strict timetable that was to open the United


\(^{13}\) See Pastor, supra note 6, at 60.

States to Mexican trucks no later than January 1, 2000. When the United States government refused to meet this timetable, Mexico requested the formation of a NAFTA arbitration panel to determine if the United States had violated its NAFTA obligations. In 2001, a NAFTA panel issued its award, holding that the United States had indeed violated Articles 1202 and 1203 of NAFTA. The panel ruled “that the United States take appropriate steps to bring its practices with respect to cross-border trucking services and investment into compliance with its obligations under the applicable provisions of NAFTA.” Unfortunately, that did not settle the matter. Under political pressure from trade unions and other groups, with support from Congress, the U.S. government has still not complied with the panel’s ruling. As a result, in 2009, Mexico levied compensatory duties, increasing tariffs on ninety U.S. product groups, totaling approximately $2.4 billion in value. As of May 2011, the United States still had not begun compliance with its NAFTA obligations, although the Obama Administration appeared to be slowly moving in that direction.

The experience with Cross-Border Trucking Services stands in sharp contrast with the European experience with road transport. In the 1950s, European governments began collaborating to rebuild the ground transportation system that had been destroyed during the Second World War, establishing in the process international treaties to facilitate movement of trucks between countries. In 1948, with the encouragement of

15. See NAFTA, supra note 3, Annex I (“Reservations for Existing Measures and Liberalization Commitments”); id. (“Schedule of the United States” setting forth reservation with respect to “Land Transportation” resulting in full phase-out of limitations on cross-border truck services by six years after NAFTA entry into force, or January 1, 2000).


18. Id. ¶ 299.


European governments, road transport industry association in eight European countries created an international organization—the International Road Transport Union—to promote free movement of trucking services within Europe.\textsuperscript{22} The Cross-Border Trucking Services dispute under NAFTA is a clear example of the political and cultural roadblocks that impede North American integration. U.S. failure to fulfill its obligations under NAFTA due to political pressure from the U.S. Teamsters Union and other groups was a step backward in economic integration. It is paradoxical to create the groundwork for an efficient, integrated economy in North America—a prime goal of NAFTA—and simultaneously ignore the many obstacles to the movement of goods across borders between Canada, Mexico, and the United States. Political realities in the United States have dictated this result, however. Unfortunately, as the following discussion makes clear, there is no intergovernmental apparatus available that can adequately address these obstacles other than litigation and retaliation, as in Cross-Border Trucking Services. Indeed, after the Cross-Border Trucking Services decision, the United States, having lost all three NAFTA government-to-government disputes under NAFTA Chapter 20,\textsuperscript{23} has effectively prevented the settlement of disputes involving alleged violations of NAFTA by failing to appoint panel members in key NAFTA Chapter 20 disputes.

II. NAFTA: The Headless Approach to Regional Trade Cooperation

If the European Union is a bureaucratic behemoth, NAFTA is the perfect institutional model for advocates who believe “the less government the better.” A survey of the few institutions formed pursuant to NAFTA can be quickly accomplished.

A. The NAFTA Commission

The dearth of supranational mechanisms in NAFTA is evident from the top. NAFTA is governed by a trilateral Commission, comprised of the trade ministers of the three NAFTA parties, carrying out the policies of their governments.\textsuperscript{24} The NAFTA Commission generally meets every


\textsuperscript{24} See NAFTA, supra note 3, art. 2001.
year, but the meetings are generally lacking in substantive importance, reflecting the general view in the North American capitals of apathy towards North American integration.

B. The NAFTA Secretariat

NAFTA Article 2002 authorizes the NAFTA Commission to establish a Secretariat, but is careful to specify that each NAFTA Party shall establish its own “national Section,” or office, of the Secretariat, appoint a Secretary to administer its national Section, and be responsible for the costs of that Section. As a result, the NAFTA Secretariat has three offices, each located in the trade ministry of the respective parties, and the staff members are career trade officials of that Party. The NAFTA Secretariat, then, is a fiction; far from a supranational organ, it is a loose collection of coordinating offices in the three countries. Even those offices are deemed wanting: in the opinion of Gary Hufbauer and Jeffrey Schott, the NAFTA Secretariat, in fulfilling its role as administrator of the NAFTA dispute settlement processes, and as supporting agency for NAFTA working groups and the NAFTA Commission, “has insufficient resources to do either job well.”

C. NAFTA’s Side Agreements and Related Agencies

The entry into force of NAFTA’s environmental side agreement and labor side agreement were the result of negotiations conducted by Presidents George H.W. Bush and Bill Clinton to secure congressional approval of NAFTA over the opposition of environmentalists and labor unions. The labor and environment side agreements promote trilateral cooperation.
tion to improve environmental and labor conditions in the territories of the NAFTA Parties, and to promote compliance with the enforcement of labor and environmental laws in each country. Unlike NAFTA, the environmental and labor side agreements have supranational secretariats to help the governments administer their commitments under the two agreements. The significance of these exceptions, however, is diminished by the very modest performance of these exceptional NAFTA supranational efforts for several reasons. First, while the agreements profess to require that NAFTA Parties enforce their labor and environmental laws, both side agreements offer extremely light-handed approaches to ensure that the Parties meet their obligations. The enforcement mechanisms of both agreements provide for investigation by the respective Secretariat’s citizen complaints that one of the Parties has failed to enforce its laws, with publication of the respective Secretariat’s findings. Only where there has been a “persistent pattern of failure” of law enforcement by one of the Parties, as opposed to individual instances of non-enforcement, can the possibility of dispute settlement and monetary fines be assessed. No such persistent pattern has been found to exist to date under either the labor or environmental side agreement, leading one to question the effectiveness of this supranational oversight.

The performance of the North American Commission on Environmental Cooperation (CEC) is modestly positive; despite a shortage of funding and a lack of strong political will, the CEC has carried out numerous cooperative activities to promote environmental conservation, and has helped publicize individual instances of environmental problems. The CEC Secretariat, with headquarters in Montreal, is staffed by qualified environmental professionals from the three NAFTA countries, and even with a limited budget, the CEC and its Secretariat have a modest track record of accomplishments, documented in the CEC’s Annual Reports. By contrast with the CEC, the Commission for Labor Cooperation (CLC)—the

33. See NAAEC, supra note 30, art. 1 (“Objectives”); NAALC, supra note 31, art. 1 (“Objectives”).
34. See NAALC, supra note 31, art. 3.
35. See NAAEC, supra note 30, art. 5.
36. Compare NAALC, supra note 31, arts. 27–41, with NAAEC, supra note 30, arts. 22-36.
supranational mechanism established to administer the North American Agreement on Labor Cooperation (NAALC)—has been a dismal failure. The CLC is governed by a Council of Ministers composed of the cabinet-level labor minister of each NAFTA government. The CLC’s Secretariat, initially headquartered in Dallas, Texas (a state not known for adamant protection of labor unions or worker rights), was saddled with political apathy and disorganization from the outset. In the late 1990s, the CLC moved its Secretariat to Washington, D.C., presumably to be more connected to corridors of influence. Unlike the work of the CEC Secretariat, however, the oversight of labor law enforcement under the NAALC is carried out not by CLC Secretariat employees, but rather by National Administrative Offices (NAOs) located in the labor ministry of each NAFTA Party. Unfortunately, given the political sensitivity of labor issues, there is little incentive for labor officials of any NAFTA party to press vigorously for the enforcement of labor laws by its NAFTA partners. The result has been an apathetic and disorganized approach to the CLC’s mission. The CLC Secretariat served primarily to organize conferences and cooperative activities, but was sufficiently ineffective and lacking in support from the NAFTA Parties that the Labor ministers from the three NAFTA Parties closed the Secretariat’s offices in 2009, after several years of investigations into questionable and possibly fraudulent expenditures by Secretariat officials. If one consults the website of the CLC today to find “Staff,” no names are listed—all positions are listed as “vacant.” The website itself is a graphic demonstration of the ineffectiveness of supranationalism in labor law enforcement under the NAALC; there is relatively little hard information, few publications, and only periodic reports. At a CLC-sponsored event, I once asked an official of the U.S. Department of Labor why the Commission for Labor Cooperation and its staff were not more effective. The official replied that the governments of the NAFTA parties were not committed to the process of trilateral labor law enforcement. A former adviser to the CLC has concluded that the lack of commitment from Canadian, Mexican, and U.S. labor ministers leaves little hope for


meaningful cooperation on labor issues through the NAALC and its structures.42

D. The North American Development Bank and the Border Environment Cooperation Commission

One other set of supranational agencies can be attributed to NAFTA: the North American Development Bank (NADB), and its sister agency, the Border Environment Cooperation Commission (BECC).43 According to the NADB website, "[t]he North American Development Bank (NADB) and its sister institution, the Border Environment Cooperation Commission (BECC), were created under the auspices of the North American Free Trade Agreement (NAFTA) to address environmental issues in the U.S.-Mexico border region."44 Bilateral rather than trilateral, the Mexican and U.S. governments created these agencies to address the serious environmental problems that exist along the U.S.–Mexico border, especially in Mexico. NADB provides grants and concessional loans to finance public works projects to correct environmental problems 100 kilometers north and 300 kilometers south of the U.S.–Mexico border. NADB holds 3 billion dollars in total capital (contributed equally by the United States and Mexico), which is used to provide funding, in collaboration with other public and private agencies, for environmental projects that are certified by the BECC and by NADB itself.45 In their ten-year assessment of NAFTA, Hufbauer and Schott provide a critical assessment of the operations carried out by NADB and BECC.46 The authors give the agencies a passing grade, but they point out the inadequacy of NADB financing in light of major environmental problems along the U.S.–Mexico border, concluding that the “achievements of NADBank and BECC fall well short of the aspirations of the environmental community.”47 Conscious of such criticism, NADB has attempted to increase its impact, and in 2009, the bank signed eight loan agreements totaling $211.9 million—a figure almost equal to the entire amount of NADB loans concluded since the creation of the bank fifteen years ago.48

42. See Brooks, supra note 39, at 17.
43. See Border Env’t Cooperation Commission, http://www.cocef.org (last visited Oct. 29, 2011). BECC is governed by a bi-national Joint Board of Directors, and has a small staff that works to identify specific projects to improve environmental protection along the U.S.–Mexican border.
45. See Capitalization, N. Am. Dev. Bank, http://www.nadbank.org/about/capitalization.asp (last visited Oct. 29, 2011). Only 15% of NADB’s $3 billion in total capital is actually paid in by the two governments, with the rest being callable capital—essentially, a guarantee to support NADB borrowing on capital markets, similar to the method used to fund World Bank loans. See id.
46. See Hufbauer & Schott, supra note 26, at 173-77, 181-82.
47. Id. at 182.
E. The Security and Prosperity Partnership (R.I.P.): The Shadow of Supranationalism Appears and Disappears

One anomalous experience in NAFTA-related “quasi-supranationalism” deserves final mention: the Security and Prosperity Partnership (SPP), a trilateral initiative intended to increase cooperation among the NAFTA governments on issues of government regulation and security. The SPP was created in March 2005, at a summit meeting of NAFTA heads of state in Waco, Texas. Prime Minister Peter Martin, President Vicente Fox, and President George W. Bush agreed to create an informal framework that would improve North American competitiveness by creating a trilateral framework that would allow public and private sector actors to address barriers to North American integration. The SPP was not a treaty or signed agreement, and though adopted at the North American Leaders Summit that has become an annual event, the SPP contained no binding obligations; rather, it attempted to establish a framework for greater intergovernmental cooperation, without raising the specter—and, for North American “nationalists”, the fear—of a supranational bureaucracy beyond the control of national, state, and local governments. A summary of SPP prepared by the Congressional Research Service describes the SPP in the following terms:

The primary purpose of the initiative was to improve cooperative efforts among the three countries in areas related to economic prosperity and the protection of the environment, the food supply, and public health. The initial plan included the establishment of a number of security and prosperity working groups in each of the two categories. [For the U.S. government,] the security working groups were chaired by the Secretary of Homeland Security and the prosperity working groups were chaired by the Secretary of Commerce.49

In 2006, in an effort to increase private sector cooperation with the goals of creating a competitive, integrated economy, government leaders created the North American Competitiveness Council as an official working group under the SPP with members from North American corporations and business groups.50 Other working groups, operating under the direction of executive branch agencies in the three countries, were directed to improving trade and commerce in North America by liberalizing Rules of Origin, exchanging information on health and safety, harmonizing use of symbols on textiles and apparel, and other relatively innocuous initiatives.51 At the North American Leaders Summit in 2008, the NAFTA

50. See id. at 3.
51. See id. at 1.
heads of state stressed the following goal, among others, for the SPP: “Competitiveness: Work to make regulations more compatible among the three countries to support integrated supply chains and reduce the cost of goods traded within North America, particularly within the auto industry. Strengthen intellectual property rights protection by advancing the Intellectual Property Action Strategy.”

Even these innocuous goals and initiatives, issued to little general attention or fanfare, quickly met opposition in Canada, Mexico, and the United States. Bloggers and patriotic groups, especially in the United States and Canada, condemned the SPP as a backdoor attempt to weaken national sovereignty by promoting the eventual creation of a North American Union. The combination of public opposition and bureaucratic inertia soon led the three NAFTA governments quietly to abandon the SPP initiative in 2008, to the relief of North American patriots and the disappointment of those who favor more, rather than less, intergovernmental cooperation in North America. During its three years of operation, the SPP generated little significant study. The brief SPP experience resulted in little concrete action, while providing evidence of North American opposition to trilateralism. Since 2008, further North American Leaders Summits have been convened, but with little effort to overcome NAFTA’s institutional deficiencies. Canada, Mexico, and the United States have continued to pursue modest intergovernmental efforts to coordinate poli-

52. Id. at 2.
53. See, e.g., Neil Craik & Joseph DiMento, Environmental Cooperation in the (Partially) Disaggregated State: Lessons from the Security and Prosperity Partnership of North America, 8 CHI. J. INT’L L. 479, 481 (2008) (“The SPP process in both its substance and form has attracted significant opposition by domestic groups in all three countries. It is viewed by its critics as proposing a more highly integrated governance structure that erodes national sovereignty through a process that has privileged corporate interests and lacks democratic accountability.”).
55. The SPP website soon displayed the following statement: “This website is an archive for SPP documents, and will not be updated.” (The website, www.spp.gov, no longer exists.)
cies on a bilateral basis, continuing the ad hoc approach to regional issues noted above.

In short, North America’s governments follow a general laissez faire approach to integration of the economies and societies of the NAFTA countries. Trilateralism is eschewed in favor of ad hoc attempts at bilateral, generally short-term solutions to issues of common concern to North Americans. Canada, Mexico, and the United States (especially the last) prefer to conduct affairs unilaterally, with occasional resort to bilateral initiatives to smooth over economic or diplomatic problems.

Does it matter that NAFTA lacks intergovernmental institutions to mediate the effects of economic integration? Isn’t the laissez faire pattern of North American integration preferable to the model followed by the European Union, where the name “Brussels” conjures up an image of faceless bureaucrats unresponsive to the citizens they regulate? To answer both these questions, one has to consider the price of inaction at an intergovernmental level. In particular, we must look at the side effects of NAFTA, how increased economic integration has carried with it social costs for each NAFTA nation.

III. NAFTA’S SIDE EFFECTS AND THE NEED TO MEDIATE NORTH AMERICAN INTEGRATION

The trade ministries of the NAFTA Parties have extolled the increased trade and investment between the three economies since NAFTA’s entry


The [d]eclaration will focus on four areas of co-operation: addressing threats to national security early; trade facilitation, economic growth and jobs; integrated cross-border law enforcement; and critical infrastructure and cyber-security.

Canada and the U.S. will develop a joint action plan on perimeter security and economic competitiveness that will set out a range of initiatives in the four key areas to improve both countries’ ability to manage security risks, while facilitating the flow of people, goods and services.

Id.

The governments also announced the creation of a bilateral, “imitation SPP” (my term), entitled the U.S.–Canada Regulatory Cooperation Council, or RCC, to reduce red tape and enhance integration of the two countries. See id.

59. For further discussion of the ad hoc approach to regional issues, see supra notes 9-10 and accompanying text.

into force,\textsuperscript{61} at the same time that government leaders have been careful not to expound on the value of an integrated economy and society in North America, so as not to stir up opponents of NAFTA who decry the loss of “sovereignty” that they fear would result from North American integration.

But the reluctance to stress integration, whether economic, social, or political, does not mean that the integration of Canada, Mexico, and the United States is failing to take place, as many observers have remarked. To the contrary, increased volumes of trade and investment have resulted in the creation of interconnected marketing networks and cross-border chains of production connecting the economies of Canada, Mexico, and the United States more closely than ever before. In a detailed and balanced study of NAFTA’s effects during the first decade of its existence, commentators have noted that NAFTA largely succeeded in its goal of reducing barriers to trade and investment.\textsuperscript{62}

The expansion of trade and investment under NAFTA has benefited certain sectors of society in each NAFTA country—especially those individuals capable of investing abroad and workers employed in industries favored by that investment. But there have been losers as well.\textsuperscript{63} Indeed, the success or failure of NAFTA depends on the eye of the beholder. NAFTA’s benefits will be extolled by those who have profited from increased trade and investment—business owners who have expanded operations and workers whose jobs have been created by NAFTA-driven investment. NAFTA’s failures will be cited by those who remain mired in poverty, whether factory workers in the United States, or Mexican farmers who have fled the countryside because they cannot compete with imports.\textsuperscript{64} The list of negative side effects of free trade\textsuperscript{65} are detailed below.

\begin{itemize}
  \item \textsuperscript{62} See, e.g., Hufbauer & Schott, supra note 26, at 62.
  \item \textsuperscript{63} Subsidizing Inequality: Mexican Corn Policy Since NAFTA 7 (Jonathan Fox & Libby Haight eds., 2010), available at http://www.wilsoncenter.org/sites/default/files/Subsidizing%20Inequality_0.pdf. Mexico lost twenty percent of its farm jobs between 1991 and 2007. Farm workers have not been absorbed into the urban economies of Mexico, where unemployment and underemployment are rampant, but have instead migrated to the United States to seek jobs, adding to the population of undocumented workers in the United States.
  \item \textsuperscript{64} See generally Zamora, supra note 56, at 110-19. Real wages in Mexico’s agricultural sector have declined since NAFTA entered into force, contributing to the illegal migration of workers to the United States. See id. at 112.
  \item \textsuperscript{65} See Hufbauer & Schott, supra note 26, at 10. NAFTA is not just a trade agreement. It is, instead, a “relationship agreement,” solidifying the connections between the three North American partners. This is true in spite of efforts by the NAFTA governments to downplay how the NAFTA partnership has geopolitical implications for the three NAFTA parties. One glaring example of such implications appeared soon after NAFTA entered into force. Mexico, facing dramatic capital flight and a run against the peso, was in need of immediate balance of payments support. President Clinton provided that support, through currency
\end{itemize}
A. Economic Inequality

NAFTA’s critics argue that NAFTA’s gains (increased trade and investment) have benefitted the select few (wealthy investors, educated workers) while impoverishing many, especially unskilled workers whose jobs have been displaced.66 As a result, NAFTA has arguably contributed to greater economic inequality in North America, at least insofar as the United States and Mexico are concerned.67 Since NAFTA entered into force, Gini coefficients show that unequal distribution of wealth has increased in Mexico.68 In opening their borders to increased trade and investment, the swaps arranged through the Federal Reserve, without having to resort to congressional action.


The vast majority of Mexican workers have not benefited from NAFTA. Instead, the minimum wage, which approximately 25% of the country’s 40 million workers earn, has declined 20% and hovers at around $4/day. . . .

. . . NAFTA’s export-driven model benefited large multinational corporations while generally decimating small and medium-sized Mexican businesses, which not only faced new competition from huge companies whose Mexican operations enjoyed an array of rights and privileges under NAFTA, but which also lost benefits from assorted credit programs and procurement preferences banned by NAFTA.

Id. at 2-3.

67. But see GERARDO ESQUIVEL, THE DYNAMICS OF INCOME INEQUALITY IN MEXICO SINCE NAFTA (Dec. 2008), available at http://www.cid.harvard.edu/Economia/GEesquivel.pdf (completing economic analysis that indicates income inequality increased dramatically in Mexico in decade before NAFTA came into force, but that income inequality has actually declined slightly since mid-1990s, due in part to increases in wages for skilled workers).

68. See id. at 2. Since the mid-1980s, when Mexico began the process of economic opening (apertura económica) that culminated in NAFTA’s entry into force, income distribution in Mexico has become more unequal. The concentration of income as measured by Gini coefficients (.000 designating perfectly equal distribution, and 1.000 indicating perfectly unequal distribution) shows that Mexico’s income inequality grew steeply in the late 1980s and early 1990s and remains high. In 2010, the Gini coefficient figures for the NAFTA Parties were the highest (most unequal) for Mexico (.481), with the United States a healthily unequal second (at .408), and Canada a moderately equal Party (.326). See Global Peace Index Related Indicators—2010, VISION OF HUMANITY, http://www.visionofhumanity.org/gpi-data/#/2010/gini/compare/MX+US+CA (last visited Oct. 29, 2011). By comparison, wealth is more evenly distributed in Europe, as shown by the figures for France (.327), Germany (.283), Spain (.347), Italy (.36), and the United Kingdom (.36). See Global Peace Index Related Indicators—2010, VISION OF HUMANITY, http://www.visionofhumanity.org/gpi-data/#/2010/gini/compare/FR‡E‡E+ES‡IT‡GB (last visited Oct. 29, 2011).

The Gini coefficient (developed in 1912 by Italian economist Corrado Gini) is a measure of income inequality within a society. According to the World Bank, the Gini coefficient is “the most commonly used measure of inequality. The coefficient varies between 0, which reflects complete equality and 1, which indicates complete inequality (one person has all the income or consumption, all others
NAFTA parties have contributed to the decline of formerly protected industries (textiles and automotive products in the U.S.; agricultural products and certain manufacturing in Mexico), costing many workers their jobs; in Mexico, the principal safety net has been migration to the United States to seek jobs, creating a major political problem in the United States.

B. Unauthorized Immigration

The Pew Hispanic Center calculates that 11.2 million undocumented persons (unauthorized immigrants) live in the United States, and that 6.5 million of these immigrants came from Mexico. NAFTA’s proponents hoped that the free trade agreement would spur the Mexican economy to create more jobs, thus relieving pressure for workers to migrate to the United States (a traditional “safety valve” for Mexico’s under-employed workforce). As a result, immigration was left off the table during NAFTA negotiations. Unfortunately, the migration of undocumented workers from Mexico to the United States increased after NAFTA entered into force, driven by continued joblessness and worker displacement in Mexico, moderate economic growth in the United States, and the growing network of Mexican families living in the United States. Immigration, and the presence of a large population of Mexican citizens who reside in the United States and participate fully in the U.S. economy, remains a volatile issue in U.S.–Mexican relations.

Post-NAFTA, the Canadian and Mexican economies are even more tied to that of the United States, for better or worse. Because of its size, the U.S. economy (almost ten times the size of the Canadian economy, and fourteen times the size of the Mexican economy) is not as dependent on trade with either country.


70. See id. at 2.

71. See id. at 2.


dent for its economic growth on the performance of our NAFTA partners. Nevertheless, economic weakness in either country can bring political and geopolitical consequences that will inevitably impact the United States.

C. Environmental Effects

One negative side effect of free trade—and of economic activity in general—has to do with the environmental effects of business enterprises, whether through new investment or continuing activities that have environmental impacts. In the case of Mexico, in particular, strains on the environment abound in a country that combines a weak infrastructure for environmental protection with a mediocre record of environmental law enforcement. The NAFTA-related initiatives that were intended to promote environmental protection in North America, discussed previously, have been inadequate to the task of protecting the North American environment.

D. National Security

As already noted, the NAFTA governments did not stress that there was a geopolitical dimension to the free trade agreement. Nevertheless, it is easy to see that the three NAFTA countries are bound by geography to be concerned about the security and stability of our NAFTA partners. Entry of proven terrorists into the United States from Canada is well-documented. The largest national security concern the region, however, revolves around the increased violence and the growth of organized crime in Mexico. The crime wave in Mexico is closely linked to North American integration, for the reasons that follow.

Corporations—Ford, Apple Computers, Walmart, Home Depot—are not the only manufacturing and distribution networks of a trilateral nature that have grown with the increase in NAFTA trade and investment. The wave of organized crime in North America is fueled by illicit drug trafficking carried out through distribution channels between Mexico and the United States, the principal drug market in the world. For many years, the

Mexico&countryCode=mx&regionCode=na#mx (last visited Oct. 29, 2011). U.S. gross domestic product (GDP) in 2010 was $14.26 trillion; Canadian GDP in 2010 was equivalent to $1.57 trillion; and Mexican GDP in 2010 was equivalent to $1.039 trillion. See id.

74. For further discussion of the NAFTA-related initiatives, see supra notes 30-48 and accompanying text.

75. See generally HUFBAUER & SCHOTT, supra note 26, at 153-83.


United States government has quietly supported the replacement of single-party government in Mexico by a system of free elections with power shared by three principal political parties. Unfortunately, democracy has also brought greater instability, through the lack of a majority party in Congress and a weakening of the Mexican president as a stable (if previously undemocratic) force to govern Mexico.\textsuperscript{78}

We ignore the geopolitical effects of increased economic integration in North America at our own peril. The United States is not immune from the effects of instability or insecurity in Mexico, any more than Canada is immune from instability or insecurity in the United States. NAFTA has advanced the process of interdependence by demolishing barriers to trade and investment, and North America governments and their citizens must devise ways to manage this interdependence.

The architects of the European Union, striving for a continental union of countries with even more widely divergent levels of development than exist in NAFTA, recognized the need to reduce national disparities in poverty and income levels to promote stable development. To that end, the EU has followed a general policy of social cohesion, devoting billions of euros to achieve an approximate convergence of social and economic indicators.\textsuperscript{79} As I have proposed elsewhere, the NAFTA parties should follow a similar approach by creating a North American Regional Development Fund that would commit the NAFTA governments to a policy of promoting social convergence in North America.\textsuperscript{80} A North American Regional Development Fund would use funding from all three NAFTA governments to promote infrastructure development in economically depressed regions in Canada, Mexico, and the United States. Such a proposal runs counter to our history. The United States has historically provided scant foreign aid to Mexico, due in part to Mexican reluctance to adhere to U.S. policies and also to U.S. perceptions that foreign assistance

During FY 2000, 89 million automobiles, 4.5 million trucks, and 293 million people entered the U.S. from Mexico. Each of these modes of transportation have been used by drug traffickers to ship their goods across the border. For example, a tractor-trailer transporting legitimate cargo may also contain hidden bales of marijuana; a legal immigrant might carry concealed parcels of heroin through a border checkpoint; or a passenger car may contain bags of cocaine in a tire or other secret compartments.

\textit{Id.}


\textsuperscript{80} See generally Zamora, supra note 56.
was unnecessary because of stability insured by single party rule in Mexico. With Mexico undergoing a period of destabilization (which coincided with the arrival of competitive democracy in 2000), the United States has dramatically increased its foreign aid to Mexico, but most of the funding has been directed to military and national security funding. Such a level of military aid would not be needed, however, if the NAFTA governments invested with foresight in programs designed to forestall the criminality and destabilization that occurs under conditions of poverty and poor education.

IV. INTERNATIONAL RELATIONS IN AN ERA OF DISAGGREGATED STATES AND THE ROLE OF CIVIL SOCIETY IN MEDIATING INTEGRATION

The failure of NAFTA’s governments to mediate the effects of economic integration and globalization is prejudicial to a stable economy and society in North America. The answer to instability and disruption will not be found in military measures or in the construction of fences along our borders, but rather in multilateral cooperation. Dr. Isabel Studer, a Mexican expert in North American affairs, has clearly identified the shortcomings of laissez-faire integration in North America:

[T]he three [NAFTA] countries should begin by recognizing how their failure to act collectively is undermining the potential benefits accrued from their complementarities and the already high levels of integration in North America. New forms of cooperation and policy coordination are certainly in the realm of the possible, but the essential ingredients are political leadership and the kind of collaboration and commitment between the public sector and the private sector that brought NAFTA to life in the early 1990s. In the absence of these factors, and of a more institutionalized framework, it is difficult to imagine how the NAFTA countries can resolve common transnational problems in such strategic areas as migration and labor disputes, climate changes, and energy.

In 2011, there is little reason to hope that the requisite political leadership needed to strengthen NAFTA’s institutional deficiencies, will be forthcoming. If NAFTA’s governments will not create trilateral institutions to coordinate policies, can other institutions fill the vacuum?

A hopeful answer to this question can be found in two currents of international relations theory propounded by international relations scholars: disaggregation and the rise of organized civil society initiatives.

82. Isabel Studer, Obstacles to Integration: NAFTA’s Institutional Weakness, in Requiem or Revival? The Promise of North American Integration 53, 71 (Isabel Studer and Carol Wise eds., 2007) (emphasis added).
Without pretending to provide a comprehensive overview of these theories, I will briefly explore the relevance of these two streams of analysis.

A. Disaggregated States and Transgovernmental Networks

Anne-Marie Slaughter, an expert in law and international relations, is the best-known proponent of the theory of disaggregated states. Slaughter and others identify the limitations that national governments face in dealing with world problems, and the lack of intergovernmental institutions to promote governance in an increasingly interconnected (and confused) world. Slaughter’s theories, expounded in numerous writings, are generally associated with the concept of disaggregation. In the following passage, Murphy describes Slaughter’s approach to solving this “globalization paradox”:

We need more government on a global and a regional scale, but we don’t want the centralization of decision-making power and coercive authority so far from the people actually to be governed. . . .

Slaughter’s new world order would resolve this paradox primarily through a series of “government networks.” To a considerable extent these government networks already exist. They consist of national regulatory agents and agencies, judiciaries, and legislators who reach out (“network”) to their counterparts in other nation-states . . . . They create their own international organizations, but these are “not ‘inter-state’ organizations; they are not formed by treaty or even executive agreements . . . .”

A key part of Slaughter’s analysis is the concept of the “disaggregated state,” which she describes as “simply the rising need for and capacity of different domestic government institutions to engage in activities beyond their borders, often with their foreign counterparts. . . .

The concept of the “disaggregated state” stands in sharp contrast to the “unitary state, a concept that has long dominated international legal and political analysis.” . . . Her core vision of a disaggregated world order is “a concept of an international order


in which the principal actors are not states, but parts of states; not international organizations, but parts of international organizations."\(^8^5\)

I do not pretend to expound meaningfully on theories of disaggregation; rather, my purpose is to call attention to the concept of disaggregation and to the operation of transgovernmental networks as they relate to North American integration. In fact, Anne-Marie Slaughter has referred (albeit briefly) to NAFTA in describing how transgovernmental networks operate: “Within the North American Free Trade Agreement (“NAFTA”), U.S., Mexican, and Canadian environmental agencies have created an environmental enforcement network, which has enhanced the effectiveness of environmental regulation in all three states, particularly in Mexico.”\(^8^6\)

This allusion to the North American Agreement on Environmental Cooperation (NAAEC), although overly generous,\(^8^7\) correctly identifies the potential importance of transgovernmental networks in NAFTA. One can only appreciate the importance of these networks by contrasting the profound lack of contact among governmental agencies in Canada, Mexico, and the United States prior to NAFTA.\(^8^8\) The NAFTA Agreement created numerous trilateral working groups and has led to other initiatives that permit interaction among executive and legislative agencies in the three NAFTA countries.\(^8^9\) The most successful NAFTA-related network may be the Joint Public Advisory Committee (JPAC), a committee established pursuant to the NAAEC, which has had at least a limited effect in influencing the Commission on Environmental Cooperation in carrying out its mandate.\(^9^0\)

We need a scholarly, comprehensive evaluation of transgovernmental networks emanating from the “NAFTA exercise”—that is, from the conglomeration of cross-border initiatives, public and private, that were


\(^8^6\) Slaughter, Sovereignty and Power in a Networked World Order, supra note 84, at 289; see Craik & DiMento, supra note 53, at 511-12 (noting, with some hyperbole: “A study on the extent of transgovernmental networks between Canada and the United States identified at least 240 networks, showing that, even before the SPP, networked governance was pervasive in North America.”).

\(^8^7\) For a more critical evaluation of the Agreement on Environmental Cooperation and the Commission that administers it, see supra notes 37–38 and accompanying text.


\(^8^9\) See id.

spawned after the negotiation and entry into force of NAFTA, an agreement that formed a partnership among three neighbors that previously ignored each other.91 Without more evidence, the effects of such networks to date appear to be limited. As discussed above,92 the most ambitious attempt to establish a network—the creation of the Security and Prosperity Partnership—ended almost as soon as it started. The NAFTA governments are capable of directing their agencies to undertake trilateral studies and initiatives within the scope of their inherent jurisdiction. Nevertheless, there is still a lack of leadership within the NAFTA governments to compel such a stance.

Additional proof of the limited promotion of transgovernmental networks can be seen in the handling of disputes over the enforcement of NAFTA’s rules in Chapter 11, which guarantees the rights of foreign investors. Rather than establish a tribunal or agency to promote investor rights, NAFTA created a dispute settlement mechanism based on arbitration by ad hoc groups of arbitrators appointed pursuant to the rules of ICSID or UNCITRAL.93

Public opinion still shows a reluctance of North Americans to favor any campaign to invest in cross-border projects to assist the process of integration, as a presumed risk to national sovereignty. I will return to this point at the end of this Essay.

B. Civil Society Initiatives

The skeletal institutional apparatus of NAFTA and the limited operation of NAFTA-driven transgovernmental networks lead to the conclusion that North American economic integration proceeds haphazardly, without significant efforts to promote cross-border understanding and cooperation that would relieve the pressures caused by societal dislocations (economic, political, cultural) that integration brings. This conclusion ignores, however, the growing importance of private actors in North American integration. Private actors—corporations, NGOs, universities, academic associations, professional societies, humanitarian associations, and more informal groups—are occupied on a daily basis in carrying out transnational projects that confront the problems related to North American integration. They lack the authority to create de jure regimes to manage integration, but they do create de facto foundations for economic and social cooperation in North America. Grouped under the rubric of transnational civil society initiatives, activities by private groups and networks have

91. See Craik & DiMento, supra note 53, at 511-12 (noting with some hyperbole: “A study on the extent of transgovernmental networks between Canada and the United States identified at least 240 networks, showing that, even before the SPP, networked governance was pervasive in North America.”).

92. See supra text accompanying notes 49–59.

93. See NAFTA, supra note 3, arts. 1115–38; see also NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (Todd Weiler ed., 2004) (discussing NAFTA investor dispute generally).
drawn the attention of international relations theorists. Thanks to the ease of travel and development of communications channels, especially the Internet, many cross-border civil society initiatives have been undertaken to help tackle problems associated with North American integration.

- **NGO networks.** Non-governmental organizations (NGOs) have increased in number and importance in North America, and in recent years NGOs have developed cross-border ties to advance common interests with groups in other countries. NGOs span a wide range of subjects, from humanitarian and environmental causes to liberal or conservative political movements.

- **Corporate networks.** Manufacturing and distribution chains have expanded dramatically since NAFTA entered into force. U.S. auto manufacturers, electronics companies, and others have made use of the NAFTA structure invested heavily in Canada and Mexico, taking with them cultural and behavioral models that advance the corporations’ goals. Nationalists may bemoan the effects of multinational enterprise on local cultures, but the creation of multinational manufacturing, marketing, and distribution networks will not recede. Trade associations, such as the U.S.-Mexico Chamber of Commerce, the American Chamber of Commerce in Canada, and the American Chamber of Commerce in Mexico, are active in promoting cross-border initiatives to promote cross-border business. The extension of cross-border investments by multinational corporations has also created an opportunity to use the corporate

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Although there is no single accepted definition or conception of civil society even in Western societies, the dominant prevailing conceptions in the Western literature have emphasized an intermediate space between the state and the individual populated by voluntary, self-generating, largely self-supporting social groups independent of the state. The growth of this modern form of civil society is tied to the rise of modern liberal democracy and capitalism in the West. In this view, civil society is seen as a force against the state.

*Id.* at 250-51 (footnote omitted).


social responsibility programs to enhance welfare through their activities in the three NAFTA countries.99

– Professional associations. Lawyers and other professional groups have formed cross-border associations to promote business and to educate their members to deal more effectively with cross-border problems. The U.S.–Mexico Bar Association, for instance, boasts a network of over 200 U.S. and Mexican lawyers, who are divided into two dozen committees to develop cooperative projects.100

– Educational institutions. Unlike the European Union, which has actively promoted exchanges among European universities as well as cross-border study opportunities for EU university students,101 North American universities—with some exceptions—have been very slow to promote cross border interaction between universities and students in Canada, Mexico, and the United States. Soon after NAFTA entered into force, the three NAFTA governments promoted a North American student mobility program intended to promote short-term student exchanges between students in Canadian, Mexican, and U.S. universities. In the United States, this program has been carried out through the Department of Education’s Program for North American Mobility in Higher Education, which administers a modest budget of grants that are awarded competently, in accordance with the cooperation of Canadian and Mexican education authorities.102 A spinoff organization, the Consortium for North American Higher Education Collaboration (CONAHEC), was founded in 1994 to promote student exchanges and other collaborative programs in North America, and counts 130 institutions of higher education as


101. See The Erasmus Programme—Studying in Europe and More, EUR’N COMMIS- SION, http://ec.europa.eu/education/lifelong-learning-programme/doc80_en.htm (last updated June 8, 2010). The EU’s ERASMUS program has created cross- border study opportunities for more than 2.2 million EU university students since its inception in 1987. See id. With a budget of more than 450 million euros per year, the ERASMUS program links over 4,000 institutions of higher education in thirty-three European countries. See id.

The relative lack of cross-border university initiatives in North America is discussed further below. A comprehensive analysis of the entire range of civil society initiatives in North America is long overdue, particularly in light of the reluctance of political leaders in Canada, Mexico, and the United States to commit to the formation of trilateral or bilateral institutions of any substantial form.

V. LIMITATIONS INHERENT IN USING CIVIL SOCIETY TO SOLVE TRANSNATIONAL PROBLEMS

Civil society initiatives could be instrumental in helping North American societies to address cross-cultural, political, and legal problems associated with North American integration—regulatory disjunctures, unauthorized migration, cross-border criminality, issues of national security, etc. The Internet and other networking tools offer new and effective instruments for civil society organizations to promote cross-border understanding. In a thorough study of transnational civil society networks, however, one author discusses the many challenges (including political and cultural differences) facing civil society organizations in creating coalitions that span borders in the Americas.

In addition, however, there are major distinctions between carrying out governmental programs, which political leaders can control, and “outsourcing” cross-border initiatives to civil society organizations (whether or not the organizations are funded in part by grants from governmental agencies). By conceding jurisdiction over problem-solving to civil society organizations, governments may also lose control over the consequences of the actions undertaken by private groups. Civil action, using the Internet, and other sophisticated means employed by civil society, can even lead to radical change, as shown in the “Facebook Revolution” that helped topple Egyptian President Hosni Mubarak after thirty years.

A glaring example of the limitations on civil society initiatives as effective means to confront problems stemming from North American integration can be seen in the migration of undocumented workers from Mexico to the United States, which has become a major domestic issue in the United States, as well as a source of tension between the United States and Mexico. Civil society alone cannot control the flow of undocumented workers into the United States. As a result, more than 11 million undocumented persons—6.5 million of them from Mexico—reside in the United


104. See infra text accompanying notes 123–27.


States. In addition, some civil society initiatives may be more deleterious than beneficial to a stable North American society: the Minuteman Project, a U.S. vigilante group formed to counteract illegal immigration in the face of perceived inaction by federal and state governments, is a discordant reaction to a very real societal problem.

Anne-Marie Slaughter and others have pointed out that there are many issues in the world that cannot be dealt with effectively by civil society initiatives, but require governmental intervention, either formally or through transgovernmental networks. As John Murphy has noted:

Slaughter and Burke-White have done us a service by focusing in their article on the reality that many of the world’s most severe international problems have their origin in nation-states and that such states are in the best position to take the actions necessary to resolve them.

This statement is clearly applicable to the undocumented migration of workers in North America: an effective solution to the U.S. immigration problem will require action and cooperation by both U.S. and Mexican governments.

While non-governmental groups may be incapable of solving difficult problems such as immigration, civil society initiatives can be helpful in directing societies towards solutions, by educating the public, promoting the research necessary to understand problems that face North American

107. See supra notes 62–63.


109. See Slaughter & Burke-White, supra note 84.


Yet a new and intellectually powerful assortment of scholars—impeccably liberal internationalists, wedded to global governance, but not at all wedded to the sanctity of global civil society—has already moved beyond the idea that global governance can or should be sought through global civil society. They are almost certainly right in viewing the global civil society movement as an element, but not the most compelling one, in creating global governance. Anne-Marie Slaughter, Benedict Kingsbury, and Kal Raustiala, among others, are all committed to some form of global governance, but none suggests that its legitimacy would come about through global civil society. As Slaughter said flatly, global governance needs forms of legitimacy that only states, and their agencies, can provide; she elaborates a form of governance that goes far beyond the idea of robust multilateralism that this essay has suggested, but one which is distinctly cool to the idea of genuine legitimacy coming from global civil society. Kenneth Anderson, “Accountability” as “Legitimacy”: Global Governance, Global Civil Society and the United Nations, 36 BROOK. J. INT’L L. 884-85 (2011) (footnotes omitted).
society, creating forums for exchange of views, and promoting solutions. For these reasons, civil society groups have long attracted the attention of governments and intergovernmental organizations interested in promoting cross-border initiatives. The European Union has actively engaged with civil society in the furtherance of the EU’s efforts to create a sustainable union of disparate countries. In addition to consulting with civil society agencies over proposed EU policies, the EU provides grants to universities and NGOs to promote particular projects. According to information supplied by the EU:

The Commission pays direct grants to different beneficiaries, such as universities and NGOs, in pursuance of EU policies, in such fields as social affairs, research and development, education, environment, consumer protection and external policies. All EU funding is channelled towards precise objectives and priorities under the various policies, which, in turn are based on provisions of the Treaties.¹¹¹

During the five years from 2003 to 2007, for instance, the European Commission awarded civil society organizations over 154 million euros (approximately $215 million) to fund initiatives considered beneficial to European society.¹¹²

The United Nations Organization (UNO) has also created initiatives to pursue associations with businesses and civil society to further the goals of advancing peace and development. In 2000, the UNO created the United Nations Global Compact, which has been characterized as

the largest voluntary corporate citizenship initiative in the world, whose mission is to ensure that business—in partnership with other societal actors, including Governments, organized labour, non-governmental organizations (NGOs) and academia—plays an essential role in achieving the United Nations vision of a more sustainable and equitable global economy.¹¹³

Participants agree to advance certain “universal principles” on human rights, labor standards, environmental protection, and anti-corruption. The United Nations has made a long-term commitment to this effort by


creating a permanent Global Compact Office. It is too early to gauge the
effectiveness of this UN initiative to build a public-private partnership.\textsuperscript{114}

VI. CAN PUBLIC-PRIVATE PARTNERSHIPS ASSIST THE PROCESS OF
NORTH AMERICAN INTEGRATION?

Critics will see the UN effort as the creation of another needless and
expensive bureaucracy, but if even partially successful, the UN effort offers
a model for North American efforts to promote sustainable integration of
the continent’s economies. Initiatives such as EU cooperation with civil
society and the UN Global Compact are not substitutes for coordinated
governmental action when necessary; however, lacking effective intergov-
ernmental mechanisms, North America’s agencies, public as well as pri-
vate, could look to replicate these and other examples of partnering
public and private actors. Indeed, even the ill-fated SPP created by the
NAFTA governments\textsuperscript{115} promoted the idea of private-public partnerships,
through the creation of the North American Competitiveness Council
(NACC), an official SPP working group composed of representatives of
private business interests that was formed to provide advice on North
American economic integration.\textsuperscript{116}

Governmental support for civil society initiatives and public-private
partnerships designed to soften the effects of globalization and integration
are being fostered on a much more limited basis in North America than in
Europe, but there are examples of successful programs. As noted
above,\textsuperscript{117} in a rare example of trilateral coordination since NAFTA’s entry
into force, the Canadian, Mexican, and U.S. governments have funded a
student mobility program to cross-border exchanges by university students
in North America. Unfortunately, funding for such programs is extremely
limited. For instance, in 2010, the U.S. government awarded ten grants
for trilateral partnerships of institutions of higher education in the United
States, Canada, and Mexico. The total amount of funding for the four-

\textsuperscript{114} For a preliminary and non-committal evaluation of the Global Compact,
see Johanna Brinkmann-Braun & Ingo Pies, The Global Compact’s Contribution to
Global Governance Revisited (Martin-Luther Universität Halle-Wittenberg Discussion
stract_id=1001425. Brinkman-Braun and Pies note:

Today the GC is the world’s largest corporate citizenship initiative with
more than 3,000 business participants. Yet this number is dwarfed by the
more than 68,000 transnational corporations in existence, with more
than 800,000 subsidiaries and by millions of small and medium-sized en-
terprises at the national level. In that sense the journey has just begun.

\textit{Id.} at 10.

\textsuperscript{115} See supra text accompanying notes 49–59.

\textsuperscript{116} See Villarreal & Lake, supra note 49, at 3–4 (discussing NACC); N. Am.
(last visited Oct. 29, 2011) (same).

\textsuperscript{117} See supra notes 102–03 and accompanying text.
year grants was less than $2 million, or less than $500,000 per year—a figure sharply contrasting with the 450 million euros (approximately $634 million) appropriated by the European Commission to support the ERASMUS program that enables EU university students to study in EU countries outside their home universities.

As a general policy, the U.S. State Department has begun to recognize the value of partnering with civil society to promote projects that can improve international relations. In 2009, Secretary of State Hillary Clinton launched an initiative entitled Civil Society 2.0, which deploys federally funded “technologists” to help civil society organizations improve communication capacities. The program initially allocated $5 million in grant funds for pilot programs in the Middle East and North Africa to “bolster the new media and networking capabilities of civil society organizations.” (It is intriguing to consider that some of the participants in the Tahrir Square “Facebook Revolution” in Egypt may have benefited from this program.) Civil Society 2.0 holds annual workshops fostering cooperation with civil society organizations; as shown by information on the Civil Society 2.0 webpage, the State Department initiative has extended to the Americas.

By working in partnership with civil society organizations—NGOs, universities, and other groups—Canadian, Mexican, and U.S. government agencies could significantly improve the outcomes for North American integration. Currently, however, the paltry amount of government funding for non-military, cross-border initiatives in North America belies the size of North America’s economy and the enormity of the economic and social problems that accompany North American economic integration. By collectively increasing their funding of cross-border initiatives by civil society organizations—initiatives designed to bring North American societies closer together—the NAFTA governments would make an investment that will pay long-term dividends to promote a stable growth in an integrated North America. Short-term investments of a remedial nature—military expenditures to help combat lawlessness in Mexico, for instance, or investments to remedy environmental problems that could have been avoided

119. See supra note 101.
121. See supra note 106.
with greater trilateral cooperation—could be saved with greater planning and cooperation by NAFTA’s governmental leaders.

VII. THE ROLE OF UNIVERSITIES IN PROMOTING NORTH AMERICAN INTEGRATION

A. Student Exchanges

European universities, working with EU officials, have played a significant role in promoting the unification of European society. Through its ERASMUS program of international education, the European Union has invested heavily in continent-wide collaborative programs by universities to promote cross-border education as a way to reduce misunderstanding and promote harmony and social cohesion in Europe. By comparison, universities in the United States lag far behind their European counterparts in the number of international study opportunities for our citizens. In the United States, we view our universities as the gold standard of higher education; we believe that we have much to teach the world, a belief that is borne out by the vast inflow of foreign students who study in U.S. universities. For instance, according to data compiled by the Institute for International Education, in the 2009-2010 academic year, 690,923 foreign students were enrolled in U.S. universities, representing 3.6% of the total 19,037,000 students enrolled in U.S. institutions of higher education. By contrast, while the population of U.S. students studying abroad is growing, the number is still relatively small: in the 2008-2009 academic year, 260,327 U.S. students studied abroad, slightly over 1% of students enrolled in U.S. universities that year. Europe attracted the largest number of U.S. students, 141,955 students (55% of the total); that same year, only 7,320 U.S. university students (2.8% of total U.S. students studying abroad that year) studied in Mexico. Canada is such an insignificant destination for U.S. students that it is not among the top twenty-five destinations for foreign study. Furthermore, over half of the studies undertaken by U.S. students abroad (approximately 55%) are short-term—summer courses, January term, etc.—while only slightly over 4% of U.S. students spend an entire academic or calendar year abroad.

In sum, few U.S. students are studying in the United States’ closest geographical allies, with whom we share important economic, security, cultural, and social relationships. The Canadian, Mexican, and U.S. governments should improve the environment for cross-border North Ameri-

123. See supra text accompanying note 101.
126. See id.
can studies by helping to increase the funding for such studies. U.S. leaders, whether from public or private sector institutions, would be more capable of dealing effectively with their counterparts in Canada and Mexico if they had taken the opportunity to study our neighbors’ societies, cultures, laws, and history. The same is true for Canadian and Mexican leaders. A moderate amount of support for networks to promote cross-border North American studies will also pay dividends, as discussed below.127

B. Promoting Research on North America

The relative failure of North American universities to emphasize North American studies and to promote research on North America is as pronounced as the lack of student exchanges. According to a study published in 2007, there are only six centers or programs in the United States that concentrate specifically on North American studies; paradoxically, the number of such centers has actually declined since NAFTA came into effect.128 Increased funding from public and private funding agencies is needed to help improve the climate for North American studies. The author of the 2007 study notes:

Among the university-based centers and programs in Canada, Mexico and the U.S., the overwhelming majority (63 overall) have a Canada or Canada-U.S. focus. Equally represented are the centers that have a North American studies focus (14) and a Mexico or U.S.-Mexico emphasis (11). The abundance of Canadian Studies Centers can be partly attributed to the funding that the Canadian government provides (out of the 60 programs, 27 were sponsored by the Canadian embassy).129

The use of the term “abundance” in reference to Canadian Studies Centers on North America in the quoted text is very relative. Canada’s Centre for International Governance Innovation (CIGI), an independent think-tank based in Waterloo, Ontario, supports research on a broad range of subjects and geographical focuses.130 CIGI has created a website, the Portal for North America, which serves as a network for linking researchers rather than as a research center per se.131 On the other hand, university-affiliated centers in Canada have not been active in their promotion of trilateral North American studies, which may reflect a bias among

127. See infra text accompanying notes 128-40.
129. Id. at 272 (emphasis added).
Canadian academics, who tend to focus on bilateral relations with the United States rather than on trilateral relations,\(^{132}\) Carleton University’s Centre on North American Politics and Society organizes seminars,\(^{133}\) while McGill University’s North American Studies program, founded in 1968, focuses solely on Canada–U.S. studies and concentrates on undergraduate studies.\(^{134}\)

While not plentiful in the United States, centers for research and dialogue on North American issues do exist at U.S. universities. The most prominent centers in the United States are the Center for North American Studies, established in 1994 at American University in Washington, D.C.,\(^{135}\) and the North American Center for Transborder Studies (NACTS), founded in 2005 at Arizona State University.\(^{136}\) Both centers are active and sponsor research, publications, conferences, and public information on issues related to North American integration. While not limited to North American issues, the National Law Center for Inter-American Free Trade, affiliated with the James E. Rogers College of Law at the University of Arizona, sponsors research related to North American trade and legal harmonization and maintains a valuable database on Inter-American law.\(^{137}\)

For many years, Mexican universities have also been deficient in emphasizing U.S. studies, despite the important linkages between Mexico and the U.S. economy and society. As Mexico began to open to U.S. investment and commerce, in 1988, the Universidad Nacional Autónoma de México (UNAM) recognized the lack of attention to North American studies and established the Centro de Investigaciones Sobre América del Norte (CISAN) (Center for North American Research), housed at UNAM’s campus in southern Mexico City.\(^{138}\) Since its creation, CISAN has grown into an active center, with a staff of twenty-three resident research fellows and a large staff of assistants. CISAN promotes research and publishes economic, political, social, and cultural studies involving North America.\(^{139}\)

\(^{132}\) See supra note 8.


\(^{138}\) See Nat’l L. Center for Inter-Am. Free Trade, http://www.natlaw.com (last visited Oct. 29, 2011). Founded in the mid-1990s by Professor Boris Kozolchyk, a noted comparative law scholar, the National Center has undertaken ambitious projects to promote harmonization of commercial law and practices in the Americas, including with Canada and Mexico. See id.


\(^{139}\) See, e.g., Leonardo Curzio, La Seguridad Nacional en México y la Relación con Estados Unidos (2007).
In 2008, Mexico’s largest private university, the Instituto Tecnológico de Estudios Superiores de Monterrey (ITESM, commonly referred to as “Monterrey Tec”), established at its Mexico City campus the Center for Dialogue and Analysis on North America (Centro de Diálogo y Análisis sobre América del Norte, CEDAN). CEDAN’s director, Dr. Isabel Studer, is a noted authority on North American relations, with a career that spans important governmental and academic positions. CEDAN promotes research and organizes conferences and workshops on North American issues, including migration, climate change, security, energy resources, inequality, and competitiveness.

VIII. Promoting Discourse on North American Integration: The Role of Information Clearinghouses

For those who fear the waxing of supranational governance and the waning of national sovereignty, any discussion of integration in North America—whether economic, social, or political—is threatening. This aversion to serious dialogue on North American integration reflects historical attitudes that will not change quickly. Laura Spitz, a North American lawyer educated in both her native Canada and in the United States, has drawn attention to this lack of dialogue: “Given the potential significance for democracy, sovereignty, government, and justice in each of the NAFTA member-states, surprisingly little attention—at least in a relative sense—has been paid to integration qua integration in North America.” Spitz provides the following context for discussing integration:


The endorsement by a major city mayor of a document described as “The Declaration of North American Integration” represents a long-term effort by local governments to bypass state and federal governments and work directly with Mexico and Canada to create agreements that integrate the continent below the radar screen, charges an activist. Adam Rott, founder of watchdog blog Oklahoma Corridor Watch, brought to light the document signed by [Oklahoma City] Mayor Mick Cornett.

Id.

142. See Laura M. Spitz, MILLER THOMSON, http://www.millerthomson.com/en/our-people/laura-m-spitz (last visited Oct. 29, 2011) (click “complete profile”). Laura Spitz holds a B.A. from the University of British Columbia, an LL.B. from the University of Toronto, and a Ph.D. in law from Cornell University. A law professor at the University of Colorado School of Law, Professor Spitz returned to private practice in Vancouver in 2010.

While 'integration' is a contested term, it must mean—at a minimum—the process of combining or integrating previously separate or differently divided groups into a new or larger whole. In the context of North America, it is marked by simultaneous: (a) deregulation at the domestic or national level; and (b) increasing formalization, coordination, and institutionalization at the transnational and international levels. . . . Regional integration might usefully be described as the dynamic development of political, economic, legal, and cultural (that is, social) systems and identities, at the regional level, pushing in the direction of new community loyalties that disrupt historical systems of political, economic, legal, and cultural organization.  

Spitz is careful to point out that the economic integration implicit in NAFTA is not “asocial,” but has effects that go far beyond economic outcomes. She also argues in favor of a “constructivist” analysis of regional integration in North America—one that requires an examination of North American integration through a multi-disciplinary analysis, which requires us to look beyond “structuralist” analysis limited only to the trade and economic effects of NAFTA. She asserts:

Most studies of North American integration assume a rationalist and instrumentalist frame. I have argued that constructivist theory—and, specifically, constructivism’s focus on the production of discourse as a set of practices that are simultaneously constitutive and reflective—may help point the way toward a theory that provides for a fuller account of ‘North America’ as both a material and symbolic geopolitical identity.

If I understand Laura Spitz’s argument correctly, the failure to promote a multi-disciplinary, expansive discussion of North American integration (in Spitz’s terminology, dialogue on “integration qua integration”) is doubly limiting: Our aversion to “integration discourse” not only prevents us from fully understanding the repercussions of NAFTA (and other phenomena) that contribute to the interaction of societies in North America, but also prejudices our ability to promote the orderly development of a congruent North American society by promoting collaborative efforts to confront the negative side effects of economic integration.

In their role as objective centers for the examination and dissemination of ideas, North America’s universities must do more to help overcome this relative lack of dialogue on integrations. Although they are not commonplace, there are some successful models for such enterprises; such initiatives should be replicated and expanded.

144. Id. at 755-56 (emphasis added) (footnotes omitted).
145. See id. at 758-59.
146. See id. at 791.
A. Center for North American Studies, American University (Washington, D.C.)

In 1994, Professor Robert Pastor, a former National Security Adviser for Latin American and Caribbean affairs at the U.S. State Department, established the Center for North American Studies to promote academic inquiry into North American studies. The center’s website notes:

Since 1994, trade and investment among Canada, Mexico, and the United States have tripled, and immigration has soared. Yet, the three governments have not kept pace with the changes, and there is a lack of awareness that new approaches are needed to build a new North America. The Center for North American Studies was established to educate a new generation of students, to promote policy debate among the governments and the public, and to undertake research on ideas for a continental future.147

B. North American Center for Transborder Studies (NACTS), Arizona State University

Established in 2005, the NACTS, in addition to sponsoring research, serves as a network for scholars and public policy analysts. As noted on its website, NACTS carries out the following activities:

– Researching and publishing reports on specific policy issues that affect the three countries.
– Managing grants and contracts awarded to ASU and partner organizations;
– Convening strategic North American- and transborder-related events;
– Representing ASU in a number of research and other consortia;
– Promoting ASU at key research- and policy-related events throughout North America; and
– Hosting and engaging visiting scholars and students from Canada, the United States and Mexico.148

C. North American Integration and Development (NAID) Center, UCLA

Soon after the entry into force of NAFTA, the University of California at Los Angeles (UCLA) created the North American Integration and Development (NAID) Center to promote interdisciplinary research and to assist governments and communities achieve sustainable development

across borders. The NAID Center emphasizes U.S.–Mexico integration, and the NAID website lists a wide range of projects, reports and teaching activities related to U.S.–Mexico issues.


CONAHEC, an nonprofit consortium based at the University of Arizona and supported in part by the U.S. Department of Education’s Fund for the Improvement of Post Secondary Education (FIPSE), has created an active network of organizations in Canada, Mexico, and the United States that are interested in North American studies, especially student exchanges.

E. Centro de Investigaciones Sobre América del Norte (CISAN), at Universidad Nacional Autónoma de México (UNAM)

With considerable financial support from federal funding of the UNAM, CISAN appears to undertake an active agenda for dialogue. In addition to sponsoring independent research, CISAN provides a network for communication among academics, and sponsors a wide range of events and media outlets for discussion of North American issues.

F. Center for Dialogue and Analysis on North America (CEDAN), ITESM (Mexico City)

Similar to CISAN, CEDAN at ITESM in Mexico City offers a range of opportunities for networking and dissemination of information, in addition to its research agenda.

G. CIGI’s Portal for North America

In addition to sponsoring research, Canada’s CIGI has created a broad network on North American issues, entitled Portal for North America.

149. See generally About Us, N. Am. Integration and Dev. Center, http://www.naid.ucla.edu/about-us.html (last visited Oct. 29, 2011). “The NAID Center was founded in 1995 to conduct interdisciplinary research concerning the economic integration process between the United States, Mexico and Canada, and to assist communities and governments with projects and policies for sustainable and equitable development across borders.” Id.


151. One might question the validity of “independent research” through a university program such as CISAN that is funded entirely by the federal government. Surprisingly, in recent years, UNAM’s research institutes have been permitted considerable (though not complete) latitude to select their research agendas, and to publish results that may deviate from official government positions.

152. See supra notes 138–39 and accompanying text.

H. North American Forum on Integration (NAFI)

A Canadian initiative founded in 2002, the North American Forum on Integration (NAFI) is a non-profit organization based in Montreal. NAFI lists the following objectives on its website:

- Making the academic world, the public and decision-makers aware of the challenges posed by integration between the three NAFTA countries;
- Identifying the elements of the North American agenda which would allow the consolidation and reinforcement of the North American region;
- Favouring the creation of North American networks to set the basis for a trilateral dialogue.  

NAFI has organized conferences on specific North American issues, but its most successful initiative to date has been the organization of annual conferences entitled “Triumvirate.” At these conferences, which are based loosely on the “Model United Nations” model, students from North American universities convene in a mock parliament called the “North American Model Legislature,” acting as quasi-legislators, lobbyists, and journalists to address political, economic, and environmental issues.

IX. Conclusion

The discussion of NAFI’s North American Model Legislature, a relatively insignificant event in the global scheme of things, is a fitting place to end this Essay. I began with a lament over the non-existence of trilateral institutional structures, either NAFTA-related or otherwise, that would help to remediate the negative side effects of post-NAFTA integration in North America. Reluctance to embrace trilateral cooperation is directly related to North Americans’ opposition to supranational structures that are seen as threats to national sovereignty and undue limitations on freedom of national government control. One of the few NAFTA-related institutions created to generate trilateral cooperation, the North American CLC, had such a troubled history that the NAFTA parties have abandoned the effort, which had done little to begin with. Even such informal attempts to promote trilateral cooperation have proven too threatening to the sensibilities of North American leaders as representing inroads into supranational governance. Thus, the Security and Prosperity Partnership

was abandoned not long after it was created, and most of the working
groups and commissions created by numerous provisions of NAFTA have
not been active. The general lack of trilateral cooperation could be recti-
fied by promoting what Anne-Marie Slaughter and other scholars have
identified as transgovernmental networks, that is, cooperation by national
government officials who are specialized in common subject areas, who
can interact with their counterparts in other NAFTA countries. Critics of
this approach may complains of the lack of public control over such bu-
reaucratic networks, but the alternative—lack of interaction, communica-
tion, and cooperation among government officials dealing with common
problems—is patently unacceptable.

The best hope for mediating the negative effects of North American
integration may well lie in non-governmental efforts: initiatives carried out
by civil society organizations and networks created by such organizations.
As Anne-Marie Slaughter and others have argued, there are certain issues
that require governmental or intergovernmental attention, rather than
private action. The most prominent such issue has to do with migration of
undocumented workers in North America. Even with such important pub-
lic policy issues as migration, however, civil society organizations can play
constructive roles, by helping to educate the public and to promote dia-
logue on sensitive issues.

Among civil society organizations, North American universities—orga-
nizations with considerable budgets, and with the academic freedom
and mission to help society address important issues—should do more to
foster North American studies and cross-border exchanges among stu-
dents and professors in Canadian, Mexican, and U.S. universities. Even in
the challenging economic conditions of recession and diminished public
budgets, the NAFTA governments must do more to fund research and
教学 on issues of importance to North American integration. Such
public investment, properly targeted, will pay long-term dividends in creat-
ing a more harmonious environment in North America.

Finally, we should stop treating “North American integration” as if it
were a four-letter word. In universities and public spaces, we must begin
to devote more attention and discuss more openly the interrelated issues
surrounding North American integration. Many of the issues being ad-
dressed separately—migration of undocumented workers, environmental
problems, organized crime, and national security—are interconnected.
As a specific proposal to help highlight such discussions, I would offer the
following idea: the NAFTA governments should create a clearinghouse of
information and networking related to North American integration. Simi-
lar clearinghouses or networks do exist,157 but it would be helpful to have
a central clearinghouse as a starting point for dialogue and research on
North American integration. With funding and an imprimatur from the

157. See supra text accompanying notes 141–56.
three governments, such a central clearinghouse and website would benefit civil society organizations and others interested in engaging the issues addressed in this Essay.