LEGAL INTEGRATION IN NORTH AMERICA: DOMESTIC AND MULTILATERAL COMPARISONS
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LEGAL INTEGRATION IN NORTH AMERICA:
DOMESTIC AND MULTILATERAL COMPARISONS
Abstract

With so much attention riveted upon economic integration today, another form of integration, having to do with the laws, constitutional provisions, and judicial arrangements countries abide by, has received considerably less attention. To partly redress that imbalance, a case study of legal integration in North America is undertaken. Building upon the specific dispute settlement arrangements of chapters 19 and 20 of the North American Free Trade Agreement, two comparative studies are pursued—the first between the legal practices, constitutional requirements, and judicial contexts in Canada, Mexico, and the United States; the other between NAFTA, GATT, and the World Trade Organization provisions. Two broad findings undergird legal integration in North America: The recognition of the need a) for at least three forms of reciprocal relationships: between economic and legal forms of integration; regional procedures and their domestic counterparts; and regional procedures and their multilateral counterparts; and b) to keep the state an active participant in supranational efforts by leaving a veto power over such developments or the exit option with the state, and thereby accommodating domestic interests and cross-national divergences as widely as possible.
Background

Economic integration in North America is spawning integrative efforts in other areas as well. One of those areas involves dispute settlement between countries, which, in turn, invokes the code of law and constitutional provisions within each country. In fact, without first formulating dispute settlement arrangements, negotiations between Canada and the United States toward economic integration were deadlocked during 1987 and most of 1988. Yet, the very emergence of a binational panel under Chapter 19 of both the Canadian-U.S. agreement of 1988 and NAFTA of 1993, for example, elevates quite disparate, even incompatible, domestic practices and procedures to the regional level.¹ What are some of these, and how is the process of streamlining them taking place, if at all?

Disillusionment with the GATT dispute settlement procedures, outlined under article XXIII, contributed in part to the growth of a regional trading entity in North America. However, parallel negotiations in the Uruguay Round of GATT culminated, also in 1993, in the creation of the World Trade Organization, with its own theoretically more binding and effective dispute settlement arrangements.² How does the North American variant compare and contrast with its multilateral counterparts, especially since Canada, Mexico, and the United States, by ratifying the WTO treaty, also have recourse to this alternate arrangement?

Three sections address these and other related questions pertaining to the evolution of legal integration in North America.³ The first spells out the dispute settlement arrangements of NAFTA under chapters 19 and 20, the second compares and contrasts domestic practices and institutions, and the third does likewise to regional and multilateral arrangements. A subsequent section summarizes observations, draws conclusions, and projects implications.


Dispute Settlement Arrangements in North America

Two specific sets of arrangements emerged in North America, the second building upon the first. These are part and parcel of the Canadian-U.S. Free Trade Agreement and the North American Free Trade Agreement, respectively.

CUSFTA and Binational Panels

When the Canadian-U.S. trade negotiations broke down in September 1987, they were revived in large part by a decision to create a dispute settlement mechanism to adjudicate anti-dumping and countervailing cases. Two chapters in the ensuing agreement bear upon the mechanism adopted.

a. Through articles 1804 and 1805, Chapter 18 deals with disputes stemming from a) interpreting and implementing the FTA, b) perceived inconsistencies with the obligations of the FTA; c) nullification or impairment with regard to trade in goods, technical barriers to trade, cross-border trade in services, or intellectual property rights; d) environment and conservation agreements, sanitary and phytosanitary measures, or standards-related provisions; and e) any related agreements, such as GATT Chapter 18 also establishes the Canadian-U.S. Trade Commission. This is a cabinet-level body, like the Council of Ministers in the European Union. Articles 1808 through 1819 establish conditions for creating arbitral panels, the qualification of panelists, rules of procedures to be adopted, and the publication of reports.

b. Chapter 19 governs disputes stemming exclusively from the imposition of anti-dumping and countervailing duties (ADD and CVDs, respectively), and contains several innovative procedures. One of them is the establishment of binational panels

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6 Endsley, op. cit., pp. 128-130.

whose rulings are to be binding. Key provisions from the chapter are elaborated below.

Articles 1901 through 1905 spell out the background, bases, and scope of the dispute settlement mechanism. Whereas Article 1901 limits the applicability of provisions to the trade of only goods, not services, Article 1902 provides each party the right to apply its own trade relief laws, called trade contingency laws in Canada, and trade remedy laws in the United States. These laws typically include relevant statutes, the legislative history, regulations, administrative practices, and judicial precedents. Amendments of these domestic laws would henceforth necessitate approval of the other CUSFTA member, and be consistent with the spirit of the agreements signed and the obligations imposed by GATT. By Article 1903, any one party may request, in writing, a review of another party's ADD or CVD statute. Should this review call for remedial action, the other party is allowed several options: to follow through within 9 months, terminate the FTA with a 60-day written notice, or undertake any other legislative or executive action. By establishing a binational panel, Article 1904 allows adjudication at the supranational level instead of through a judicial review based on domestic trade relief laws. Each party provides names of 25 members to a roster, then selects 2, who may be from any country. A fifth member is chosen by both disputing parties together, and in the case of a disagreement, use is made of a lot. No one on the roster may be employed by the government, and a majority of them are to be lawyers. The panel selects its own chairman. Should a party not be able to make its two selections within 45 days, a lot is again employed. Each party may make up to four challenges of the other side's selections. In the case of allegations against a specific ruling, an Extraordinary Challenge Committee (ECC), consisting of 3 judges from a roster of 10, is to be established to investigate the complaint. Finally, by Article 1905, the panel is empowered to review allegations of domestic laws hindering the investigation of complaints filed under the FTA.

An Extraordinary Challenge Committee can also be created as a final appeal against a panel ruling. The defaulting party may choose at least 1 of 3 conditions for an extraordinary challenge: 1) misconduct, bias, or serious conflict of interest on the part of a panel member; b) departure from a rule of procedure by the panel; or c) excessive use of power, authority, or jurisdiction by the panel. While appeals to the ECC may reflect the pursuit of self-help, responses to a ECC ruling indicates the degree to which member countries are willing to live by collective rules.

8Thomas M. Boddez and Alan M. Rugman, "Effective dispute settlement: a case study of the initial panel decisions under chapter nineteen of the Canada-U.S. Free Trade Agreement", in Fry and Radebaugh, (eds.), Investment in the North American Free Trade Area, pp. 93-115; and Winham, Trading With Canada, pp. 44-46.
10Ibid., pp. 25.
Advantages

What were some of the advantages of the dispute settlement mechanism? First, since all members could be disciplined, whether it was the weaker Canada, or the stronger United States, fewer harassment cases were filed. Second, by speeding up litigation, it became more appealing than any existing national trade relief laws, or even Article XXIII of GATT. Third, unlike any existing trade dispute settlement mechanisms, CUSFTA produced rulings which were explicitly binding. Although this was a major advance, it also raised the stakes of integration: To not abide by a ruling would jeopardize the entire agreement. Finally, it strengthened multilateral provisions and obligations, and enhanced respect for the multilateral body.

Disadvantages

What were some of its disadvantages? Foremost among them was that members of the panels were not chosen independently, based on legal expertise, but from a roster supplied by the governments. This was not a convincing safeguard against the pursuit of self-help by members. Second, by making the dispute settlement mechanism the crucible for further North American integration, an unnecessary minefield was placed in the trade relations of two countries: The two countries were able to create the largest free-trade boundary in the world even without such a provision. Third, the dispute settlement mechanism could theoretically become costly and cumbersome should the number of appeals increase. Finally, there was no guarantee that performances of the dispute settlement body would not be influenced by fluctuations in the national economy—a downturn enhancing nationalistic sentiments among panelists, thereby undermining the very supranational purpose the panels were expected to pursue.

NAFTA and Binational Panels

How were the arrangements of CUSFTA broadened to embrace all of North America? At least three forms of dispute settlement measures have been adopted by NAFTA:1

a) Chapter 19 creates binational panels to review anti-dumping or countervailing duty disputes; b) Chapter 20 establishes a Free Trade Commission empowered to organize standing committees or working groups to resolve differences over interpreting and managing the overall agreement; and c) arbitral panels seek to nip disputes on a sectoral basis, for instance, each of the chapters on Financial Services, Standards, and Investment seeks party-to-party consultation to pre-empt disputes.

Several measures of CUSFTA have been retained in NAFTA, with incremental improvements. Whereas Chapter 18 of CUSFTA has evolved into Chapter 20 of NAFTA, Chapter 19 of both agreements are quite similar.

Chapter 20 is patterned much like the panel process under GATT: The Free Trade Commission (FTC), a cabinet-level political body, is the counterpart of the GATT Council: Decisions are made through consensus, and deliberated only when consultations or resolution efforts at lower, informal levels fail. The process begins when any member with a grievance over interpreting, managing, or implementing the agreement engages in direct consultations with the member causing that grievance. If a resolution is not reached in 45 days, the FTC is formally asked to mediate, which it may do by convening a variety of committees, or resort to alternate methods of dispute settlement. If the dispute still remains unresolved after 30 days, an Arbitral Panel is formed, under Article 2008, from a roster of 30 qualified individuals nominated in equal numbers by the three member countries. A panel consists of five members, two chosen by each of the disputing countries from their own nominees and a fifth selected by the FTC. It has up to 90 days to present a preliminary report, then, after each disputing country's response, to prepare a final report for the FTC. In its report, a panel must notify the FTC if privileges under NAFTA have or have not been nullified or impaired for any member, as well as recommend a solution. As at the multilateral level, compliance involves eliminating the action causing grievance; and non-compliance legitimates retaliation by the member country aggrieved.

The relationship between Chapter 20 and GATT is enhanced by Article 2005, which allows members to take a dispute to the multilateral body. While forum shopping is encouraged, consensus of all three members is required to proceed to a GATT panel.

One of the more unique and compelling contributions of CUSFTA is the dispute settlement mechanism outlined in Chapter 19. What NAFTA did, in its own Chapter 19, was to improvise several of the procedures. The underlying forces in Chapter 19 of both agreements are to a) retain national trade relief measures pertaining to antidumping and countervailing duties; b) adopt as a standard of review the measures practised in the aggrieved country; c) permit binational panels to review duty determinations by national agencies; and d) streamline to as practical a degree as possible the trade relief measures of the different countries.

For a comparison of the two agreements, see ibid. For more on CUSFTA, see several articles in Schott and Smith (eds.), The Canada-United States Free Trade Agreement; and Smith and Frank Stone, (eds.), Assessing the Canada-U.S. Free Trade Agreement, Ottawa, Institute for Research on Public Policy, 1987, and Winham, Trading With Canada.


See Winham, "Dispute settlement in NAFTA and the FTA", pp. 259.

Ibid., pp. 262-263.
Extending the arrangements of CUSTA to Mexico necessitated some significant changes on the part of that country, as Article 1907:3 and Annex 1904:15(d) Schedule B of NAFTA indicate. Nevertheless, three areas critical to the streamlining of Mexican trade laws continue to be the degrees of a) openness of the process, to injured enterprises, both at home and abroad; b) fairness of the process, in particular rising above the influences of some traditionally vested interests and institutions, as well as customs; and c) the capacity to compile records of the proceedings of injury cases, so as to permit judicial review by panels.

Both Canada and Mexico see the dispute settlement mechanism in Chapter 19 as some kind of an insurance for accessing the world's largest national market, that is, the United States. For one thing, any U.S. trade relief laws cannot now be altered without the consent of its NAFTA partners; and non-compliance by the United States would only spark retaliation. For another, should the U.S. engage in a trade skirmish with the European Union or Japan, the probability of Canada and Mexico being dragged in would be lower. Ultimately, the streamlining of national trade relief measures may result in more effective dispute settlement in North America than at the multilateral level where over 120 countries bring almost as many different national trade contingency customs and practices. Just as the advantages and disadvantages of the CUSTA dispute settlement mechanism were discussed previously, the next sections undertake a similar assessment of NAFTA's.

Advantages

What are some of the advantages of extending CUSTA's dispute settlement arrangements? First, by including Mexico, a country with a quite different legal framework and disparate trade relief process, the robustness of those arrangements and the capacity of Mexico to make necessary internal changes to adjust to a supranational body may be tested to the fullest. Second, if those arrangements endure and the costs of the adjustments are not too large, the possibility of including other countries at a subsequent stage may become less problematic, especially since NAFTA is slated to expand membership in the future. Third, the possibility of the United States exerting

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17 Winham, "Dispute settlement in NAFTA and the FTA", pp. 267-268.
19 Some insights, on Chile for example, in "Chile hopes for U.S. trade pact within two years", News, September 5, 1994, 27; and U.S. International Trade Commission, U.S. Market Access in Latin
less relational power over outcomes may be higher in this regional setting of fairly like-minded countries than in the more diverse and competitive atmosphere of GATT Fourth. Any success on the regional front would put pressure on the multilateral mechanism to experiment with the regional arrangements, which, in turn, would only have all-round beneficial consequences for trade. Finally, if all goes as planned, a giant stride may have been taken towards creating the single largest market in the world, with all the implications for meaningful regional integration.

Disadvantages

What are some of the drawbacks? First, the internal changes within Mexico still have to take roots, and the probability of those arrangements running off course is probably at its highest in these initial years—creating a suspense which may even hinder meaningful measures. Second, in the same way, the political and/or economic uncertainties accompanying Mexico, with its one-party democracy and a history of economic fluctuations, may get in the way of effective adjudication and dispute settlement. Third, in this decade of rapid economic changes, any sudden economic fluctuation in any of the three countries may add unnecessary pressure upon the dispute settlement body, and thereby threaten supranational pursuits. Finally, an article of faith has to be maintained at all times, and needlessly, that all three governments appoint panelists based upon professional merits and not political considerations.

Summary

As evident, regional arrangements in North America directly depend upon domestic practices, institutions, and decisions. Divergences at the domestic level, on the other hand, remain an ever-present challenge to expected convergences at the regional. What are some of these differences impinging dispute settlement under NAFTA?

**Broad Context of Domestic Law**

At least two features of domestic law may impact legal integration: whether civil or common law provides the foundation, and the place and role of the judiciary. Several dimensions of each are isolated for a comparative study across North America.
Civil Versus Common Law

Whereas civil law is built upon specified codes, leaving little room for judges to create law or rely too much on case law, common law revolves around the principle of *stare decisis*, which creates the scope for judges to be more interventionist and innovative, while also strengthening past decisions.\(^20\) The roots of civil law may be traced as far back as to the reforms of Justinian, the Roman Emperor, and more recently to the Napoleonic Code in France in the early nineteenth century. As a body of law, it found great appeal in continental Europe, and wherever continental European countries built empires. Common law, by distinction, is derived from the largely unwritten laws of England, and is influential wherever Great Britain extended its empire, albeit in increasingly statutory form—as has been the case for the United States.\(^21\) Yet, civil code has found its way into even the British legal framework. Nevertheless, whereas common law remains a British contribution to legal developments across most of the United States and Canada, civil law is practised in Québec in Canada, Louisiana in the United States, and all of Mexico—locations historically influenced by France or Spain.\(^22\)

Table 1 differentiates the way sources of law are rank-ordered and the roles of the key players for both forms of law. These create disparate assumptions, approaches, and methods.\(^23\)

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Table 1

Civil and Common Law: Underlying Differences

<table>
<thead>
<tr>
<th>Underlying Differences:</th>
<th>Civil Law</th>
<th>Common Law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sources (in order of importance):</strong></td>
<td><em>Constitutional: based upon specific, detailed codes</em></td>
<td><em>Constitutional: less codification</em></td>
</tr>
<tr>
<td></td>
<td><em>Treatises of legal scholars</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Stare decisis (case law)</em></td>
<td><em>Stare decisis (case law)</em></td>
</tr>
<tr>
<td><strong>Role of key players:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>a. Judges</em></td>
<td><em>a. Apply law, serve as reporter</em></td>
<td><em>a. Formulate law</em></td>
</tr>
<tr>
<td><em>b. Lawyers</em></td>
<td><em>b. Present evidence to panel of judges</em></td>
<td><em>b. Present evidence to jury; discover precedents</em></td>
</tr>
<tr>
<td><em>c. Legislators</em></td>
<td><em>c. Make law rational, predictable, certain, systematic</em></td>
<td><em>c. Make law broadly applicable</em></td>
</tr>
</tbody>
</table>

Sources

Although both civil law and common law depend upon constitutional provisions and *stare decisis*, the weight given to each is not the same. Furthermore, whereas both give top-priority to constitutional provisions, the constitutions are themselves quite distinctive. Civil law, on the one hand, is guided by specific codes which are detailed in the constitution, thereby making for a more voluminous document and offering less discretion or flexibility on the part of the judge. Common law, on the other, relies more on traditions than on codes, with the result that the constitution is less detailed and the latitude of interpretations wider. North America brings out these contrasts clearly: Mexico, which practices civil law, has a much more elaborate constitution than either Canada or the United States. In the case of Mexico, civil and criminal law are reduced to four specific codes: the civil code, code of civil procedures, penal code, and the code of criminal procedures. Although common law is widely practised in Canada, civil law

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24 Stoner distinguishes between the *rule of precedent* and the *authority of tradition* in the United States. See *op. cit.*, pp. 421-441.
is staple in the province of Québec. Common law is also practised widely across the United States, although civil law is practised in Louisiana. However, whereas both sources influence the legal framework, judicial development, and constitutional provisions in Canada, common law alone is influential in the United States.

The second-most important source drawn upon is *stare decisis* under common law, and the treatises of legal scholars under civil law. In applying standing decisions from the past, judges may find themselves creating or amending existing laws. This logically follows from not having to abide by codes. In a similar fashion, the reliance on the works of legal scholars under civil law also allows the judge more breathing space than always following specific, detailed codes. Codes oftentimes even provide references to individual scholars and their relevant works.

Interestingly, the codes provide more references to the works of legal scholars than to case law, the third primary source relied upon within the civil law framework. Standing decisions are quite often published in a society practising civil law, yet judges have turned to them less frequently, indeed, they tend not to drift too far from the codes. In Mexico, two forms of case law prevail—*ejecutorias* and *jurisprudencia*. Whereas the former represents individual opinions of the supreme or circuit courts, the latter represents binding precedents. Typically, *jurisprudencia* emerges when five consecutive *amparo* cases have produced identical rulings, and is binding on lower judicial courts, but not administrative agencies.25 *Amparo* is a legal procedural device providing for due process and detailed in Article 103 of the Mexican Constitution.26

Role of Key Players

Typical players in any legal system are the judges, lawyers, and the legislators. The roles they perform are quite different under civil and common law. As alluded to previously, whereas judges under civil law are restricted to primarily applying the codes, under common law they are able to actually formulate and amend laws. This constraint under civil law and liberty under common law has a reciprocal impact on the evolution of political institutions and practices—an issue significant and relevant enough to warrant further discussion. The next section reviews the political context within which law is practised.

The roles of lawyers are also conditioned differently. Under civil law, the key objective is to place the specific case within the somewhat broader range of

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25Bridge et al., *op. cit.,* p. 4.

constitutional provisions and codes, reflecting a deductive legal approach. In addition, the lawyer has to present evidence typically to a panel of judges, which involves additional time for a ruling to be agreed upon between judges. By contrast, under common law, the lawyer presents evidence to a jury, which then recommends a decision to the judge, who is not bound to strictly follow that decision—again indicating the far greater discretion of the common law judge over the civil law judge. Under common law, the lawyer’s approach is more inductive, requiring the application of broad constitutional principles to specific cases.

Finally, legislators, upon whom rests the task of formulating and amending constitutional provisions and principles, also find themselves moving in opposite directions. The codes under civil law need to be systematic, reflect as much precision and predictability as possible, and convey rationality. Under common law, on the other hand, legislators are entrusted with formulating and amending laws as broadly as possible. The results are contrasting: The former produces a detailed document, circumscribes deliberations in proceedings, and creates the scope for greater political intervention; the latter produces a more sparse document, encourages a wide variety of plausible interpretations, and minimizes political interference in judicial outcomes.

**Place and Role of the Judiciary**

What is the place and role of the judiciary in each of the three countries? Table 2 lists six dimensions, of many, along which comparisons are conducted.

*In Constitution*

The place of the judiciary in the constitution varies according to the legal system of the country: For the common law system in Canada and the United States, the judiciary is discussed more broadly and briefly in the constitutions than it is under the civil law system in Mexico. At the same time, constitutions reflect metanorms, that is, rules specifying how legal norms within a society are formulated, implemented, and interpreted. As such, they become higher-order norms, set the framework within which lower-order norms emerge, and in the final analysis, institutionalize the various interests of society. On the basis of how metanorms and lower-order norms are related,

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three ideal types of constitutions may emerge: the absolutist, legitimizing, and higher-law. In absolutist constitutions, both metanorms and lower-order norms originate as commands, are centralized, and place the executive powers of the country above the law; in legitimizing constitutions, metanorms furnish the framework of lower-order norms, but state institutions, functions, and resources are more decentralized, while electoral devices and practices are developed and encouraged; and in higher-law constitutions, a bill of rights checks and balances the metanorms of state and lower-order norms of society. Canada and the United States have typically been placed in this third category, while Mexico’s experiences approximate characteristics of the second more than any others. This relationship between metanorms and lower-order norms influences not only the evolution of judicial institutions, but also their relationships with the institutions of government, as evident in the discussions to follow.

Table 2

Place of the Judiciary:
A North American Comparative Perspective

<table>
<thead>
<tr>
<th>Place of Judiciary:</th>
<th>Canada</th>
<th>Mexico</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. in constitution</td>
<td>Section 101 of constitution for all Canada, Section 92:14 for provinces</td>
<td>detailed, specific chapter</td>
<td>broad, brief section (Article III:3)</td>
</tr>
<tr>
<td>2. in government</td>
<td>fusion of power between executive &amp; legislature, leaving judiciary as only independent branch</td>
<td>separation of power; Article 49 creates independent judiciary</td>
<td>separation of power; Article III creates dependent judiciary</td>
</tr>
<tr>
<td>3. in relation to the chief executive</td>
<td>mixed relationship: independent in performing duties and power of ultra vires; dependent on government for appointment (by GG)</td>
<td>subordinate; president appoints judges to Supreme Court of Justice (Article 96), based on counsel of Senate</td>
<td>independent; president appoints judges to Supreme Court, subject to Senate ratification (Article II:2)</td>
</tr>
</tbody>
</table>

29Stone, op. cit., pp. 445-446.
4. in terms of supreme court appointments (1950-1985):
   a. frequency of appointments:
   b. average tenure:

Three levels:

5. in terms of internal hierarchy:

6. in terms of judicial review (JR):

*exclusive provincial authority with a hierarchy of supreme, county, provincial, & municipal courts (Section 92:14);

*Supreme Court of Canada from 1875, with 9 judges (Section 101);

*Federal Court of Canada from 1971, with appellate and trial divisions (Section 101)

not explicitly provided in constitution, but Constitution Act of 1982 brought due process under courts; Supreme Court serves as constitutional advisor for federal government & parliament

power of JR restricted to: (a) conflicts between federal and state governments; & (b) protection of individual liberties (Article 103)

not explicitly provided by Constitution, but implicitly derived

**In Government**

The place of the judiciary in the government refers to how autonomous it is of other branches of government. As it transpires, the constitution in all three countries emphasize an independent judiciary. Even though power is fused between the executive and legislature in Canada, a distinct division of power tradition has
emerged with regards the judiciary,\textsuperscript{30} Article 49 of the Constitution of Mexico stipulates explicitly the separation of power between branches; and Article III of the Constitution for the United States creates an independent judiciary in a system of checks and balances with the other two branches, which are also independent. Beyond the specific articles, however, the distribution of power in the government, as well as the degree of checks and balances stipulated, suggest that the judiciary, as too the Congress, in Mexico, are not quite as independent as Article 49 leads one to expect. Whereas in Canada and the United States the judiciary, as well as the legislature, have the instruments to check and balance executive power, in Mexico neither branch has demonstrated the ability to do so, nor does the constitution provide them as many instruments to do so with.

In Relation to the Chief Executive

The constitution gives the Mexican president enormous powers. For instance, there is no clear provision to override a presidential veto, and his judiciary appointments are largely discretionary and lacks a detailed legislative review. As indicated in Table 1, in relation to the chief executive's place, position, and power, the judiciary is relatively subordinate in Mexico and highly independent in the United States, with the Canadian somewhere in between. To add to the domination of the chief executive in Mexico is the pervasive presence of a single party. Although Canada and the United States have not had their constitutions identified in terms of a single party, as in the case with Mexico, every party to win an election in both countries has wanted to stack the Supreme Court with judges sympathetic to its own policy preferences whenever occasion has arisen. In Mexico, however, the PRI, in continuous power since 1929, has been able to mould just about every constitutional amendment.

In Terms of Appointments

In Mexico and the United States, the president appoints all Supreme Court judges. Whereas in Mexico the legislature has played the role of a rubber-stamp of presidential appointments, in the United States these appointments are ratified through a rigorous process in the Senate. In Canada appointments are made by the Governor General, who is himself appointed on the recommendation of the federal cabinet. The terms of appointment are also set by the federal cabinet, thus creating a partisan influence similar to the presidential nominations in the United States, but different in the crucial aspect of ratification in the legislature. Since the Canadian Senate is appointed largely under the influence of the Prime Minister, who is also leader of the majority party in

the House of Commons, ratification becomes a meaningless process. Nevertheless, the Canadian judiciary exerts the power of *ultra vires*, that is, the capability to declare void any executive or legislative decision.

Judicial branch stability, measured in terms of the average tenure of a judge, may affect performances. More judges are appointed in Mexico, for example, than in the United States over any given period of time, and the average tenure of the judges is shorter in Mexico than in the United States—factors suggesting a higher degree of flux, though not drastically so. For instance, whereas Mexico has averaged a new appointment every year between 1950 and 1985, the United States averaged 1 every 2 years. The average tenure of a Mexican Supreme Court judge during the same period was 7 years, in the United States 12. It may be premature to comment on how this plays out at the supranational level. However, it would be interesting to keep an eye on whether NAFTA accentuates convergences in the number of appointments made and the average tenure in the member countries, the way it affects convergences in the national trade relief laws.

**In Terms of Internal Hierarchy**

In all three countries the judicial system is federal, that is, having two levels of adjudication, each with a hierarchy. At the federal level, the Supreme Court is at the apex, district courts at the bottom, and circuit courts in between. Although federal laws and the constitution are above laws at any other level, in Canada and the United States, the federating units, provinces and states, respectively, make laws in certain areas where federal laws have not been formulated, thereby creating pockets of equal status and stature between the different levels of courts. A different pattern prevails in Mexico, where the Supreme Court consists of four chambers, each representing civil, criminal, administrative, and labor law, respectively. In Canada, a three-level judiciary has evolved over time, representing the provinces, supreme, and federal courts. Section 92:14 of the Constitution extends exclusive authority to the provincial government over the judiciary. The form which evolved reflects a hierarchy with the supreme court at the top, and the county, provincial, and appellate courts placed below. Québec and Nova Scotia have municipal courts in addition. At the same time, Section 101 created the Supreme Court of Canada, which originated in 1875, but assumed greater autonomy from 1949 as the ultimate appellate court over civil and common law with 9 judges. It also created the Federal Court of Canada from 1971 with appellate and trial divisions. Whereas the appellate courts have 10 judges, the trial courts have 14.

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31 For more discussion on this issue, and especially with regards Mexico, see Robert E. Biles, "The position of the judiciary in the political systems of Argentina and Mexico", *Lawyer of the Americas*, Vol. 8, 1976, pp. 289-291.

32 When *supreme court* does not begin with a capitalized alphabet, reference is to the court at the federating unit level, when it does, reference is to the federal level.
In Terms of Judicial Review

Finally, the scope of judicial review also seems to be different. The Canadian Constitution did not originally create any courts, and it was not until the Constitutional Act of 1982, which included the Charter of Rights and Freedoms, that constitutional rights for individuals, including due process, were brought under the courts. Nevertheless, the Supreme Court of Canada serves as a constitutional advisor for the federal government and parliament. It also hears appeals from courts in the provinces. In Mexico, only two areas have been specified by Article 103 of the constitution for full-fledged judicial review: in conflicts between federal and state authorities; and in protecting individual liberties. Whereas the weaknesses of the judicial branch are quite evident when dealing with the former, its strengths are equally visible when evaluating the latter. In the United States, although the constitution does not explicitly provide the courts the power to undertake judicial review, it has been implicit in the actions and decisions of judges all along.

Summary

The argument that legal integration in North America depends upon domestic practices, institutions and decisions is amplified in this section. In turn, differences and similarities between the three countries are highlighted, indicating the complex domestic panoply against which regional dispute settlement arrangements are invoked. The next section elaborates similarities and differences between Chapter 19 of NAFTA and multilateral dispute settlement arrangements, and in the process further demonstrate the legalization process currently evolving in the international system, creating both opportunities and complications.

Multilateral Level: A Comparison

How do multilateral dispute settlement arrangements compare with the North American? Table 3 provides the framework of analysis for GATT, North America.

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and the WTO arrangements, in that order; comparisons along twelve illustrative, non-exhaustive dimensions follow. Since the North American arrangements were spelled out earlier, more attention is paid the two multilateral variants here.

**Formal Procedures**

These are spelled out through articles XXII and XXIII of GATT, Chapter 19 of CUSFTA/NAFTA, and Annex 2 of the WTO. For a multilateral arrangement, the formalized procedures of GATT are too brief and broad—perhaps fitting for when they were formulated, in 1947, but far too inadequate for the complexities of trade in the 1990s. By contrast, the WTO, which in fact incorporated the GATT document, provides more elaborate procedures, blending well not only with the increased competitiveness of today, but also largely independent of the meta-power influence GATT was formulated under. Whereas Article XXII lays out the procedures of consultation, Article XXIII elaborates procedures of nullification or impairment of benefits—the terminology by which complaints are filed and panels established for investigation. The North American arrangements, are sufficiently detailed to address the trade relations of the three signatories, but flexible enough for future expansion and informal enough as to not threaten national arrangements.

**Central Agency Responsible:**

For the GATT, the central agency was the Council, for North America binational panels, and for the WTO the Dispute Settlement Body (DSB). All three agencies create specific panels for each case filed and select panelists from an existing roster. Between 3 and 5 of them, are chosen for the multilateral bodies, and 5 for the North American. Although panelists are nominated or appointed by the member countries for all three agencies, these nominations or appointments tended to be politically-determined for GATT, since the GATT Council was an executive arm of all high contracting parties, but largely for professional considerations for CUSFTA/NAFTA and the WTO. In fact, both these latter arrangements require that either lawyers and judges, or other legal experts, constitute the majority of nominees or appointees, or be accorded extra consideration in the selection process.

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Table 3
Supranational Dispute Settlement Arrangements:
A Comparative Profile

<table>
<thead>
<tr>
<th>Features</th>
<th>GATT</th>
<th>CUSFTA/NAFTA</th>
<th>WTO</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Formal procedures</td>
<td>Articles XXII, XXIII</td>
<td>Chapters 18, 19</td>
<td>*Annex 2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*Article II:2</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>(binding clause)</td>
</tr>
<tr>
<td>2. Central agency responsible</td>
<td>GATT Council: creates panels of 3-5 members</td>
<td>Binational panels</td>
<td>Dispute Settlement Body: creates panels of up to 5 members</td>
</tr>
<tr>
<td>3. Nature of panelists</td>
<td>political/professional</td>
<td>judges/ lawyers</td>
<td>Legal experts</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*consultations</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(article 4)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*good offices</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(#5, #24)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*conciliation</td>
</tr>
<tr>
<td>4. Political methods of dispute settlement</td>
<td>*consultation</td>
<td>reliance on domestic trade relief review procedures</td>
<td>*conciliation</td>
</tr>
<tr>
<td></td>
<td>*conciliation: bilateral, plurilateral, multilateral</td>
<td>*recommendations: by panels (#19), Appellate Body (19), DSB (#16, #17)</td>
<td>*mediation (#5, #24)</td>
</tr>
<tr>
<td></td>
<td>*mediation through DG or independent experts</td>
<td>*surveillance (#21), *compensation &amp; suspension of concessions (#22)</td>
<td>*conciliation</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Legal methods of dispute settlement</td>
<td>*GATT Council: plenary meetings, intersessional committees, panel of experts</td>
<td>*Binational panel created for each case: reviews domestic rulings made</td>
<td>*Panel procedure (#6-16, #18, #19)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*Appellate Review Procedure (#7-19)</td>
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<td></td>
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<td>*DSB Ruling (#16,17)</td>
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<td>*Reports (#16, #17)</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>*Arbitration (#25)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*Domestic court proceedings</td>
</tr>
</tbody>
</table>

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### Political Methods of Adjudication

Although politically-motivated solutions are inherent in the trade dispute settlement process as we know it today, how they relate to legally-derived solutions sheds light on the relative strength between rule-orientation in each agency. For example, political methods of adjudication were considerably more important for cases under GATT than they are expected, or mandated, to be for the WTO. Although the North American binational panels only review rulings already made at the domestic level, where the political element is ever present, the resort to a binational review process adds a conspicuous legalistic flavor.

Both multilateral arrangements depend upon political solutions, as evident in the numerous provisions outlined. Taking the case of GATT first, following a written complaint, the injured party would seek (a) consultation or conciliation—which may be bilateral, plurilateral, or multilateral—or mediation through the office of the Director General, independent experts, or any other individual or institution; or (b) a
solution through the GATT Council, which serves as an executive arm of the contracting parties, when consultation or conciliation fail.\textsuperscript{36}

The WTO requires the process to begin with consultations. Should they so desire, disputants may also seek good offices, conciliation, and mediation through the Director General. Article 6:1 provides the right to a panel, obligating the disputing parties thereby to follow any recommendations made by the panel. Recommendations may also be made at a subsequent stage of the adjudication process, by the Appellate Body and the DSB itself.

Legal Methods of Adjudication

Whereas the North American arrangements are structured to review a ruling already made by a member country, the two multilateral counterparts initiate the legal process themselves. For the GATT, until 1955, the Council reviewed complaints in biannual plenary meetings, through inter-sessional committees, or by delegating them to working parties. Since then, disputes were increasingly submitted to a panel of experts, marking a shift away from a negotiated to an arbitrated settlement.\textsuperscript{37} Of the 233 disputes initiated between 1947 and 1987, 42, or 18\%, were either settled through consultations or withdrawn.\textsuperscript{38} In a majority of cases, consultations were bilateral.\textsuperscript{39} During the same period, 90 cases have been settled by panels,\textsuperscript{40} representing about 85\% of all cases brought to the Council.\textsuperscript{41}

These panels had between 3 and 5 members, who examine the complaint in terms of the provisions of GATT and submitted a legally-derived report to the Council, which either adopted, or acknowledged without approving, the report. No report was outrightly rejected.\textsuperscript{42} Although the Council was charged with deliberating reports and adopting appropriate measures, its rulings were to be unanimously approved. Since voting is based on the principle of one-country, one-vote, the defaulting party was able to veto any decision.\textsuperscript{43}

\textsuperscript{38}Ibid., p. 66.
\textsuperscript{39}Petersmann, "International and European foreign trade law", p. 468.
\textsuperscript{40}Jackson, Restructuring the GATT System, p. 66.
\textsuperscript{41}W. Christopher Lenhardt and Michael Ryan, "Rules and outcomes in GATT dispute settlement", Paper presented at the American Political Science Association annual convention, Washington, D.C. September 2-5, 1993, Table 1.
\textsuperscript{42}Jackson, Restructuring the GATT System, p. 66.
\textsuperscript{43}Pescatore creates 3 phases of the process between the establishment of a panel and the GATT Council response—the first and the last being what he calls the political phase. See op. cit., pp. 13-14.
In the WTO, once the DSB decides on a panel, its composition has to be determined within twenty days. Generally, the procedures follow GATT practices, a key difference being the tighter time-limits, as explained below. As with GATT, disputes are categorized into violation complaints, non-violation complaints, and situation complaints, with the latter two subjected to greater screening than the first. Unlike the GATT, however, several reports are required—interim and final reports by the panel, appellate reports, and reports for suspending concessions to non-complying parties. All of these undergird the judicialization of the trade dispute settlement process at the multilateral level.

Rulings

The slow shift towards rule-orientation under WTO is further evident in the nature of rulings. Rulings under GATT required unanimity, which was not only hard to obtain from the large number of members, but could also be aborted since any dissenting party could easily exercise the veto power. By contrast, the WTO relies on consensus, a more relaxed approach to a difficult task. In North America, the binational panels rely on majority voting of the panelists.

Time Involved

Another indication of the shift towards rule-orientation is the tighter time-limit for the WTO, as contrasted to the GATT Panels have, at most, 6 months, and the Appellate Body up to 3 months. Under GATT, the corresponding time-limit for the panel was upwards of 1 year. The CUSFTA/NAFTA panels are also required to issue a ruling within the year—315 days to be exact between the filing of a case and the issuance of the ruling.

Appeal Possible

Given the veto potential under GATT, the possibility of appealing a ruling was an exercise in futility, at best, since the rulings themselves were not binding. By contrast, both arrangements CUSFTA/NAFTA and the WTO make special arrangements for appeals. In the former, this is through the Extraordinary Challenge Committee, in the latter through the Appellate Review Board. Rulings of both are binding.
Nature of Appellate Review

Yet another indicator of the ongoing judicialization of the trade dispute process is in the nature of appellate reviews. Whereas under GATT an appeal was not necessary given the presence of the veto power, both the North American and WTO arrangements specifically permit this option and elaborate the procedures. Both the Extraordinary Challenge Committee and the Appellate Review Board consist of 3 members, drawn from a roster of legal experts and professionals supplied by the member countries, and rulings are made by a majority vote. The key difference between them is that a dissatisfied disputant is allowed to serve notice to terminate obligations under the agreement in North America, but no provision of this kind exists for the WTO.

Follow-up

Supervision of follow-up action also reaffirms the trend towards legalizing the dispute process over trade. Whereas the GATT was conspicuous by not monitoring the implementation of rulings, the WTO allows for a wide variety of supervisory procedures. Given the large membership of GATT, though, monitoring these procedures may prove a daunting task. Being a much smaller outfit, CUSFTA/NAFTA, which allows disputants to either follow through on each ruling or terminate membership, can monitor the follow-up much more expediently and effectively.

Binding

Both the North American and WTO arrangements are explicitly binding—a significant departure from the GATT. Although precedence plays a big part under GATT, this in itself does not make the arrangements or rulings binding. Further debilitating for GATT is that it is not regarded a treaty, hence, its provisions are not technically binding themselves.

Sanctions

Although sanctions are explicitly provided for in North America and the WTO and implicitly in GATT, the nature is quite different within each context. Whereas both the power reputation and rule application served as sanctions under GATT, in the other two sets of arrangements, rule-application alone determines the sanctions to be imposed.
Advantages

What may be some of the advantages of multilateral arrangements? First, they add order and predictability to global trade, useful for both expanding trade flows and minimizing self-help practices. Second, they make unnecessary regional trading patterns, thereby eliminating potential sources of conflict. Third, supranational pursuits are enhanced, either in conjunction with the pursuit or in place of sovereign interests. Fourth, they strengthen the shift from a power orientation towards a rule orientation in inter-state behavior. Finally, the transformation from GATT to the WTO suggests that the momentum towards global-level integration has not been constrained in any significant way by efforts at regional-level integration.

Disadvantages

Similarly, what are some of the disadvantages? First, greater openness in trade may worsen existing terms of trade and make more asymmetrical trading patterns, as the relatively developed economies are structured to reap more benefits than relatively less developed ones, at least in the short-term. Second, serious efforts already made in structuring regional trading relations may become, in the worst of scenarios, an exercise in futility, and in the best, duplicitous and inefficient. Third, although the WTO marks a distinct improvement over GATT arrangements, there is no guarantee compliance or consistent trading behavior will prevail over non-compliance or inconsistent trading behavior, particularly since the historical record offers no precedent in this regard, and all the more so in an increasingly multipolar global political economy. Finally, even if the revised multilateral arrangements operate effectively, as a function of their increasing viability, they may produce a complicated and cumbersome bureaucracy which may become too costly to maintain and progressively debilitate the very institutions and practices offering hope and stability.

Relationship Between Regional and Multilateral

Although legal integration developed in North America as an alternate to the dispute settlement arrangements of GATT, in part because of the increasing non-compliance and even open violation of Article XXIII provisions, it provided through the binational panel mechanism the platform upon which the more elaborate and respectful multilateral provisions of the WTO were built. As such, it is an independent and innovative attempt, on the one hand, and part of an international movement towards a more rule-oriented and disciplined form of trade relationship between countries, on the other. Finally, it also overlaps with, and thereby depends upon, the multilateral arrangements of the WTO.
Conclusions

Even a cursory analysis of North American legal integration reveals a number of basic and unique features.

First, a reciprocal relationship with domestic practices, institutions and decisions is fundamental. With the authority to review national trade relief determinations, chapter 19 of NAFTA not only invokes a variety of domestic-level factors, but can also recommend changes in domestic legislations to suit the collective needs of North America. Those well-established domestic-level factors, in turn, are now subject to adjustments triggered by supranational needs—a process which may involve limited efforts in some areas, but concerted efforts in others. What makes legal integration in North America important and relevant, though, is that each member retains a veto power—a formula which may be more practical for supranational integration than others to have been tried thus far.

Second, legal integration in North America is being sought within the multilateral context, not against it. This too is a feasible development, especially since the perceived weaknesses of the GATT dispute settlement arrangements provided in part the fuel for North American integration to assume the seriousness it did in the 1980s. By formulating a binding mechanism under chapter 19, NAFTA may even have catalyzed the adoption of a more effective and binding set of arrangements through the World Trade Organization. This chain reaction strengthens the rule of law over power considerations at the global level, creating an environment in which competitive efforts at regulating trade through law may produce the long-sought global-level goal of stabilizing the trading order.

Third, one of the basic units of North American legal integration—the binational panel—is not just an institutional innovation of considerable supranational and legal importance, but also constructed to not override the role and relevance of domestic trade relief practices and provisions. As a halfway house, it may serve as some sort of a model for other regional arrangements in the making, or even the multilateral organization.

Fourth, North American legal integration squarely places domestic political considerations in the limelight and before more scrutinizing eyes. Trade-offs between vested domestic interests and supranational pursuits, always a domestic political decision, have now to be made against the backdrop of higher stakes—demanding a more responsible and collective-minded approach from decision-makers.

Finally, although the multilateral set of arrangements provide a context for North American legal integration, it also serves as a corrective. Through forum shopping, members of NAFTA may help strengthen the very arrangements of Chapter 19, and set into motion a competitive process of dispute adjudication that can only enhance the recourse to and respect for the rule of law over the historical reliance on power considerations or reputation in resolving conflict.
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