THE 2008 WING-TAT LEE LECTURE IN INTERNATIONAL AND COMPARATIVE LAW

A Proposed North American Regional Development Fund: The Next Phase of North American Integration Under NAFTA

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> Our three countries have enjoyed a thriving relationship derived from their decision to open doors and break down barriers. [M]arkets continue to open up for a freer flow of goods, services and investment, and our economies are integrating as never before. By expanding trade, investment and employment, the NAFTA is enhancing opportunities for the citizens of all three countries and has made our trilateral relationship more dynamic.
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> —Statement by NAFTA Trade Ministers on NAFTA's tenth anniversary[1]

INTRODUCTION

NAFTA is misnamed. More than a "free trade agreement," the North American Free Trade Agreement is a blueprint for economic integration of the first-, eighth- and ninth-largest national economies in the world. NAFTA sets forth rules not only to promote trade in goods and services, but also to further cross-border investment, promote capital movements and international payments, protect intellectual property rights, and address antitrust considerations and a wide range of other business and economic concerns. Measured against the historical dearth of multilateral agreements in North America, NAFTA should be viewed as

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1. PIERRE S. PETTIGREW, ROBERT B. ZOELLICK & FERNANDO CANALES, NAFTA: A DECADE OF STRENGTHENING A DYNAMIC RELATIONSHIP 1 (2003), *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file606_3595.pdf.

a "relationship agreement," an important departure for neighboring countries that have ignored each other as much as possible. The statement quoted above, made by the trade ministers of Canada, Mexico, and the United States (NAFTA Parties) on the tenth anniversary of NAFTA taking effect, recognizes NAFTA's importance as a new direction in North American relations.

The statement that NAFTA is a "relationship agreement" does not mean that the NAFTA Parties sought to cede political or even economic sovereignty to a supranational authority. While an important departure from the past, NAFTA was nevertheless a very tentative step towards trilateral cooperation. Indeed, NAFTA's viability is still being questioned by important leaders in all three NAFTA countries. In adopting the Free Trade Agreement, the NAFTA Parties were careful to avoid imposition of a supranational authority with any meaningful rule-making power separate from that of the individual governments operating in unison. They also avoided the inclusion of any meaningful social agenda in NAFTA, ignoring the major differences in economic development that exist in North America. As discussed below,[2] NAFTA's proponents contended that it would spur economic growth in Mexico, relieving social pressures in that country.[3] One can argue that NAFTA has helped generate considerable economic growth in Mexico as well as in Canada and the United States,[4] but that growth has not resulted in leveling the fields of economic development in the three countries. Roughly half of Mexico's population was mired in poverty prior to the conclusion of NAFTA, and half of the population remains mired in poverty fifteen years after NAFTA took effect.[5]

In adopting NAFTA as an ambitious blueprint for economic integration, the NAFTA governments carefully avoided any reference to the model of economic integration that has been pursued for half a century in Europe. More precisely, the governments of Canada, Mexico, and the United States chose to reject two important pillars of

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2. *See infra* notes 95–100 and accompanying text (describing NAFTA proponents' predictions of the agreement's effect on the Mexican economy).

3. NORRIS C. CLEMENT ET AL., NORTH AMERICAN ECONOMIC INTEGRATION: THEORY AND PRACTICE 281–85 (1999).

4. *See* GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 1–2 (2000), *available at* http://bookstore.petersoninstitute.org/book-store//332.html (citing the growth of NAFTA economies above the average of Organisation for Economic Co-operation and Development countries during the first decade of NAFTA's existence).

5. The World Bank, Poverty in Mexico—Fact Sheet, http://go.worldbank.org/MDXERW23U0 (last visited Sept. 20, 2008) ("In 2002, half the population in Mexico was living in poverty and one-fifth was living in extreme poverty.").

European unification: (1) free movement of workers, one of the fundamental freedoms of European unification; and (2) the harmonization of social welfare and environmental protections, which was deemed necessary to prevent "social dumping" in Europe—i.e., the migration of industries to regions of poorly paid workers and environmental degradation.[6] The European Union (EU) is the most ambitious and successful economic, social, and political unification of separate nations ever achieved. While NAFTA is a much more limited attempt at integration than the EU, the NAFTA nations, instead of rejecting the EU model out of hand, should analyze the European experience and consider what aspects of the European approach to economic integration might work in North America.

Part I of this article briefly examines the EU's experience in promoting greater "social cohesion," a phrase embraced by EU policy-makers, which signifies the goal of assisting disadvantaged persons and poorer regions within the European Union in sharing in the prosperity enjoyed by the most economically advantaged regions of the continent.[7] Part II presents a dramatic contrast between the EU and NAFTA, which fails to address with effective trilateral measures the differences in levels of economic development and poverty that exist in North America.[8] The central thesis of this article is that the public infrastructure for a competitive, prosperous economy is lacking in Mexico, and that such an infrastructure is not likely to be established in the near future without assistance from Mexico's NAFTA partners, which are the logical source of assistance. The unauthorized migration of Mexican workers to the United States, a prime safety valve for the Mexican poor, is one result of NAFTA's shortcoming in this regard.[9] Part III presents a brief survey of development assistance to Mexico and suggests an alternative to the present approach: the creation of a North

6. The conclusion of NAFTA's supplemental agreements on labor cooperation and environmental cooperation were politically expedient, especially in the United States, but it is hard to argue that the agreements represent a nascent social agenda. Both the North American Agreement on Labor Cooperation and the North American Agreement on Environmental Cooperation clearly state that each country may set its own standards of labor or environmental protection—there would be no effort to force the setting of North American standards in these areas. *See* North American Agreement on Labor Cooperation (NAALC), U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1499 (1993), *available at* http://www.naalc.org/naalc/naalc-full-text.htm; North American Agreement on Environmental Cooperation (NAAEC), U.S.-Can.-Mex., art. 3, Sept. 14, 1993, 32 I.L.M. 1480 (1993), *available at* http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english.

7. *See infra* Part I (discussing social cohesion).

8. *See infra* Part II (contrasting EU development of social policy with that of NAFTA).

9. *See infra* Part II (discussing NAFTA's impact on Mexico).

American Regional Development Fund to counteract weaknesses in physical and institutional infrastructure in Mexico.[10]

I. THE EUROPEAN UNION MODEL

A. Free Movement in the European Union

The Treaty of Rome, signed in 1957 by the original six members of the European Economic Community (EEC), the predecessor of the EU, set forth in Article 3(c) a lofty principle of "the abolition, as between Member States, of obstacles to the free movement of . . . persons."[11] The treaty established a right of movement of persons engaged in economic activities, including workers, service providers, and others.[12] This original concept of freedom of movement has been strengthened and carried forward in the subsequent agreements and enlargements of the EEC. Through the adoption of numerous regulations and directives, and thanks to numerous decisions of the European Court of Justice, EU law gradually strengthened the right of movement for workers and their families, for students, for service providers, and even for persons seeking employment.[13]

At least in the first half-century of European integration, the guarantee of free movement of persons did not bring about a vast international migration of workers in Europe, despite differences in wages in the region.[14] The second enlargement of the EEC in the 1980s, which added Greece, Portugal, and Spain to the EEC, raised the specter of possible mass migrations of workers from low-wage areas to more affluent countries. At the time it joined the EEC, Spain's per

10. *See infra* Part III (analyzing the current and alternative approaches to development in Mexico under NAFTA).

11. Treaty Establishing the European Economic Community art. 3(c), Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome], *available at* http://www.interreg3c.net/sixcms/media.php/5/EC+Treaty.6806.pdf.

12. CATHERINE BARNARD, EC EMPLOYMENT LAW 111 (Oxford Univ. Press 2d ed. 2000) (1995).

13. *See id.* at 112–96 (setting forth a chronological development of the right of free movement of persons within the EU during the second half of the twentieth century); *see also* Christopher J. Cassise, *The European Union v. The United States Under NAFTA: A Comparative Analysis of the Free Movement of Persons Within the Regions*, 46 SYRACUSE L. REV. 1343, 1351–52 (1996); Francis J. Conte, *Sink or Swim Together: Citizenship, Sovereignty and Free Movement in the European Union and the United States*, 61 U. MIAMI L. REV. 331, 342–47 (2007); Mark Jeffery, *European Union Developments: The Free Movement of Persons Within the European Union: Moving Employment Rights to Fundamental Rights*, 23 COMP. LAB. L. & POL'Y J. 211, 211–12 (2001).

14. Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 971–74 (1994).

capita income was only one-third of Denmark's and less than half that of France. Portugal's per capita income was even lower, only half that of Spain.[15] Supporters of the enlargement worried that the income discrepancy between rich and poor European states would cause massive labor migration to France and Germany, especially since opening trade in agricultural products was likely to cause severe disruption of the agricultural industries of the "less developed" European states. The fear was that if the EEC did not lessen the "development gap" between its members, the unemployed would inundate the affluent states.[16]

Despite the (relative) freedom of labor movement guaranteed under EU law, mass migration of workers between EU members has not materialized.[17] Even after the addition of twelve new members in 2004 and 2007, including ten former Soviet Union countries, freedom of labor movement continues to be recognized as a fundamental freedom. With the expansion to a union of twenty-seven members, however, free movement of labor has become a more complicated and haphazard principle that has weakened the broader concept of "free movement."[18] In the 2004 expansion to twenty-five members, the EU's first ten members received the option to control immigration of workers from the newer EU members, reflecting concerns over the influx of foreign laborers from economically disadvantaged areas of the expanded Union. According to information on the official EU website, the original Member States are free to decide whether to grant access to their labor markets and may grant access to citizens coming from one new country but restrict it from citizens of another.[19] Each Member State is free to fix its own policy according to its own political strategy.[20] Despite this

15. THE SECOND ENLARGEMENT OF THE EEC: THE INTEGRATION OF UNEQUAL PARTNERS 69 (Dudley Seers & Constantine Vaitsos eds., 1982).

16. *Id*. at 8, 31, 81–83, 252–53.

17. Bradly J. Condon & J. Brad McBride, *Do You Know the Way to San José? Resolving the Problem of Illegal Mexican Migration to the United States*, 17 GEO. IMMIGR. L.J. 251, 291 (2003) (illustrating that, as of 1996, only 1.5% of the EU population lived in another EU country); *see also* Johnson, *supra* note 14, at 971–74.

18. *See* Conte, *supra* note 13, at 340 (arguing that despite the EU's "generous legal framework," many practical, administrative obstacles and xenophobic attitudes put a brake on free movement of workers).

19. *See Commission Factsheet on the Transitional Arrangements Relating to Enlargement*, http://ec.europa.eu/youreurope/nav/en/citizens/services/eu-guide/trans-measures/trans-measures_en.pdf (last visited Sept. 20, 2008) (stating that concerns over large scale migration from the underdeveloped regions of the central European states caused the EU to allow members to adopt transitional periods for full implementation of freedom of movement, but this transitional period cannot exceed seven years).

20. *Id.*

discretionary approach to recent EU expansion, migration of labor from newer to older EU members has not been dramatic to date. According to a 2006 report of the European Commission, the flow of labor between the original EU ten and the newer fifteen members was very limited and had little effect on the labor market.[21]

Thus, despite the principle of relative free movement of labor incorporated in the EU constituent treaties, wholesale migration of workers has not occurred within the European Union. According to Francis Conte, less than two percent of the average EU Member State's working population comes from other Member States.[22] Conte attributes this trend to persistent reluctance among Europeans to hire foreign citizens, but there may well be other reasons for the lack of worker migration in Europe. First, the EU Social Charter has gradually evolved to address differences in labor protection among Member States. Second, the European Regional Development Program (ERDP) provides significant funding from the EU budget for the economic development of poorer member nations.

While the European Social Charter is not likely to serve as a model for North American integration, for reasons discussed below,[23] the ERDP is a potential model for more effective North American integration. The following section outlines the Social Charter before examining the ERDP in more detail.

B. The EU Social Charter

In contrast with NAFTA's failure to address the effects of free trade on public welfare,[24] European unification has been grounded on a principle of coordinated social policies, including the harmonization of labor policies and standards.[25] Article 117 of the original Treaty of

21. *See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions*: *Report on the Functioning of the Transitional Arrangements Set out in the 2003 Accession Treaty (Period May 1, 2004–April 30, 2006)*, at 5, COM (Feb. 2006), *available at* http://ec.europa.eu/employment_social/news/2006/feb/report_en.pdf. Only 1% of the German work force, 2.7% of the Belgian work force, and 0.4% of the UK work force consists of workers from the newest EU members. *Id.* at 8. *But see* Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J.L. & PUB. POL'Y. 341, 369 (2007) (citing the emigration of 800,000 Poles as a result of Poland's accession to the EU).

22. Conte, *supra* note 13, at 338–39.

23. *See infra* notes 189–200 and accompanying text.

24. *See infra* notes 136–38 and accompanying text.

25. Craig L. Jackson, *Social Policy Harmonization and Worker Rights in the European Union: A Model for North America?*, 21 N.C. J. INT'L L. & COM. REG. 1, 10 (1995); *see also* Donald C. Dowling, Jr., *From the Social Charter to the Social Action Program 1995–1997: European Union Employment Law Comes Alive*, 29 CORNELL INT'L L.J. 43, 60–77 (1996)

Rome established a hortatory principle that Member States "agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained."[26] Article 118 admonished the European Commission to promote "close cooperation between the Members States and facilitate the coordination of their action in all social policy fields."[27] The EU's attention to social welfare policy did not immediately mean that the EU would itself be responsible for the regulation or provision of social welfare. Despite the breadth of vision contained in the EC Charter, member nations did not immediately act upon the vague social welfare provisions in the Treaty of Rome.[28] In this respect, the development of NAFTA is similar to the European experience in that freedom of trade and investment precede concerns for social welfare.

According to Stefano Giubboni, the lack of initial EEC attention to social policy was simply an extension of the understanding that the direct provider of social welfare was the nation state.[29] By the mid-20th century, the societies that formed the EEC embraced the notion that governments had a preponderant responsibility to provide for the welfare of people whom they governed. Thus, according to Giubboni, the EEC's initial reluctance to directly address the social welfare needs of European society did not indicate a lack of interest, or even a lack of a role, for the Community.[30] Rather, the Member States were "imbued with the embedded liberalism compromise . . . [it was understood that the] EEC would, therefore, have no need . . . of social powers of its own."[31] Giubboni concludes that the EEC's enshrinement and constitutionalization of free market economic principles in the economic field "would be based on the guarantee, no less secure for being implicit, of the preservation of strong and deeply rooted national welfare-state systems."[32]

(enumerating the rights contained in the European Social Charter).

26. Treaty of Rome, *supra* note 11, art. 117.

27. Treaty of Rome, *supra* note 11, art. 118.

28. BARNARD, *supra* note 12, at 2–20; *see also* Tony Atkinson, *Social Inclusion and the European Union*, *in* INTEGRATION IN AN EXPANDING EUROPEAN UNION: REASSESSING THE FUNDAMENTALS 143, 144–45 (J.H.H. Weiler, Iain Begg & John Peterson eds., 2003) (stating that social policy received little attention in early days of the European Economic Community).

29. STEFANO GIUBBONI, SOCIAL RIGHTS AND MARKET FREEDOM IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE 16 (Rita Inston trans., 2006).

30. *Id.* at 17.

31. *Id.*

32. *Id.*

Over time, the EU's involvement in harmonization and coordination of national welfare policies became more refined, more explicit, and more intrusive into national legal systems. Finally, in 1989, after two years of deliberations at various levels of EEC agencies, eleven of the twelve EEC heads of state (minus the United Kingdom) adopted a Community Charter of Fundamental Social Rights.[33] This charter was a broad collection of principles that asserted the EEC's interest, along with the Member States, in assuring fundamental social rights, including employment and remuneration, pensions, health protection in the workplace, social protection, and many others. Soon after, the Treaty on European Union, signed at Maastricht in 1992, made a commitment to social policy an active part of the EU agenda.[34] The Treaty brought the ethos of social policy into the EU charter itself by adding Chapter XIII and empowering the European Council to adopt directives designed to improve working conditions in EU Member States, to improve social security throughout Europe, to protect workers from termination, and to address many other issues of social welfare.[35]

The Treaty of Amsterdam,[36] signed in 1997, further strengthened the social policy chapter of the EU charter by reinforcing the constitutional importance of social welfare values[37] and laying the groundwork for coordinated strategies to manage employment.[38] In the opinion of one European labor law expert, the Treaty of Amsterdam ushered in a new balance between national and supranational EU agencies in protecting labor and dealing with social welfare.[39]

Thus, the architects of European unification believed that convergence of labor and social welfare policies was a natural component of a single market, necessary to avoid large migrations of workers from unproductive regions in less affluent Member States to more productive states.[40] Effective implementation of a supranational

33. *Community Charter of Fundamental Social Rights*, COM (1989) 568 final (Nov. 29, 1989).

34. Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 (1992).

35. KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 9–10, 301–11 (Robert Bray ed., 2d. ed. 2005).

36. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Oct. 2, 1997, O.J. (C 340).

37. GIUBBONI, *supra* note 29, at 83–84.

38. *See* Maurizio Del Conte, *The Workers in the Globalized Economy: The European Way to the Foundation and Enforcement of the Social Rights*, 2 RICH. J. GLOBAL L. & BUS. 213, 216–17 (2001).

39. GIUBBONI, *supra* note 29, at 28.

40. Cassise, *supra* note 13, at 1377; *see also* Noemi Gal-Or, *Labor Mobility Under NAFTA: Regulatory Policy Spearheading the Social Supplement to the International Trade Regime*, 15

social charter at the national and local levels has not been achieved, however, despite the adoption of numerous directives and rulings by the European Court of Justice. According to Fritz Scharpf, a leading expert on European labor and social welfare law, even social welfare reforms emanating from EU membership have had limited success due to differences in the levels of economic development of EU members and the continuing predominance of nation-centered systems of labor and welfare protection.[41] Professor Jonathan Zeitlin, director of the European Union Center at the University of Wisconsin, takes a cautious view of supranational efforts, including those of the EU, to promote social welfare reform: "Much recent work on welfare states and labor market institutions has advanced strong reasons to believe that the possibilities for genuine cross-national learning and policy transfer are . . . severely limited."[42]

In sum, despite the strength of commitment to pan-European political economy and an ambitious campaign to incorporate a common level of labor and social welfare rights in the European Union, the European Social Charter has had limited impact. However, the EU has implemented a more promising instrument for social cohesion: funding mechanisms to mitigate differences in levels of economic development among EU members. These instruments, examined in the section below, present more interesting opportunities for incorporation into the North American context.

ARIZ. J. INT'L & COMP. L. 365, 391 (1998).

41. *See* FRITZ W. SCHARPF, *The European Social Model: Coping with the Challenges of Diversity*, *in* INTEGRATION IN AN EXPANDING EUROPEAN UNION: REASSESSING THE FUNDAMENTALS, *supra* note 28, at 109, 130.

> [S]ince effective welfare-state policies will remain located at the national level, they cannot overcome the constitutional asymmetry that constrains national solutions. Since uniform European social policy is not politically feasible or even desirable, there is reason to search for solutions which must have the character of European law in order to establish constitutional parity with the rules of European economic integration, but which also must be sufficiently differentiated to accommodate the existing diversity of national welfare regimes.

Id.; *see also* Ana Guillén, *A View from the Periphery*, *in* INTEGRATION IN AN EXPANDING EUROPEAN UNION: REASSESSING THE FUNDAMENTALS, *supra* note 28, at 161, 163 ("Spain has probably produced the most spectacular social protection gains among southern countries [of the EU] but has not managed to solve the problem of high and persistent unemployment.").

42. Jonathan Zeitlin, *Introduction: Governing Work and Welfare in a New Economy: European and American Experiments*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY 1, 7 (Jonathan Zeitlin & David M. Trubek eds., 2003).

C. EU Structural Funds and the Goal of "Social Cohesion"

To see how different NAFTA and the European Union are in their basic approaches to social welfare and political philosophy, one need only compare the website of the NAFTA Secretariat[43] with that of the European Union.[44] The NAFTA Secretariat site is sparse at best. It does not include any inspiring expressions, plans, or directives for future integration, or even an annual report. The "What's New" tab links to the following comment: "This area is not populated with content . . . ."[45] The EU's Europa web site, in contrast, is a cornucopia of legal texts, case law, reports, inspirational pronouncements ("Europe is fun!"), and promotional calls for unification, peace, and harmony.[46] The Europa website is also a good place to begin to learn the distinctive forms of bureaucratic terminology that season EU legislation, reports, documents, and pronouncements.[47] In a language sometimes referred to as "Eurospeak," EU policy makers have developed numerous terms that have become indicative of major policy areas.[48]

One such phrase, "social cohesion," became a part of the EU lexicon in the 1980s as the European Community began to expand its membership to three States (Greece, Spain, and Portugal) whose per capita incomes were well below the levels enjoyed by the existing EEC members. Social cohesion came to define the broad objective of lifting less developed regions in the European Community and poorer sectors within each EEC member to the employment and income levels of more developed regions. As described by Dr. Andrew Evans:

> The concept of cohesion was formally introduced into the EEC Treaty by the Single European Act [in 1987]. Its introduction reflected doubts whether existing arrangements for Community assistance would be adequate to counteract the regional effects of completion of the internal market, which the Commission admitted were likely to be "uneven." In particular, it was feared that increased competition would tend to favour the more developed, central regions of the Community at the expense of less developed, peripheral regions.[49]

43. NAFTA Secretariat, www.nafta-sec-alena.org (last visited Aug. 27, 2008).

44. European Union On-Line, www.europa.eu (last visited Aug. 27, 2008).

45. NAFTA Secretariat, *supra* note 43.

46. European Union On-Line, *supra* note 44.

47. *Id.*

48. The prolix nature of EU reports, legislation, and other writings lend themselves to bureaucratic obfuscation; reading EU official documents is a great test of endurance for the reader.

49. ANDREW EVANS, EU REGIONAL POLICY 13 (2005).

Similar to the gradual solidification of the EU Social Charter, this broad objective evolved into a pattern of assistance that became incorporated into the EU constituent treaties. Accordingly, the 1992 Treaty on European Union amended the Treaty of Rome to "constitutionalize" social cohesion as a basic objective of the European Community,[50] including setting specific principles by amending Articles 158 to 162 of the Treaty of Rome. Social cohesion became the foundation of EU regional policy, which was intended to help less-developed Members States become viable members of the Community by raising levels of employment and labor productivity in those regions.

The instruments of EU social cohesion consist of several funding mechanisms.[51] Two of these mechanisms, the European Regional Development Fund (ERDF) and the European Social Fund (ESF), are collectively referred to as the EU Structural Funds.[52] A third fund, the Cohesion Fund, was established in 1994 at the demand of less developed Member States to assist in coping with the disciplines imposed by the monetary union and a single currency.[53]

The level of regional development funding provided by the European Union is impressive. For the period 2007 to 2013, the total cohesion funding from EU resources is projected to amount to 347.41 billion Euros (approximately $538.5 billion), equal to 35.7% of the total EU budget.[54] Funded by contributions from the Member States, EU Structural Funds accounted for the second largest EU redistributive expenditure, after the Common Agricultural Policy (CAP).[55] Cohesion policy funding overall accounts for one-third of the EU budget.[56] The latest allocation of EU Structural Funds amounts to 308 billion Euros (approximately $474 billion) for the six years from 2007 to 2013

50. *Id*. at 14.

51. *See* ROBERT A. PASTOR, TOWARD A NORTH AMERICAN COMMUNITY: LESSONS FROM THE OLD WORLD FOR THE NEW 41–62 (2001) (giving a brief overview of these mechanisms); *see also* Canova, *supra* note 21, at 364.

52. *See* PASTOR, *supra* note 51, at 19–78 (discussing a detailed study of the ERDF); *see also id*. at 79–108 (discussing the ESF).

53. *Id.* at 14, 149.

54. EU Directorate General for Regional Policy, Funds Available, http://ec.europa.eu/regional_policy/policy/fonds/index_en.htm (last visited Sept. 15, 2008). The EU's budget for regional development funding amounted to 1.27% of total GDP of the EU's fifteen member states at that time. *See* PASTOR, *supra* note 51, at 45.

55. JACQUELINE BRINE, THE EUROPEAN SOCIAL FUND AND THE EU: FLEXIBILITY, GROWTH, STABILITY 11 (2002).

56. *Growing Regions, Growing Europe: Fourth Report on Economic and Social Cohesion*, at 173, COM (May 2007) [hereinafter *Growing Regions, Growing Europe*], *available at* http://ec.europa.eu/regional_policy/sources/docoffic/official/reports/cohesion4/pdf/4cr_en.pdf (last visited Aug. 24, 2008).

(approximately $79 billion per year).[57] Since the early 1990s, EU allocations for social cohesion policy have been equal to between 0.35% and 0.45% of total annual EU GDP.[58] By comparison, if Canada, Mexico and the United States were to allocate 0.40% of total North American GDP to social cohesion policy funding for North American projects, it would yield an annual fund equal to $61.1 billion.[59]

Structural Funds are used primarily in the form of grants for projects co-financed with national and local public agencies. Over the years, a sophisticated system has been developed to provide allocations to poorer regions wherever they are located in EU Member States. The bulk of ERDF and ESF funding is available for regions where per capita GDP is below seventy-five percent of the Community average.[60] Financing from the Cohesion Fund is directed to Member States whose per capita GDP is less than ninety percent of the Community average.[61] Not surprisingly, Member States with per capita income below the EU average have benefited from the bulk of EU structural financing. From 1989 to 2006, the countries listed in the following Table received significant allocations of ERDF, ESF, and Cohesion Funding.[62] To date, the greatest beneficiaries of this funding have been Spain, Portugal, Ireland, and Greece:

Selected Distribution of Structural and Cohesion Funds, 1989–2006

EU Member	Total Funds (Annual avg., in millions of European Currency Units)	Funds as percentage of National GDP
Spain	111,564	1.1
Portugal	46,283	2.5
Ireland	16,000	1.6
Greece	50,922	3.1

57. *See* European Union, EU Regional Policy—General Provisions ERDF-ESF-Cohesion Fund (2007–2013), http://europa.eu/ scadplus/leg/en/lvb/g24231.htm (last visited Sept. 20, 2008) [hereinafter EU Regional Policy—General Provisions].

58. *Growing Regions, Growing Europe*, *supra* note 56, at 174.

59. The World Bank, Key Development Data & Statistics, http://go.worldbank.org/ 1SF48T40L0 (last visited Sept. 20, 2008) (citing figures based on total GDP in billions of dollars (U.S.) for Canada ($1,272), Mexico ($839.2) and the United States ($13,164) for the year 2006).

60. *See* EU Regional Policy—General Provisions, *supra* note 57 (under "General Provisions on the Structural Funds").

61. *See id.* (under "Cohesion Fund").

62. PASTOR, *supra* note 51, at 47 (citing EU and other sources).

The relatively affluent Member States, France, Germany, Italy, and the United Kingdom, receive annual funding that is greater than the amounts shown above, but the allocations are a much smaller percentage of their much larger economies.[63]

1. Types of Funding

EU regional development funding occurs through a range of instruments, including interest rebates on loans, outright grants, studies, and technical assistance.[64] In the early period of structural funding, the relative allocation of funds between Member States commanded prime attention, but over time the focus has shifted to ensuring that resources are used effectively to advance convergence of economies.[65]

Given the EU's immense institutional structure, the decision-making on allocation of cohesion funding and disbursement is an ongoing issue. At the top level, EU planners stress the importance of creating a "partnership" between regional and local bodies with EU agencies in drafting as well as implementing programs.[66] Funding usually requires co-financing with national and local agencies that have a stake in the outcome of the project. In practice, there is a desire for EU policy-makers to influence national policies, using the leverage of structural funding to affect national economic and social policies.[67] Andrew Evans notes, "[European] Union decision making is ill adapted to the articulation of cohesion requirements in Articles 158 and 159."[68] As a result, decisions are left to "intergovernmental bargaining."[69]

Two general types of projects or programs receive funding: (1) infrastructure projects, supported primarily by the ERDF and Cohesion Funds; and (2) worker training and assistance through the ESF.

1. Infrastructure funding. Infrastructure funding is carried out primarily through the ERDF and Cohesion Funds, with the largest amount coming from the ERDF. ERDF financing can take the form of co-investments for job creation, infrastructure development, measures that support regional business development (especially small- and medium-size businesses), and technical assistance.[70] A great deal of

63. *Id.*

64. EVANS, *supra* note 49, at 35 (ERDF); *see also id.* at 96 (ESF).

65. *Id.* at 25–42, 76.

66. JOANNE SCOTT, DEVELOPMENT DILEMMAS IN THE EUROPEAN COMMUNITY: RETHINKING REGIONAL DEVELOPMENT POLICY 26 (1995).

67. EVANS, *supra* note 49, at 7.

68. *Id.* at 249.

69. *Id.*

70. *See* EU Regional Policy—General Provisions, *supra* note 57 (under "European Regional

ERDF structural funding goes to improve transportation and energy infrastructure, information technology, production processes, and environmental protection in the disadvantaged regions.[71] At the Nice Summit in 2000, each EU Member State agreed to prepare a National Action Plan every two years to combat poverty and "social exclusion," taking into account national, regional, and local differences.[72]

2. Worker training and assistance. The European Social Fund is the primary funding mechanism to address issues of unemployment and under-employment in Member States. Articles 123 to 127 of the original Treaty of Rome provided the basis for creation of mechanisms to promote high employment.[73] Subsequent amendments to the Treaty added Articles 146 to 148, specifically authorizing the creation of a European Social Fund. Such funding was originally intended to "alleviate the social costs of establishing the common market"[74] by helping workers adjust to industrial restructuring resulting from increased competition in European markets. Over time, however, the ESF has evolved into a more proactive program for funding educational and training programs to make labor more productive, whether or not the region has been affected by worker layoffs or other consequences of joining the EU. ESF funding is generally limited to providing fifty percent of the eligible costs of worker assistance, with the remainder coming from national and local agencies.[75] Examples of particular programs funded by ESF include "vocational training and guidance; recruitment and wage subsidies; resettlement and socio-vocational integration in connection with geographical mobility; and services and technical advice concerned with job creation."[76]

2. Positive Effects of Social Cohesion Funding

While the EU's regional development program described above has not been above criticism, the overall results of the EU's social cohesion policy have been impressive. When Spain joined the EC, its infrastructure and educational base were significantly below the EC average. After more than a decade of regional development funding, Spain's per capita GDP rose from seventy percent of the EC average in

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Development Fund (ERDF) (2007–2013)").

71. *See* EUROPEAN UNION, WORKING FOR THE REGIONS 20–21 (2004), *available at* http://ec.europa.eu/ publications/booklets/move/27/working2004_en.pdf.

72. Atkinson, *supra* note 28, at 143.

73. EVANS, *supra* note 49, at 79.

74. *Id*. at 80.

75. *Id*. at 82, 87.

76. *Id*. at 92.

1986 to nearly eighty percent in 1999.[77] Anyone familiar with the pre-EU Spain and the post-EU Spain can appreciate the relative gains made simply by traveling Spanish highways, visiting now well-managed Spanish towns, and witnessing the obvious improvements to the country's infrastructure. Similar gains occurred in Portugal, Ireland and Greece: from 1986 to 1999, the per capita income of these four "[c]ohesion countries" rose from sixty-five to seventy-eight percent of the EU average.[78] While it is impossible to draw a direct causal link, there is a strong case to support the conclusion that the EC's regional development policies and funding mechanisms played an important role in the convergence of EU economies.[79]

The discussion here is not intended as a comprehensive review of the EU's social cohesion programs and of its success or failure in securing "convergence" in levels of economic, social, and institutional development in Europe. European regional development policy has its critics. One study, published in 1995, criticized EC regional policy for over-emphasizing economic growth over more nuanced notions of development such as income distribution within society, protection of workers, environmental sustainability, and others factors.[80] Critics have also raised questions about the effective use of ERDF funds once they have been allocated, claiming there has been an over-emphasis on investing in physical infrastructure without examining whether such investment is the best use of funds for development.[81] In looking at EU regional development policies as models for North America, Robert Pastor criticizes the EU's bureaucratic approach to development, arguing that its six different, sometimes overlapping and duplicative, funds used for regional policies are inefficient.[82]

While these critics are correct that the EU's social cohesion programs are not perfect, these programs have produced sufficient results, especially in the record of the Structural Funds, to elicit the attention of North American leaders. The dilemma is that there is currently very little trilateral leadership or cooperation in North America: U.S. attention has been diverted to fighting terrorism, Mexico is saddled with immense economic and political challenges, and Canada is struggling to find its own way. The lack of meaningful "trialogue" is due in part to

77. PASTOR, *supra* note 51, at 55.
78. *Id*. at 51–52.
79. *Id.* at 55–59.
80. SCOTT, *supra* note at 66, at 131–37.
81. EVANS, *supra* note 49, at 76, 78.
82. PASTOR, *supra* note 51, at 60, 62.

North America's deficient institutional structure for developing trilateral initiatives, as discussed below.[83]

In the following section, I contend that the design of NAFTA as a purely economic integration of North America, without trilateral mechanisms to mediate social and other issues connected with economic integration, is unsustainable. The United States, in particular, cannot isolate itself from social, economic, and political repercussions in Mexico. Not only does U.S. geography make this isolation impossible; the gradual social integration of Mexico and the United States, with over twenty million U.S. citizens of Mexican heritage, makes U.S. isolation from Mexico unacceptable to many U.S. citizens.[84]

D. The European Union as a Problematic Model for North America

What lessons, if any, does the EU experience hold for the NAFTA Parties? The easy answer is the Rumsfeldian view that mainstream European experience is irrelevant, if not harmful, to the interests of the United States.[85] From the outset, NAFTA was based on an entirely different model than that of the European Union. NAFTA did not include a visionary quest for closer political alignment or diplomatic resolution of non-economic conflicts. Instead, government leaders sold NAFTA to their constituents with the promise that the agreement would *not* lead to political unification. The word "integration" rarely appears in the Agreement,[86] and the term "unification" is never used.

Despite NAFTA's success in promoting economic integration in North America—as evidenced by the increase in intraregional trade and investment, and integration of manufacturing and service sectors[87]—

83. *See infra* notes 224–25 and accompanying text (describing the geographical separation between the central offices of the NAFTA Secretariat).

84. ROBERTO R. RAMIREZ, WE THE PEOPLE: HISPANICS IN THE UNITED STATES CENSUS 2000 SPECIAL REPORTS 1 (2004), *available at* http://www.census.gov/prod/2004pubs/censr-18.pdf.

85. *See* Steven R. Weisman, *Threats and Responses: Diplomatic Strategy; U.S. Set to Demand that Allies Agree Iraq Is Defying U.N.*, N.Y. TIMES, Jan. 23, 2003, at A1 (explaining former Defense Secretary Donald Rumsfeld's famous dictum that France and Germany represented an "old Europe" that was not in tune with U.S. interests, which became a lightning rod for criticism of the Bush Administration's disdain for Western Europe after European allies failed to support the U.S. invasion of Iraq; this is the original report of this view).

86. *See, e.g.*, North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, Annex 300-A.2 (1993), *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 ("The Parties shall review, no later than December 31, 2003, the status of the North American automotive sector and the effectiveness of the measures referred to in this Annex to determine actions that could be taken to strengthen the *integration* and global competitiveness of the sector.") (emphasis added).

87. *See* HUFBAUER & SCHOTT, *supra* note 4, at 1–73 (a balanced overview of the integrating

there has been very little movement towards broader cooperation. The primary reason for this is the overwhelming imbalance of economic, diplomatic, and military power between the United States and its NAFTA partners. Moreover, there is also an ideological divide between the U.S. and its NAFTA partners. As Pastor points out, North America is characterized by a "U.S. penchant for unilateralism" whereas Canada and Mexico prefer bilateralism.[88]

In short, there is a dramatic contrast between pan-Europeanism and cooperation on the one hand and U.S. individualism on the other. Most U.S. citizens continue to hold their allegiance to their nation firmly, which they still perceive as a monolithic block. In the age of globalization, however, the power of the nation-state is waning as other constructions, such as global enterprises, multilateral organizations, and groupings of countries, vie for influence. The rise of these extra-political, international forces undermines the usefulness and success of allegiance to the nation-state. Accordingly, the European experience with economic integration should not be ignored in North America. Nor is it too late to model the North American allegiance in part on its European counterpart. As Pastor points out, "Canada, Mexico and the United States do not view themselves as parts of a region in a way that France and Germany view themselves as part of the European Union, but the idea of a European identity did not spring up fully formed in 1957."[89]

Europe may indeed hold some valuable lessons for the U.S. Pastor, who favors broader North American integration than now exists, concludes that "the [NAFTA] governments shortchanged their people by defining the North American relationship solely by commerce."[90] It is true that "fundamental differences between [Europe and North America exist] in economic organization, social values, policy regimes, and political/institutional structure."[91] Nevertheless, there is no reason to conclude, and even less to desire, that North American structures for cooperation will remain static while Europe evolves dynamically. The United States can no longer virtually ignore Mexico. While the United States government has taken Mexico's stability for granted, the advance of democracy, encouraged by both public and private U.S. organizations, has raised the specter of destabilization. The migration

effects of NAFTA).

88. PASTOR, *supra* note 51, at 2.

89. *Id.* at 95.

90. *Id.* at 97.

91. Zeitlin, *supra* note 42, at 1.

of undocumented Mexican workers to the United States is just one side effect of our economic and social integration. The U.S. cannot undo a 2000 mile border, and it cannot continue to ignore the social and economic repercussions of the free trade partnership it helped to create.

NAFTA has been a positive geopolitical development in North America, but the agreement represents the beginning of more structured intergovernmental relations, not an end result. The following sections set forth some of the geopolitical shortcomings of NAFTA—in particular, the failure to address differences in levels of economic development in the region—and recommend solutions for dealing with them. The challenge for those who believe in increased North American integration will be to convince the citizens of the NAFTA countries that shared approaches to economic and social development will not only be acceptable, but also compelling.

II. NAFTA'S FIRST FIFTEEN YEARS: REEVALUATING THE ASSUMPTIONS OF "PURE" ECONOMIC INTEGRATION

On January 1, 2009, NAFTA will celebrate its fifteenth birthday. After a decade and a half of existence, the agreement continues to stir controversy in all three member countries, with proponents citing the clear growth of intraregional trade and investment that has taken place since NAFTA's adoption,[92] and opponents questioning the displacement of workers and uneven distribution of benefits.[93]

The distribution of economic benefits and the effects of increased competition on workers were not considered during NAFTA negotiations. NAFTA's creators also minimized the importance of different levels of economic development between the United States and Canada on the one hand and Mexico on the other. They did so despite the fact that the per capita income of Mexico is approximately one-sixth that of the United States, and one-fifth that of Canada.[94]

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92. *See, e.g.*, HUFBAUER & SCHOTT, *supra* note 4, at 1–2 (explaining that in the decade following NAFTA's entry into force, the three countries' economic output more than doubled, and the economies of all three countries grew faster than the average of all OECD countries); *see also id.* at 18–38 (evidence of trade increases in goods and services and in foreign direct investment among NAFTA countries).

93. *See, e.g.*, Robert E. Scott, *NAFTA's Hidden Costs: Trade Agreement Results in Job Losses, Growing Inequality and Wage Suppression for the United States* (Econ. Pol'y Inst., Briefing Paper, 2001) *available at* http://www.epi.org/briefingpapers/nafta01/nafta-at-7.pdf (addressing unforeseen problems and costs created by NAFTA); Alexander J. Kondonassis, A. G. Malliaris & Chris Paraskevopoulos, *NAFTA: Past, Present and Future*, J. ECON. ASYMMETRIES, June 2008, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1084662 (addressing controversial issues and negative aspects stemming from NAFTA).

94. *See* The World Bank, Key Development Data & Statistics, http://go.worldbank.org/

While recognizing that Mexico's economic strength and levels of employment lagged behind those of its NAFTA partners, NAFTA's proponents theorized that the agreement would spur economic growth in Mexico, reduce unemployment, and remove the impulse of Mexican workers to migrate to the United States for jobs.[95] In the exchange of letters calling for the beginning of negotiations, the NAFTA parties made clear that immigration would be excluded from NAFTA,[96] and the agreement includes only limited guarantees of freedom of movement for business persons.[97] Yet while Mexico's economy did grow at a healthy rate for most of the decade following NAFTA's entry into force,[98] the growth was "insufficient to address its long-run development challenges"[99]—high levels of poverty, discussed below,[100] and chronic unemployment and under-employment.

One side effect of endemic poverty in Mexico, coupled with a relatively healthy economy in the United States, has been a constant and increasing rate of "exportation" of unauthorized workers from Mexico to the United States.[101] NAFTA has not changed this. Some experts place legal migration from Mexico to the United States at 130,000 to 170,000 annually, with illegal (unauthorized) migration amounting to approximately the same numbers.[102] Once limited to certain border communities and large cities, Mexican migration to the United States has now spread to almost all regions of the country.[103] The Pew Hispanic Center estimates that approximately 11.5 million persons of

1SF48T40L0 (last visited Sept. 27, 2008) (listing per capita income in U.S. dollars for 2006: U.S. ($44,710), Canada ($36,650), and Mexico ($7,830)).

95. Elizabeth L. Gunn, *Regionalizing Labor Policy Through NAFTA: Beyond President Bush's Temporary Worker Proposal*, 28 B.C. INT'L & COMP. L. REV. 353, 357 (2005); Gal-Or, *supra* note 40, at 366; CLEMENT, *supra* note 3, at 280–85.

96. Johnson, *supra* note 14, at 940, 957, 959 et seq.

97. *See* NAFTA, *supra* note 86, at ch. 16, arts. 1601–08.

98. HUFBAUER & SCHOTT, *supra* note 4, at 2 (explaining that the average annual real GDP growth in Mexico from 1994 to 2003 was 2.7%—an amount higher than the average growth of other OECD countries for the same period).

99. *Id.*

100. *See infra* notes 130–45 and accompanying text (examining persistent post-NAFTA poverty in Mexico).

101. *See* Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401, 1410–29 (2007) (analyzing the Mexican labor migration to the United States in a historical context).

102. Gary Clyde Hufbauer & Gustavo Vega-Cánovas, *Whither NAFTA: A Common Frontier?*, *in* THE REBORDERING OF NORTH AMERICA? INTEGRATION AND EXCLUSION IN A NEW SECURITY CONTEXT 17–18 (Peter Andreas & Thomas Biersteker eds., 2003).

103. PHILIP MARTIN, *Mexico-US Migration*, *in* HUFBAUER & SCHOTT, *supra* note 4, at 447–48.

Mexican birth lived in the United States in 2006.[104] As Mexico's population in 2006 was 104 million inhabitants,[105] this means that more than ten percent of persons born in Mexico now live in the United States. Philip Martin estimates that two-thirds of the eight million Mexican workers employed in the United States are unauthorized.[106] They have been attracted to the United States by the fact that U.S. wages for unskilled or semi-skilled labor are up to ten times higher than wages in Mexico, and the work is more consistent.[107]

NAFTA has not rectified the lack of jobs and productivity of Mexican workers or stemmed the tide of migration to the United States. Mexico's opening to foreign competition, crowned with its entry into NAFTA, has caused economic dislocations in numerous sectors of the Mexican economy, including small- to medium-scale manufacturing and agricultural production. Whether the adoption of NAFTA, overall, has worsened the condition of Mexican workers is open to debate,[108] but there is little question that NAFTA has not improved Mexican wages overall. According to a study published in 2004 by the Carnegie Endowment for International Peace, real wages in Mexico today are lower than they were before NAFTA was adopted.[109] Ironically, as

104. *See* PEW HISPANIC CENTER, STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES tbl.3 (2006), http://pewhispanic.org/files/factsheets/foreignborn2006/Table-3pdf (data regarding foreign-born individuals living in the United States in 2000 and 2006).

105. *See* The World Bank, Key Development Data & Statistics, http://go.worldbank.org/1SF48T40L0 (last visited Sept. 20, 2008) (under "Key Development Data & Statistics" heading, select Mexico in drop down menu and press "GO" for listing of Mexico's development data, including population).

106. MARTIN, *supra* note 103, at 443.

107. *See* U.S. Department of Labor, Minimum Wage Laws in the States—July 24, 2008, http://www.dol.gov/esa/minwage/america.htm#content (last updated July 2008) (illustrating that U.S. federal law establishes a minimum hourly wage in the United States of $6.55 per hour, effective July 24, 2008, with the rate to rise to $7.25 per hour by July 24, 2009; though some states have higher minimum wages); Mexican Department of Labor, Salarios Minimos-2008, http://www.sat.gob.mx/sitio_internet/asistencia_contribuyente/informacion_frecuente/salarios_minimos/ (last visited Sept. 20, 2008) (data showing that the Mexican federal government sets the *daily minimum wage* for the entire country with the lowest minimum wage, applicable in the poorest regions of the country, of 49.50 pesos per day (equal to approximately U.S. $4.60 per day), up to the highest minimum wage of 52.59 pesos per day (equal to approximately U.S. $5.00 per day)).

108. *See* HUFBAUER & SCHOTT, *supra* note 4, at 105 (estimating that between 1993 and 2000, the number of manufacturing firms operating in Mexico declined by 9.4%).

109. JOHN J. AUDLEY, DEMETRIOS G. PAPADEMETRIOUS, SANDRA POLASKI & SCOTT VAUGHAN, NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE 6, 12 (2004), *available at* http://www.carnegieendowment.org/files/nafta1.pdf; *see also* Sandra Polaski, *Mexican Employment, Productivity and Income a Decade After NAFTA* 1–12 (Brief Submitted to the Canadian Standing Senate Committee on Foreign Affairs, Feb. 25, 2004), *available at* www.carnegieendowment.org/pdf/files/canadasenatebrief.pdf (analysis of Mexican

Mexico's trade barriers to agricultural imports have been largely dismantled, causing job losses in the Mexican countryside, the highly competitive (and subsidized) U.S. agricultural sector has been booming and thereby creating a magnet for low-cost labor and inducing unauthorized immigration from Mexico.[110]

While NAFTA itself may not have raised the status of Mexican labor on the whole, especially the conditions of semi-skilled or unskilled labor,[111] the migration of Mexicans northward has provided important economic benefits to Mexico in the form of remittances or funds sent back home by Mexicans working in the United States. The increase in remittances since the turn of the millennium is shown in the following table:[112]

Annual Remittances to Mexico (Billions of Dollars)							
2000	2001	2002	2003	2004	2005	2006	2007
7.5	10.1	11.0	14.9	18.1	21.0	24.7	25.0 est.

Remittances sent home by Mexicans working abroad amounted to over twenty-four billion U.S. dollars in 2006—approximately 2.8% of Mexican GDP.[113] A study conducted by the University of Zacatecas reported that residents of that state, a principal source of migration to the United States, receive one million dollars per day from remittances more than the Mexican federal government spends in the state.[114] Remittances account for the second largest source of foreign exchange

job market and income one decade after NAFTA).

110. *See* Ong Hing, *supra* note 101, at 1431 ("The need for and recruitment of low wage workers from Mexico that has resulted from increased economic integration has had no lawful channel by which to facilitate such movement."); *accord* MARTIN, *supra* note 103, at 452–53 (discussing the effect of agricultural opening on loss of jobs by Mexico's three million corn farmers, formerly protected by subsidies and trade barriers); Canova, *supra* note 21, at 345 (citing a 2006 study alleging migration of 750,000 Mexican farmers due to increased competition caused by trade liberalization); Bradly J. Condon & Brad McBride, *supra* note 17, at 261–63 (government policies influencing demand for Mexican workers).

111. Skilled labor in Mexico has benefitted from NAFTA, due to the increase in foreign investment in the formal sector of the economy.

112. Remittances-Mexico-SP, Migration and Remittances Factbook, http://siteresources.worldbank.org/NEWSSPANISH/Resources/remittances-mexico-SP.pdf (last visited Sept. 20, 2008).

113. *See* The World Bank, Key Development Data & Statistics, http://go.worldbank.org/1SF48T40L0 (last visited Sept. 27, 2008) (under "Key Development Data & Statistics" heading, select Mexico in drop down menu and press "GO" for listing of Mexico's development data); *cf.* HUFBAUER & SCHOTT, *supra* note 4, at 112 (estimating remittances in 2004 totaling 2.6% of GDP).

114. PASTOR, *supra* note 51, at 125.

earnings in Mexico, after crude oil exports, and amount to 2.6% of GDP.[115] If these funds were suddenly excluded from Mexico's resources, the economy would be devastated.

This pattern—increased migration from Mexico to the United States and a reciprocal dependence on remittances—was an unforeseen result of NAFTA's plan for economic integration. In 1992, U.S. presidential candidate Ross Perot warned of the "giant sucking sound" from U.S. jobs that would be lost to Mexico because of NAFTA. But neither Perot, nor other political leaders of the time, focused on the possibility of increased migration of Mexican workers to the United States as a side effect of the trade agreement.

NAFTA has only a thin line of defense against the possible negative effects of free trade on the labor sector of each NAFTA partner through the Supplemental Agreement on Labor. Unfortunately, the Labor Side Agreement, promoted by U.S. labor groups, has proved largely ineffectual.[116]

A. Meager Results Under the Labor Side Agreement

The North American Agreement on Labor Cooperation (NAALC) is the closest thing to a social charter in NAFTA,[117] but its existence does not alter my previous conclusion that NAFTA's negotiators had no interest in trilateral cooperation on employment and social welfare issues.[118] Added at the behest of U.S. negotiators to offset opposition to NAFTA by U.S. labor leaders, the NAALC was not designed to press for harmonization of legal protections in the NAFTA countries.[119] Instead, the NAALC, like its sister agreement, the North American Agreement on Environmental Cooperation (NACEC), only committed the NAFTA Parties to enforcing whatever national laws were in existence—an obvious reference to U.S. and Canadian concerns over the lack of enforcement of Mexican environmental laws.

115. Banco de México, Banco de México Informe Anual 2005, at 43 (2006), *available at* http://www.banxico.org.mx/documents/%7B5AA1E2B9-58FE-147D-C97B-6B9E7406630B%7D.pdf.

116. North American Agreement on Labor Cooperation (NAALC), U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1499 (1993), *available at* http://www.naalc.org/naalc/naalc-full-text.htm.

117. *Id.*

118. *See supra* notes 93–98 and accompanying text (describing the NAFTA Parties' unwillingness to incorporate employment or social welfare issues into the agreement).

119. *See* M. Jeanette Yakamavich, *NAFTA on the Move: The United States and Mexico on a Journey Toward the Free Movement of Workers—A NAFTA Progress Report and EU Comparison*, 8 L. & BUS. REV. AM. 463, 476 (2003) (explaining that NAFTA lacks a mechanism for uniform interpretation and enforcement of legal norms).

Administered by a Commission on Labor Cooperation (CLC) that consists of the labor ministers of the NAFTA Parties, the NAALC is charged with investigating citizens' complaints concerning the failure to enforce certain labor rights under the domestic law of the NAFTA Party. Certain key labor principles, such as right to strike and freedom of association, are not subject to the full range of CLC oversight of enforcement.[120] The CLC administers a small trinational Secretariat to oversee the work of the Commission, but the Agreement depends on National Administrative Offices (NAOs) that are housed in the labor ministry of each NAFTA Party for enforcement.

The experience under the environmental side agreement has been modest to date,[121] but with hopeful signs. By contrast, the experience of the NAALC has been an exercise in mismanagement and lack of governmental support. When first organized, the CLC was headquartered in Dallas—a city not known for being pro-worker—but the ineffectiveness of the original CLC led the parties to move the headquarters to Washington. However, this move did little to raise the profile or effectiveness of the CLC. From the outset, there was little support from the departments of labor of the NAFTA Parties that oversee the CLC to ensure that the NAALC would be effective. As Hufbauer and Schott contend, the NAOs are reluctant to press for vigorous enforcement, and the CLC has served as more of a meeting place than a true enforcement mechanism for labor law.[122] According to Hufbauer and Schott, only thirty-one cases had been brought to the NAALC in the first decade of the Agreement's entry into force. Of these thirty-one cases, only fourteen resulted in case reports, the result of which was innocuous action via referral to "ministerial consultations."[123] In short, "[t]he Labour side agreement is little more than a toothless list of hopes."[124] The NAALC, like the NACEC, was negotiated to provide "political cover" for Democratic members of the U.S. Congress to support NAFTA and was never backed with sufficient financial resources to be effective.[125]

120. *See* North American Agreement on Labor Cooperation, *supra* note 116.

121. *See generally* HUFBAUER & SCHOTT, *supra* note 4, at 183 (after a lengthy discussion of NAFTA's environmentally related provisions, the authors conclude that "NAFTA's environmental record is imperfect").

122. *See id.* at 121, 128.

123. *Id*. at 121–26.

124. Gary C. Hufbauer & Jeffrey J. Schott, *The Prospects for Deeper North American Economic Integration: A U.S. Perspective* 17 (C.D. Howe Inst., Commentary No. 195, 2004), *available at* http://www.cdhowe.org/pdf/commentary_195.pdf.

125. HUFBAUER & SCHOTT, *supra* note 4, at 467, 486.

The NAALC is so peripheral to the purposes of NAFTA that the official NAFTA website does not even include texts of the NAALC or NACEC, though it does provide a link to the official websites.[126] The NAALC website itself demonstrates the relative ineffectiveness of the labor side agreement: there is virtually no information on complaints filed for failure to enforce labor and employment laws, and as of May 2008, the most recent Annual Report of the CLC posted on the web site was for the year 2003.[127] Allegations of political favoritism and misuse of funds in 2006 against a former Executive Director of the CLC, a political appointee of the U.S. government, further damaged the morale and reputation of the CLC and of the NAALC.[128] The governments of Canada, Mexico and the United States appear to have made a political decision not to promote rigorous trilateral oversight of labor law enforcement by the Commission on Labor Cooperation. If this were not the case, the relative ineffectiveness of the NAALC would not have been acceptable to governmental leaders.

The weakness of labor law enforcement is particularly exaggerated in Mexico, where unemployment and under-employment are rampant. By some estimates, almost two-thirds of Mexican workers are employed in the so-called "informal sector" of the economy—they are self-employed or work for relatively small, unregulated businesses that lie outside of the legal framework.[129] Unemployment and low labor productivity are consonant with the endemic poverty that has plagued Mexico for generations. If NAFTA is to serve as a sustainable blueprint for North American integration, the NAFTA governments cannot continue to ignore this fact.

B. The Dark Side of NAFTA: Poverty in Mexico

The World Bank lists Mexico as a middle-income country.[130] This categorization is likely of little comfort to the approximately twenty million Mexicans who subsist on less than two dollars per day.[131]

126. *See* NAFTA Secretariat, *supra* note 43.

127. *See* Secretariat of the Commission for Labor Cooperation, http://new.naalc.org/publications/ annual_reports.htm (last visited Aug. 23, 2008).

128. Jesse Lee, *Chairman Miller Writes Secretary Chao About NAFTA Official Ducking Prosecution*, THE GAVEL, Apr. 17, 2008, http://speaker.house.gov/blog/?p=1294.

129. International Labour Organization, *Women and Men in the Informal Economy: A Statistical Picture* 12, 36 (2002), *quoted in* ROGER BLANPAIN ET AL., THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW— CASES AND MATERIALS 209 (2007).

130. *See* The World Bank, Mexico Country Brief, http://go.worldbank.org/ZFQFJM2DO0 (last visited Sept. 20, 2008).

131. Approximately twenty percent of Mexico's population live on less than two dollars per day, and five percent live on less than one dollar per day, based on 1993 Purchasing Power

Mexico may have the fourteenth largest economy in the world,[132] but as discussed in the following paragraphs, the inequality of income distribution in Mexico is dramatic and is at the root of Mexican migration to the United States.

Comparisons of levels of development between North America and Europe are instructive here. When Greece joined the EC in 1981, its per capita GDP, like those of Spain and Portugal, was less than half of Germany's.[133] Concerned with the relative lack of economic development, the EC adopted regional development policies, with positive results, as discussed previously.[134] By comparison, the income disparities in North America are more pronounced than in Europe. Mexico's per capita income is only one-sixth that of the United States,[135] but unlike the experience of the European Union, the negotiators of the NAFTA Agreement paid little attention to structuring NAFTA to accommodate differences in economic productivity among the three NAFTA Parties. Far from adopting regional development policies to address imbalances in regional development, as occurred during the enlargement of the European Union, NAFTA's negotiators ignored the wide discrepancies between income levels and industrial development in North America.[136] Instead, NAFTA's negotiators took the position that NAFTA would bring prosperity to Mexico, diminishing social needs and removing the need for development from NAFTA partners.[137] But NAFTA has not had this effect. Rather, NAFTA has contributed to job losses in some Mexican sectors and has exacerbated regional, sectional, and class disparities in Mexico to the detriment of the rural southern states and poorly educated laboring

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Parities, a measure of global poverty. THE WORLD BANK, REPORT NO. 28612-ME, POVERTY IN MEXICO: AN ASSESSMENT OF CONDITIONS, TRENDS AND GOVERNMENT STRATEGY xxv (2004) [hereinafter POVERTY IN MEXICO], *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/07/13/000012009_20040713141715/Rendered/PDF/286120ME.pdf.

132. *See* CIA, *Rank Order – GDP*, *in* THE WORLD FACTBOOK (2008), https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html (purchasing power parity).

133. Condon & McBride, *supra* note 17, at 270.

134. *See supra* notes 43–84 and accompanying text.

135. *See supra* note 94 and accompanying text.

136. Mexican adherence included reservations to many of NAFTA's more rigorous market-opening measures, but many of these reservations were scheduled to be phased out. By 2008, most of them have been eliminated, including the reservations protecting Mexico's highly protected agriculture industry, with resulting job losses in the Mexican sector that has traditionally served as a lifeline to the poor.

137. CLEMENT, *supra* note 3, at 281–85.

class, but to the benefit of the industrialized north and skilled workers.[138]

Endemic poverty in Mexico is fertile ground for illegal migration to the United States. Income inequality, long a trademark of Mexican society, is as entrenched today as it was at the advent of Mexico's "social revolution" in 1910. Income disparity in Mexico, as measured by a Gini coefficient of .546,[139] is extremely high by international standards. According to a World Bank study, distribution in Mexico was "more unequal than the (high) Latin American average. . . . An important part of the reason for high levels of poverty in Mexico is the high level of income inequality."[140] The Gini coefficient for the United States (.408) is higher than the European average, but still lower than Mexico's.[141] The Gini coefficient for Canada is a moderate .31 by comparison,[142] showing a more even distribution of income. Income inequality is so pernicious in Mexico largely because its GDP per capita is only one-sixth that of the United States.[143] This fact demonstrates that the poor in Mexico are much poorer than their U.S. counterparts.

Poverty in Mexico is the root cause of Mexican migration to the United States, and low labor productivity and income inequality are the root causes of Mexican poverty. To have an accurate picture of the lack of Mexican labor productivity (reflected in low wages), one must look closely at official Mexican government statistics. In figures reported by the government statistical bureau, the Mexican unemployment rate generally hovers below four percent, well below that of other industrialized countries, including Canada and the United States.[144]

138. PASTOR, *supra* note 51, at 89 (twenty-five of Mexico's thirty-two states and federal territory accounted for less than three percent of total domestic production).

139. Gini coefficient taken from POVERTY IN MEXICO, *supra* note 131, at 25. The figures in the text accompanying this footnote and footnote 141 are reported as 54.6 and 40.8 in the World Bank publication POVERTY IN MEXICO, instead of the fractional version used here, which accords with the standard calculation of Gini coefficients. 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 have none)." The World Bank, Poverty Analysis—Measuring Inequality, http://go.worldbank.org/3SLYUTVY00 (last visited Sept. 20, 2008).

140. POVERTY IN MEXICO, *supra* note 131 at 23.

141. *Id.* at 25.

142. Figure based on after-tax income. Statistics Canada, Analysis of Income in Canada (2002), http://www.statcan.ca/english/freepub/75-203-XIE/00002/part7.htm (last visited Sept. 20, 2008).

143. *See supra* note 94 and accompanying text.

144. *See* The Mexican Census Bureau, http://www.inegi.gob.mx/inegi/defaultaspx?s=

This low figure is due to Mexico's definition of an unemployed person as one who has worked less than one hour per week.[145] As anyone who has visited a large Mexican city in the past twenty years can attest, a large percentage of Mexicans are "employed" in the informal sector, selling soft drinks in the middle of crowded freeways, vending snacks on the streets, etc. The productivity of this large class of workers is extremely low.

In short, low wages in Mexico are tied to low labor productivity. Despite a healthy increase in foreign direct investment (FDI) since the entry into force of NAFTA, the growth of stable jobs in the formal industrial sectors and a hoped-for increase in labor productivity have not been forthcoming.

C. The Link Between Labor Productivity, Foreign Direct Investment and Public Infrastructure

One of the prime goals of NAFTA was to increase cross-border investment in North America, providing for an integrated economy in the region that could compete with European and Asian rivals. NAFTA's investment chapter (Chapter 11) provided the legal framework to promote cross-border investment, especially investment from the comparatively capital- and technology-rich Canada and United States. Between NAFTA's entry into force in 1994 and 2005, foreign direct investment into Mexico—two-thirds of it from U.S.-based enterprises—has totaled $170 billion.[146] Yet, as noted previously, while new foreign investment has certainly aided the Mexican economy, the country continues to be unable to generate sufficient job growth to offset the great oversupply of labor.

Enhancing the climate for private investment, domestic as well as foreign, is an important foundation for economic growth. But private investment does not operate in a vacuum. To be productive, private investment must be able to count on public infrastructure that supports stable economic activity. Poor roads, railroads and ports; poor energy production and distribution; poor water and sanitation resources; a poor education system and weak system of worker training; and poor institutional infrastructure, in the form of administrative agencies, deter

est&c=125 (last visited Oct. 4, 2008) (figures for Mexican workforce age 14 and over); *see also* HUFBAUER & SCHOTT, *supra* note 4, at 99–100 (the official unemployment figures for Canada (7.6%), Mexico (2.6%), and the United States (6.0%)).

145. HUFBAUER & SCHOTT, *supra* note 4, at 100.

146. Andreas Waldkirch, *The Effects of Foreign Direct Investment in Mexico Since NAFTA* 26 (Munich Personal REPEC Archive, Paper No. 7975, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115300.

private investment. The public infrastructure necessary for a competitive, prosperous economy is lacking in Mexico, and such an infrastructure is not likely to be established in the near future without assistance from Mexico's NAFTA partners, which are the logical source of this aid.

1. Mexico's Physical Infrastructure

Mexico's physical infrastructure—roads and transportation systems, energy infrastructure, health system, and others—lag far behind those of its NAFTA partners. Mexico suffers from high transport, telecommunications, energy, and capital costs, and its water and sewage treatment infrastructure is woefully lacking.[147] According to one report, the country's relatively low investment in infrastructure puts Mexico 61st out of 131 countries surveyed for percentage of GDP invested in infrastructure.[148] The lack of public investment in these areas is an important obstacle to attracting investment. As discussed above, the lack of infrastructure development in Mexico is precisely the problem that the European Union has confronted through its regional development policies.[149]

To give one example of Mexico's relative lack of infrastructure development, Table 3 shows the great discrepancies in the size of governmental expenditures for road transportation in Canada, Mexico, and the United States for the years 2001 to 2003, which are representative of long-term trends. The fact that Canada and the United States are approximately five times larger than Mexico[150] may justify somewhat larger highway expenditures. But the United States generally spends 130 to 150 times more on its road transport system than Mexico, and Canada spends 10 to 12 times what Mexico does on its road transport infrastructure.

147. HUFBAUER & SCHOTT, *supra* note 4, at 468, 472.

148. Lilia Gonzalez, *Necesario, Contar con Infraestructura para Impulsar la Competitividad*, EL ECONOMISTA, Apr. 4, 2008, at 38, *available at* http://eleconomista.com.mx//descargas/pdf/portadas/economista-impreso-2008_04_4_8580.pdf.

149. *See supra* notes 70–72 and accompanying text.

150. The territory of each is approximately five times as large as Mexico. The surface area of each of the three countries, in thousands of square kilometers, is:

Canada	9,984
Mexico	1,964
U.S.	9,632

The World Bank, Key Development Data & Statistics, http://go.worldbank.org/ 1SF48T40L0 (last visited Sep. 20, 2008) (under "Key Development and Statistics" heading, select the "Country" dropdown menu and highlight each respective country name—Canada, Mexico, United States—individually, and press "Go" to view the data for that particular country).

Annual Government Expenditures for Road Transportation (Millions of Dollars)			
	2001	2002	2003
Canada	8,579	8,721	10,113
Mexico	796	919	827
United States	110,465	118,619	120,803

Source: North American Transportation Statistics Database[151]

The lack of public investment is particularly damaging in southern Mexico, which lags behind the rest of the country in economic output as well as public infrastructure. According to a World Bank study, the average labor productivity of workers in southern Mexico is only fifty-three percent of the national average, a result of poor transportation infrastructure as well as lower skill levels due to lack of education and training (discussed below).[152]

Mexico similarly lags behind the U.S. and Canada in expenditures for water supply and treatment, energy development, telecommunications, and other important infrastructure. Access to water and sanitation in Mexico are well below the average of other OECD countries, with consequent negative effects on health as well as on industrial development.[153] NAFTA's negotiators did recognize the importance of adequate infrastructure in Mexico, at least along the border, by establishing the North American Development Bank (NADBank) to address environmental issues in the U.S.-Mexico border region.[154] However, NADBank's limited resources have had minimal impact, even on its target region.[155] From 1994 to 2006, NADBank disbursed less than $500 million in loans and grants,[156] a small fraction of the

151. North American Transportation Statistics, http://nats.sct.gob.mx/nats/sys/tables.jsp?i=3&Id=10 (last visited Aug. 21, 2008).

152. Uwe Deichmann et al., *Economic Structure, Productivity, and Infrastructure Quality in Southern Mexico* 5 (World Bank, Policy Research Working Paper No. 2900, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_Id=636263.

153. *See generally* Douglas Olson and Gustavo Saltiel, *Water Resources—Averting a Water Crisis in Mexico*, *in* THE WORLD BANK, REPORT NO. 39993-MX, MEXICO 2006–2012: CREATING THE FOUNDATIONS FOR EQUITABLE GROWTH (2007), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/07/30/000020953_20070730092636/ Rendered/PDF/399930MX.pdf.

154. *See* North American Development Bank, Origins of North American Development Bank, http://www.nadbank.org/about/about_origins.html (last visited Sept. 20, 2008).

155. HUFBAUER & SCHOTT, *supra* note 4, at 18.

156. NORTH AMERICAN DEVELOPMENT BANK, ANNUAL REPORT 2006: APR. 1 – DEC. 31, at 13 (2007), *available at* http://www.nadbank.org/pdfs/pubs/AR%202006%20WEB%20Eng.pdf. NADBANK is capitalized at three billion dollars, most of which represents callable capital. As

amount needed for environmental, water, and sanitation infrastructure along the border region.

2. Mexico's Educational Infrastructure

Mexico's physical infrastructure is also significantly behind the U.S. and Canada. Even if Mexico's physical infrastructure were on par with that of its NAFTA's partners, the country's infrastructure for human development, in particular its educational system and lack of institutional infrastructure for worker training, lags far behind those of Canada and the United States. As a recent World Bank report concluded, Mexico has one of the lowest levels of education achievement of all OECD countries (including Canada and the United States), and Mexico's low productivity growth can be attributed in part to its poor comparative performance in providing education to its citizens.[157] In addition to low marks in basic education, Mexico has a significant gap with other countries in enrollment in post-secondary education and adult education.[158] Lack of adequate skills training programs for workers translates into low labor productivity growth in Mexico, and therefore low wages.[159] As the World Bank study concludes, "Mexico needs to improve the quality of its education to increase the country's economic competitiveness."[160]

The weakness of Mexico's public education system is related to weaknesses in its economy, as young people are compelled to leave school in order to help support their families. The result is a debilitating cycle of poor education and training that contributes to Mexican poverty, which in turn forces young people to leave school to guarantee their survival. Labor productivity and competitiveness are keys to economic growth in a competitive world economy. Prior to 1986, when Mexico began to open its economy to international competition, the closed political and economic systems "protected" the labor sector from the full effects of weak productivity and poor training, through a paternalistic system of social programs. In today's globalized economy,

of March 2006, NADBANK had received $348 million in paid-in capital from the Mexican and U.S. governments. NORTH AMERICAN DEVELOPMENT BANK, ANNUAL REPORT 2005: APR. 1–MAR. 31, at 21 (2006), *available at* http://www.nadb.org/pdfs/pubs/Annual%20Report%20FY%202005%20(Eng).pdf.

157. Erik Bloom et al., *Human Capital and Skills for a Competitive Labor Market*, *in* MEXICO 2006–2012: CREATING THE FOUNDATIONS FOR EQUITABLE GROWTH, *supra* note 153, at 217; *see also* PASTOR, *supra* note 51, at 140–42; Condon & McBride, *supra* note 110, at 255–56; Ong Hing, *supra* note 101, at 1431.

158. Bloom et al., *supra* note 157, at 228.

159. *Id.* at 242.

160. *Id.* at 232.

Mexican society has not yet transformed its educational system to meet foreign competition, and a large number of Mexican workers lack the skills and education to compete effectively. This will not change without a major injection of funds and institutional reforms.

Mexico's economic growth and political stability are important to the United States and Canada. For this reason alone, political leaders in the NAFTA countries should reassess their governments' failure to adopt trilateral policies to address the wide divergence in regional development that exists in North America. The following section suggests a partial solution to this dilemma.

III. RETHINKING THE NAFTA MODEL: THE NEED FOR REGIONAL DEVELOPMENT POLICY

If the United States wishes to stem unauthorized migration from Mexico, there are two possible paths: (1) Congress can appropriate funds to build a wall along the U.S.-Mexico border and reinforce an expensive and growing border enforcement mechanism; or (2) the U.S. government can work with the governments of Canada and Mexico to enhance NAFTA's ability to deal with the social consequences of North American integration. The first of these may give some comfort to worried groups of U.S. citizens, but it is likely to achieve only limited success in stemming Mexican migration and is not amenable to a sustainable vision of an economically integrated North America that can stand up to overseas competition. The second of these paths, contributing meaningfully to the enhancement of Mexico's economic and social stability, is a radical departure from NAFTA's original vision but it is the only way to assure a sustainable outcome.[161]

The NAFTA Parties must discover a suitable framework for concerted action to address the economic and social dislocations that spill over into national security issues, including illegal migration. It is disingenuous to think that NAFTA can foster radical structural adjustments to important sectors of the North American economy without the U.S. and Canadian governments being interested in the destabilizing effects domestically of these adjustments. This is especially true in the case of Mexico because the economic opening that began in the 1980s and consolidated under NAFTA has coincided with a democratic opening that has occasionally resulted in political and social disruptions. Unfortunately for Mexico, the architects of NAFTA,

161. *See* Hufbauer & Schott, *supra* note 124, at 8 ("For the United States, improving prospects for economic growth in Mexico is critical to strengthening its southern border.").

unlike those of the European Union, have disdained the need to engage a trilateral approach to social welfare issues and have left these problems to the individual governments to resolve.

Adjustments caused by increased competition were greater in Mexico than in its NAFTA partners, and yet the resources and institutional structures in Mexico were ill equipped to confront the social effects of worker layoffs.[162] While the United States maintains a system of trade adjustment assistance for U.S. workers who lose jobs due to increased competition from foreign trade,[163] no such system exists in either Mexico or Canada.[164] Mexico substituted the safety valve of migration to the United States as its surrogate for trade adjustment assistance.

The United States should reconsider whether a foreign policy based on a continuing lack of involvement in Mexican economic and social development is wise. For generations U.S. foreign policy largely ignored Mexico and was concerned with one predominant feature: an interest in maintaining political stability south of the U.S. border.[165] The PRI's hegemony over all aspects of Mexican life—social, political and economic—proved a perfect vehicle for such stability as the one-party, populist system kept the country remarkably stable through a web of corporativist/authoritarian institutions.[166] In other words, the United States was very fortunate: despite occasional storms,[167] Mexico remained a loyal, if distant, ally without the need for major allocations of U.S. foreign aid, which Mexico disdained in order to maintain a healthy diplomatic independence from the United States.

But now the PRI that dominated Mexico for seven decades is gone, and the greater political freedom and competition for power have brought greater political instability. This political change is coupled with greater economic instability caused by the normal functioning of a free-market, open economy. Any society open to international competition is a challenge to manage even for a large, mature economy such as that of the United States. For Mexico, an economy that is one-twentieth the size of its northern neighbor and where poverty remains

162. HUFBAUER & SCHOTT, *supra* note 4, at 468.

163. *See generally* U.S. Department of Labor, Employment and Training Administration, http://www.doleta.gov/tradeact/taa/WhoWeServe.cfm (last visited Aug. 21, 2008) (on U.S. trade adjustment assistance).

164. HUFBAUER & SCHOTT, *supra* note 4, at 129.

165. *See* JACQUELINE MAZZA, DON'T DISTURB THE NEIGHBORS: THE UNITED STATES AND DEMOCRACY IN MEXICO, 1980–1995, at 7 (2001).

166. *See generally* STEPHEN ZAMORA ET AL., MEXICAN LAW 32–36 (2004), and sources cited therein.

167. For example, the Mexican oil expropriations in 1938.

widespread and institutions of social protection are precarious,[168] the discipline of a free market economy can be disastrous. With no social safety net to speak of, Mexicans naturally have migrated to the United States in search of a way out of extreme poverty.

A. Background: Meager U.S. Financial Assistance to Mexico

Lack of development assistance from the United States has been a hallmark of U.S.-Mexican economic relations throughout the 20th Century. This relative dismissal of foreign aid fit into the general trend of U.S. foreign policy from 1980 to the present, which stressed "trade not aid"—that is, developing countries should follow neoliberal economic reforms, including free trade and attraction of foreign investment, rather than depend on foreign aid.[169] U.S. development assistance from governmental sources has historically been a small percentage of the country's annual income, even though the size of the U.S. economy makes the United States the largest foreign aid donor in the world. In 2006, U.S. Official Development Assistance (ODA) to the entire world amounted to $23.53 billion, almost twice the amount of the next highest donor (the United Kingdom).[170] But the U.S. total amounted to only 0.18% of U.S. gross national income (GNI), placing it next to last in the list of twenty-two OECD donor countries, edging out Greece, with 0.17%.[171]

For our purposes, the most important aspect of U.S. foreign aid is not its overall size, but the fact that the bulk of U.S. ODA is concentrated in relatively few receiving countries. The top U.S. foreign aid recipients in Fiscal Year 2004 were Iraq ($18.44 billion), Israel ($2.62 billion), Egypt ($1.87 billion), and Afghanistan ($1.77 billion).[172] In other words, these four countries accounted for $24 billion of the total $28

168. *See* THE WORLD BANK, REPORT NO. 36853, INCOME GENERATION AND SOCIAL PROTECTION FOR THE POOR 477 (2005), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/07/27/000012009_20060727152557/Rendered/PDF/368530ENGLISH01d0328670rev01PUBLIC1.pdf ("As a whole, the social protection system in Mexico, as in many Latin American countries, is still fragmented on the basis of labor market status and a large fraction of the population [i.e., the informal labor sector] still has no or inadequate coverage.").

169. *See generally* William A. Lovett, *Current World Trade Agenda: GATT, Regionalism, and Unresolved Asymmetry Problems*, 62 FORDHAM L. REV. 2001, 2006–08 (1994).

170. CTR. FOR GLOBAL PROSPERITY, THE INDEX OF GLOBAL PHILANTHROPY 15 (2008), *available at* https://www.hudson.org/files/documents/2008%20Index%20-%20Low %20Res.pdf.

171. *Id.*

172. CURT TARNOFF & LARRY NOWELS, FOREIGN AID: AN INTRODUCTORY OVERVIEW OF U.S. PROGRAMS AND POLICY 13 (U.S. Congressional Research Service Report for Congress, 2004), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-5904:1.

billion of U.S. ODA in 2004.[173] In the Americas, Colombia ($570 million), Peru ($170 million), and Bolivia ($150 million) were the largest recipients. The same year, Mexico received a total of $93 million of ODA from the United States in 2004, but half of that amount ($46 million) went to narcotics control and military/security grants, rather than economic development assistance.[174] A 2004 Congressional Research Service overview of U.S. foreign aid programs does not even mention Mexico.[175]

The U.S. federal government has the ability to mobilize massive funding to carry out programs. Following the devastation along the U.S. Gulf Coast caused by Hurricanes Katrina and Rita in 2005, Congress appropriated $120 billion for relief, two-thirds of which had been disbursed in less than three years.[176] The U.S. Farm Act provides over $10 billion per year in direct subsidies to U.S. farmers.[177]

The stake that the United States has in a stable, prosperous Mexico is certainly worth more than the $40 or $50 million per year, an amount lower than U.S. assistance to Bolivia, that we invest in Mexico by way of economic development assistance. Indeed, it is clear that the principal form of U.S. foreign aid to Mexico consists of the $24 to $25 billion per year in remittances sent by Mexican workers in the United States back home to their family members in Mexico.[178] Worldwide, remittances sent home to developing countries by foreign workers employed in industrialized donor countries exceeded the total Official Development Assistance, and in 2006 was equal to sixty-three percent of all private investment and lending to the developing world.[179] Mexico has come to depend on the foreign exchange earnings of Mexican remissions to maintain its balance of payments.[180] If jobless

173. USAID, U.S. Overseas Loans and Grants [Greenbook], http://qesdb.usaid.gov/cgi-bin/broker.exe?_program=gbkprogs.country_list.sas&_service=default&unit=R (last visited Sep. 15, 2008) (for this figure select "Summary of All Countries" from the drop down menu and click "Submit").

174. *See id*. (U.S. foreign aid to Mexico).

175. TARNOFF & NOWELS, *supra* note 172.

176. Dane Schillar, *Summit Opens with Praise of City's Recovery*, HOUSTON CHRON., Apr. 21, 2008, at A3.

177. *See* News Release, Environmental Working Group, In Recession, Modest Help for Most Americans, But Big Bucks for Big Farms, http://farm.ewg.org/farm/newsrelease.php (Apr. 14, 2008) (reporting $13.4 billion in subsidies to U.S. farmers in 2006); *see also* Hufbauer and Vega-Cánovas, *supra* note 102, at 27.

178. *See supra* note 112; *supra* tbl.2.

179. CTR. FOR GLOBAL PROSPERITY, *supra* note 170, at 64.

180. Alexandra Villarreal O'Rourke, *Embracing Reality: The Guest Worker Program Revisited*, 9 HARV. LATINO L. REV. 179, 179 (2006). Remittances of Mexican workers now comprise the second largest source of foreign exchange earnings, after earnings from petroleum

Mexicans were returned to their home country, they would further impact the soft Mexican labor market, while also reducing a major source of income for the society. At the same time, many industries in the United States would be adversely affected by the loss of workers.[181] U.S. repatriation of unauthorized Mexican migrants to Mexico would itself be extremely expensive.[182]

In sum, while immigration may not have been part of the official agenda of NAFTA, NAFTA is certainly part of the story of undocumented migration to the United States. For Canada, Mexico, and the United States to ignore immigration questions is to fail to recognize the cause and effect relationship between the two. For that reason, I contend in my conclusion that the time has come to bring immigration and social policy into the NAFTA equation.

B. Is European Experience Relevant to North America?

NAFTA's lack of attention to social welfare policy reflects a profound cultural difference between Europe and North America, or at least between Europe and the United States. As discussed above,[183] the impetus for a social policy in the EEC was an extension of an attitude, prevalent in post-war Europe at mid-century, that governments were responsible for the social welfare of their citizens. Thus:

> The credit for getting [social rights] into the European Charter does not go to its compilers alone. Rather, their incorporation also points to the shared values and policies on which the European Union is based, as expressed by the peoples, institutions and governments together. The importance—the equal dignity—Europeans attribute to economic and social rights is indeed a specific trait of European societies.[184]

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exports. *Id.*

181. *Cf.* Howard Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L. L. & FOREIGN AFF. 371, 373 (1998). According to the Pew Hispanic Center, all undocumented workers accounted for approximately 5% of the U.S. private labor force, and Mexicans held 56% of these jobs. Certain industries are more dramatically affected: in the farming industry, 24% of jobs go to undocumented workers; in cleaning, 17%; in the construction industry, 14% and in food preparation, 12%. *See* Pew Hispanic Center, *supra* note 104.

182. In September 2007, Julie Myers, the head of U.S. Immigration and Customs Enforcement, testified to a Senate committee that it could cost the U.S. government as much as $94 billion to deport the twelve million undocumented persons estimated to be living in the United States. Mike Nizza, *Estimate for Deporting Illegal Immigrants: $94 Billion*, N.Y. TIMES, Sept. 13, 2007, http://thelede.blogs.nytimes.com/2007/09/13/estimate-for-deporting-illegal-immigrants-94-billion/?scp=10&sq=repatriation%20undocumented%20expense&st=cse.

183. *See supra* notes 25–40 and accompanying text (discussing the history of the EEC's treatment of social welfare policy).

184. Giorgio Sacerdoti, *The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe*, 8 COLUM. J. EUR. L. 37, 45 (2002).

The EU's regional development policies, using EU financial resources to promote social cohesion and convergence of national economies,[185] also spring from the view generally accepted in European society that government has a fundamental responsibility to reduce income disparities.

There is broad recognition by experts in economic integration of "fundamental differences between [Europe and the United States] in economic organization, social values, policy regimes, and political/institutional structures."[186] These differences are reflected in the fact that there is generally less economic inequality in Europe than in the United States.[187]

The United States rejected the EU social charter as a model for NAFTA because, in the words of Robert Pastor, the United States "viewed the thick EU 'social safety net' as a cause of Europe's higher unemployment and therefore as hardly a model worth replicating in North America."[188] U.S. resistance to comprehensive social welfare programs is connected to cultural traits in the United States, such as individualism, self-sufficiency, and competition, which are both strengths and weaknesses. Even after the lessons of the Great Depression, there has been a resistance in the United States to any attempt to develop a welfare state. In the field of labor law, the reverence for individualism and self-sufficiency is reflected in the declining power of organized labor and in a low level of employer responsibility for employee layoffs.[189] In the United States, employers are quick to hire and quick to fire, an attitude that is reflected in the traditional U.S. contracts doctrine that employment contracts are terminable at will unless otherwise specified. So, in the United States in 2007, it was an issue of debate in Congress whether employers should be required to provide sick leave for workers (as proposed in a recent bill by Massachusetts Senator Edward Kennedy).[190] U.S. unwillingness to demand a guarantee of social welfare, either by the government or

185. *See supra* notes 43–84 and accompanying text (defining social cohesion and discussing its entrance into the European lexicon).

186. Zeitlin, *supra* note 42, at 1.

187. *Id*. at 2.

188. PASTOR, *supra* note 51, at 8.

189. In 1994, the year NAFTA entered into force, only fifteen percent of the U.S. labor force in the private sector was unionized. Clyde Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1035 (1995). "In the United States, the burden [of worker dislocation] is almost wholly on the dislocated worker, and almost none is on the employer." *Id*. at 1058.

190. S. 910, 110th Cong. (2007) ("A bill to provide for paid sick leave to ensure that Americans can address their own health needs and the health needs of their families.").

employers, is carried forward in many areas of American society including health care, the haphazard nature of pension programs, and the amount of vacation time per year.

It is not surprising that the U.S. lacks a regional social charter for NAFTA if one realizes that the United States does not even have a national social charter. Much employment and labor law in the United States is set at the state, not federal level, and the same is true for many areas of social welfare benefits.[191]

Canadian and Mexican societies pay more attention to public social welfare than the United States. Canada has a significant social welfare system that is spread between federal and provincial governments. Canada still spends considerably more per capita on government social welfare programs than the United States,[192] although social policy has migrated to the provinces and reduced federal government control.[193] One Canadian authority describes the federalization of Canada's social welfare system as "a web of national and provincial initiatives."[194] Similarly, Mexico has a comprehensive public health care system on paper, maintained by the Instituto Mexicano de Seguridad Social (IMSS). It also has broad protections against worker layoffs. The difficulty with Mexico's social welfare system is that the reality of welfare benefits often does not match the letter of the law, which is not unusual in a society with a low per capita income.[195] As noted in a recent World Bank report, the kinds of workers who migrate from Mexico to the United States—semi-skilled or unskilled laborers who come from the informal sector of the economy—are precisely the kinds of persons left uncovered by social welfare in Mexico:

> Despite recent expansion of programs oriented towards the poor, the Mexican system of social protection still closely mirrors the fragmented systems found in much of Latin America in which the main sources of protection are linked to one's participation in the labor market. Indeed, large groups of the population remain

191. *See* Zeitlin, *supra* note 42, at 4 ("A central feature of recent welfare-to-work and health care reforms [in the United States] has been the devolution of broad discretionary authority over program design and implementation from the federal government to states and localities."). *But see* Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHI.-KENT L. REV. 1427, 1438–39 (1993) (pointing out that the U.S. federal ERISA program regulating pension benefits has provided uniformity among states to prevent "social dumping" within the United States).

192. ERNIE LIGHTMAN, SOCIAL POLICY IN CANADA 266 (2003).

193. *Id.* at 26–27.

194. SHANKAR A. YELAJA, CANADIAN SOCIAL POLICY 14–15 (2d ed. 1978).

195. *See* Jackson, *supra* note 25, at 38–41 (explaining that Mexico's per capita income is a fraction of that of the U.S.).

> uncovered by formal social security institutions and lack adequate access to other risk management mechanisms that can protect them against impoverishing health shocks and poverty in old age.[196]

To summarize, NAFTA does not have a social charter because the United States does not believe in social charters, Mexico does not have the resources to fund a social charter, and Canada is too divided between federal and social responsibilities for social welfare to demand a social charter.[197] According to one authority, the Canadian government's lack of interest in a comprehensive social welfare policy has coincided with the trade liberalization brought about by NAFTA, with economic effects that some observers point to as weakening the support of worker rights.[198] Jon R. Johnson, a Canadian trade law expert, puts the difference succinctly and in a way that also helps dramatize the differences in attitudes between the United States and Europe: "Equality is obviously a value in both Canadian and U.S. political life, but it manifests itself in different ways. The U.S. is said to emphasize equality of opportunity, while Canada places more emphasis on equality of outcome."[199]

The creation of a social charter and the harmonization of social welfare laws in Canada, Mexico, and the United States seem distant and improbable outcomes.[200] However, the second key instrument of social cohesion in Europe has great potential for North America in the form of a trilateral regional development fund designed to correct the dramatic economic disadvantages of poorer regions in the continent.

C. The Need for a North American Regional Development Fund

As discussed previously,[201] the European Union has been successful in creating an integrated European economy that combines twenty-seven different nations that are widely divergent in per capita income and economic development. And despite the relative guarantee of labor movement within much of the European Union, there has not been a

196. Andrew D. Mason et al., *Strengthening Social Protection in Mexico—Recent Progress, Future Challenges*, *in* THE WORLD BANK, *supra* note 153, at 133.

197. *See* LIGHTMAN, *supra* note 192, at 265–66.

198. *See* Gal-Or, *supra* note 40, at 402. *But see* LIGHTMAN, *supra* note 192, at 31 (contending that Canada's retreat from rigorous social welfare programs actually started in the 1970s).

199. Jon R. Johnson, *Canada and U.S. Approaches to Health Care: How the Canadian and U.S. Political, Regulatory, and Legal Systems Impact Health Care*, 31 CAN.-U.S. L.J. 251, 253 (2005).

200. *See* HUFBAUER & SCHOTT, *supra* note 4, at 468–69.

201. *See supra* Part I (discussing mechanisms for economic and social integration of EU countries).

large migration of workers from one Member State to another.[202] The major instruments for European regional development policy have been the Structural Funds and Cohesion Funds, the great bulk of which have brought significant improvement in the physical and human infrastructure of the EU's weaker economies. The time has come for Canada, Mexico, and the United States to study the European experience and adopt a North American Regional Development Fund, with contributions from all three NAFTA Parties, to help bring about a stable and sustainable economy in North America. Such a fund would help finance needed infrastructure in underdeveloped regions of all three NAFTA countries, with a large percentage of the funding going to projects in Mexico, where the needs are generally greater than its NAFTA partners.

The creation of a regional funding mechanism connected to confront the "development gap" in North America is not a new idea. Robert Pastor has proposed the creation of a "North American Development Fund" that would invest $200 billion in infrastructure investments, mostly in Mexico, over the next decade.[203] Timothy Canova has called for a "Marshall Plan" for North America, based on the EU model of regional assistance.[204] In a 2005 Independent Task Force on the Future of North America convened by the Council on Foreign Relations, experts from the U.S., Canada, and Mexico reached the same conclusions:

> A fast lane to development is crucial for Mexico to contribute to the security of the entire region. Mexico's development has failed to prevent deep disparities between different regions of the country, and particularly between remote regions and those better connected to international markets. Northern states have grown ten times faster than those in the center and south of the country. Lack of economic opportunity encourages unauthorized migration and has been found to be associated with corruption, drug trafficking, violence, and human suffering. Improvements in human capital and physical infrastructure in Mexico, particularly in the center and south of the country, would knit these regions more firmly into the North American economy and are in the economic and security interest of all three countries.[205]

202. *See supra* Part I.A (describing the development and early integration of the EU).
203. *See* PASTOR, *supra* note 51, at 130–40.
204. Canova, *supra* note 21, at 352–53, 385–95.
205. COUNCIL ON FOREIGN RELATIONS, BUILDING A NORTH AMERICAN COMMUNITY 5 (2005).

The report recommends that the NAFTA Parties establish a North American investment fund for infrastructure and human capital.[206]

The political and administrative obstacles to the creation of a North American Regional Development Fund are considerable, as discussed below, but they are offset by the advantages to be obtained from the economic, political, and social welfare convergence that would eventually result from the implementation of a successful regional development program. A prime example exists under the European experience. At the time of Spain's accession to the EEC, Spanish infrastructure and educational systems lagged far behind those of the more prosperous EEC members. After years of regional funding through the Structural Funds, the development gap closed dramatically.[207] Spanish per capita GDP grew from sixty percent to eighty percent of the EC average in the thirteen years between Spain's accession in 1986 and 1999.[208]

Unlike NADBank, which is under-funded,[209] a North American Regional Development Bank must receive considerable funding to be effective in achieving development convergence in North America. According to a World Bank estimate, twenty billion dollars of assistance for infrastructure and educational projects are needed *each year* if Mexico is to attain a satisfactory level of development to become a stable partner in NAFTA.[210] This figure is dramatically larger than the Official Development Assistance granted to Mexico, which was $189 million in 2006. Borrowing from the World Bank in 2006 was on

206. *Id.* at 14.

> The fund would focus on increasing and improving physical infrastructure linking the less developed parts of Mexico to markets in the north, improving primary and secondary education, and technical training in states and municipalities committed to transparency and institutional development. A relatively small amount of funds should be targeted for technical assistance for project design and evaluation, management, and training. If the North American Investment Fund is to be effective, it will need significant help from the United States and Canada, and counterpart funding through higher tax revenues from Mexico. The fund design should consider such issues as incentives and debt absorption and management capacity of subnational governments to ensure that resources are effectively used. The fund will need to be managed in a transparent manner according to best international practices, and should be capitalized through a diverse set of innovative financial mechanisms. Availability of credit enhancement mechanisms for long-term loans in pesos will be critical.

Id.

207. *See supra* notes 52–84 and accompanying text (discussing evolution and effect of EU structural funds); *see also* PASTOR, *supra* note 51, at 29.

208. *See* PASTOR, *supra* note 51, at 55.

209. *See supra* note 156 and accompanying text (explaining the limits of NADBank's funding).

210. COUNCIL ON FOREIGN RELATIONS, *supra* note 205, at 12.

the order of one billion dollars per year.[211] By comparison, the European Union—only slightly larger in population than North America—is expected to invest the equivalent of seventy-nine billion dollars in the EU social cohesion funds each year from 2007 to 2013.[212]

Public funding without external assistance is not likely to meet Mexico's infrastructure needs. As noted previously, Mexican investment in infrastructure and education lag significantly behind that of its NAFTA partners.[213] The scale of public funding needed by Mexico to become a stable economic partner is not currently forthcoming and is not likely to be forthcoming at any time in the near future. Mexico's post-NAFTA economy is closely tied to that of the United States, and it is unlikely that the Mexican economy can prosper with the U.S. economy flirting with recession. On the other hand, if Mexico were to become economically stronger and more productive, it would be a more valuable partner in the economic growth of the region, buying more goods and services from its NAFTA partners.

As discussed above,[214] labor productivity in Mexico, whether measured by average wages, unemployment, or under-employment, is far below that of Mexico's NAFTA partners, and the lack of productivity is a deterrent to investment.[215] To encourage the levels of private investment, both Mexican and foreign, that are needed to create new jobs, a much greater allocation of public infrastructure spending is needed. Mexico's greatest needs are in the areas of transportation (road, water, and air); water treatment and delivery; sanitation; and power generation. Private investment may assist with some of these needs[216] but is not likely to be forthcoming without significant public investment to generate the conditions necessary for private investment. Institutional needs are also great, including education, worker training and retraining, and administrative management. Mexico's public education system is underfunded and poorly administered by a highly centralized bureaucracy that is captive to the largest labor union in Latin

211. The World Bank, Mexico Country Brief (2000), http://go.worldbank .org/SP2M3X2FN0 (last visited Oct. 4, 2008).

212. *See supra* Part I.C (discussing the latest allocation of EU structural funds).

213. *See supra* notes 146–60 and accompanying text.

214. *See supra* Part II.B (discussing low labor productivity in Mexico).

215. *See* Bloom et al., *supra* note 157, at 220 ("The low level of education and the high inequality [of the educational system] does not make Mexican labor attractive to investors, particularly factoring in the high labor costs and business risks.").

216. I am fully aware of Mexico's prohibitions on private investment, domestic or foreign, in electricity generation and delivery, and in the exploration and production of oil and gas and their derivatives. *See* ZAMORA, *supra* note 166, at 386–90. The political obstacles to private investment in these areas makes efficient, effective public investment all the more necessary.

America.[217] As a recent World Bank report concluded, Mexico must invest in education if it is to compete in the changing global environment.[218] Under current conditions, Mexico lags behind other Latin American countries with lower levels of income, and has one of the lowest levels of education achievement among OECD countries.[219] As the authors concluded, "Mexico is a negative outlier: its education indicators—both quality and enrollment—are below what are expected for a country at its level of development."[220]

D. The Trilateral Challenge: Political and Institutional Obstacles to the Creation of a North American Regional Development Fund

There are many obstacles to the creation of a North American Regional Development Fund, political as well as administrative. First, the creation of such a fund represents a major deviation from the original vision of NAFTA as a limited, economic partnership that does not engage the NAFTA Parties in the economic development of its NAFTA partners. NAFTA's limited vision is grounded in geopolitical and historical differences that distinguish North America from Europe. The European Union was forged on a continent of many countries, including significant national economies of relatively equal economic and political strength that have confronted each other in bitter wars in the past. European unification on the broad economic, political, cultural, and social fronts has been seen as the only acceptable alternative to the past. After enlargement, the European Union has developed an immense bureaucracy to manage the deep unification undertaken by twenty-seven Member States.

By contrast, the North American continent has been historically dominated by the economic, military, and political power of the United States. As noted by Carol Wise, an expert in hemispheric relations:

> [T]he US made it clear from the start that this North American project would remain distinct from the EU; a free trade agreement that had no aspirations toward the creation of a fully integrated political and economic union. True to its Anglo-Saxon roots, the goal set for

217. *See generally* Bloom et al., *supra* note 157, at 217–39; *see also* Marian Lloyd, *The Teacher Holds Sway in Mexico: Powerful Union Boss May Be Thorn in Calderon's Education Plan*, HOUS. CHRON., May 24, 2008, at A1 (discussing the power of Mexico's national teachers' union, known by its Spanish acronym, SNTE).

218. THE WORLD BANK, DEMOCRATIC GOVERNANCE IN MEXICO: BEYOND STATE CAPTURE AND SOCIAL POLARIZATION § 5.38, at 93 (2007), *available at* http://siteresources.worldbank.org/INTMEXICOINSPANISH/Resources/igr-ingles.pdf.

219. *See* Bloom et al., *supra* note 157, at 218.

220. *Id.* at 220.

> NAFTA was mainly an economic one, this in itself a political decision that was cast in apolitical terms by executive leaders in all three countries.[221]

The preponderance of U.S. power in the region not only makes the U.S. government reluctant to accept limitations on that power,[222] it also has made the Canadian and Mexican governments adopt policies to protect themselves from U.S. power, policies that could be compromised by entering into a political partnership that would subject them to the overwhelming domination of U.S. interests. Ironically, for different reasons, Canada, Mexico, and the United States share a phobia of "loss of sovereignty" (in the form of limitations on freedom of unilateral action) that European-style unification would entail. As stated by Carol Wise:

> [W]hile in principle NAFTA and the EU may embrace similar goals in the promotion of growth, productivity, and overall welfare gains, the shadow of the past has shaped markedly different policy choices. The EU approach to integration reflects the ideological and pragmatic concerns that gave rise to the European social welfare state in the wake of the Second World War; in the US, historical preferences have similarly prevailed, but in favour of a laissez-faire integration strategy that casts responsibility for overall welfare in individualistic terms. At least in the Washington lexicon, the EU's supranational institutions overly impinge on state sovereignty, and public policy is too interventionist and solicitous of the less developed members of the EU.[223]

In short, to avoid EU supranationalism, the pendulum of NAFTA integration swung in the opposite direction. NAFTA lacks the accoutrements of supranational authority. The NAFTA "Secretariat" actually consists of NAFTA offices housed within the trade ministry of each Party, and staffed by the trade ministry. According to Pastor:

> [A]n extraordinarily complex process of integration is under way, but the three countries still tend to focus on one problem or one commodity, two countries at a time. . . . We continue to bilateralize and compartmentalize . . . . The style of NAFTA's governance is

221. Carol Wise, *Great Expectations: Mexico's Short-lived Convergence Under NAFTA* 18 (Ctr. for Int'l Governance, Working Paper No. 15, 2007), *available at* http://www.cigionline.org (search "Working papers," click the "Working Papers" folder, and scroll down to Working Paper #15).

222. *See* PASTOR, *supra* note 51, at 13 ("The United States, whether as a government or society, has not displayed an excess of imagination on North American issues, perhaps believing that its economic weight and the existing configuration of the relationship assures outcomes favorable to its interests.").

223. Wise, *supra* note 221, at 5; *accord* HUFBAUER & SCHOTT, *supra* note 4, at 468–69, 488; *see also* PASTOR, *supra* note 51, at 166–68.

> laissez-faire, reactive, and legalistic: Problems are defined by plaintiffs and settled by litigation [through the NAFTA dispute settlement mechanisms]. There is no mechanism for defining problems in a productive way or addressing them from a continental perspective.[224]

Carol Wise refers to this form of laissez-faire integration as "Anglo-Saxon regionalism."[225]

The U.S. aversion to direct concern for the economic development of its NAFTA parties need not be a permanent condition of North American integration. The failure of NAFTA to address the difference in levels of economic development is not sustainable, due primarily to the strong social, economic, and geographic factors that tie the United States and Mexico. The EU's bureaucracy-heavy form of integration directed by supranational authorities may not be the answer in North America. Indeed, it has been criticized in Europe, as well as in the United States, for its "democratic deficit" or bureaucratic control of decision-making.[226] By contrast, some NAFTA observers prescribe a realistic, incremental approach towards policy convergence among the three NAFTA governments,[227] although there has been little evidence to date that such an approach may be forthcoming soon.[228] Hufbauer and Schott prescribe the consolidation of the three NAFTA "secretariats," presently located in each country's trade ministry and staffed with local nationals, into a single tri-national entity housed under one roof, staffed with citizens of the three Parties.[229] It will take considerable leadership in the governments of the NAFTA Parties to bring even these small changes about. The example, detailed above,[230] of the NAFTA governments' lack of support for effective functioning of the North American Agreement on Labor Cooperation gives evidence of this lack of political will.

This pattern of general reluctance by the NAFTA Parties to promote trilateral cooperation was altered in 2005 when the presidents of Canada, Mexico, and the United States held a summit meeting in Waco,

224. Wise, *supra* note 221, at 6, 30.

225. *Id.* at 6.

226. *See, e.g.*, SCOTT, *supra* note 66, at 36–37 (making the criticism that there is too much decision-making power at EU supranational level).

227. *See* HUFBAUER & SCHOTT, *supra*, note 4, at 471.

228. *See* Hufbauer & Schott, *supra* note 124, at 8 (referring to the many committees and working groups established under NAFTA, but pointing out that "[w]ithout a political push from the top, it is unlikely that these tripartite committees and groups can make significant progress").

229. *See* HUFBAUER & SCHOTT, *supra* note 4, at 488.

230. *See supra* Part II.A.

Texas. At the summit, the three presidents issued a joint statement regarding the creation of a trilateral forum—the Security and Prosperity Partnership of North America (SPP)[231]—to try to address issues of common concern that are not directly addressed in the provisions of NAFTA. According to the joint statement issued at its creation, the purpose of the SPP is to:

- Establish a cooperative approach to advance our common security and prosperity;
- Develop a common security strategy to further secure North America, focusing on:
    - Securing North America from external threats;
    - Preventing and responding to threats within North America; and
    - Streamlining the secure and efficient movement of legitimate and low-risk traffic across our shared borders.
- Promote economic growth, competitiveness, and quality of life.[232]

A modest effort, the SPP lacks a formal charter or organization and depends instead on the willingness and inherent powers of the heads of state of each country to coordinate foreign affairs.[233] The SPP might show that the NAFTA Parties are finally moving in the direction of meaningful trilateral cooperation. Unfortunately, the early signs of such a shift are not hopeful. As noted by Carol Wise, the SPP:

> [M]irrors rather than deepens NAFTA and offers no new institutional innovations or major commitment of funds with which to promote North American competitiveness. . . . Canada and Mexico will continue to work bilaterally with the US on competitive measures and the facilitation of cross-border trade and investment, and each of the

231. *See generally* Security and Prosperity Partnership of North America, http://www.spp.gov (last visited May 26, 2008).

232. White House Press Release, Fact Sheet: Security and Prosperity Partnership of North America, Joint Statement by President Bush, Prime Minister Martin, and President Fox (Mar. 23, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/03/20050323-4.html.

233. Despite its informal and modest agenda, even the SPP has come under attack by groups that fear the loss of U.S. sovereignty (i.e., hegemony). Numerous articles on the internet regarding the SPP yield frightened discussions on the perceived threat of trilateral cooperation. *See, e.g.*, Murray Dobbin, *The Plan to 'Disappear' Canada* (June 30, 2007), http://www.globalresearch.ca/index.php?context=va&aid=6194; Mexican Action Network Against Free Trade, *The SPP Violates the Law and Appears to Be a Technical Coup D'etat* (Oct. 29, 2007), http://www.rmalc.org.mx/aspan/index.htm; James Plummer, *Are You Ready for Your North American Union ID Card?* (July 17, 2006), http://www.humanevents.com/article.php?id=16058.

three members will continue to rely on its own domestic legal and institutional backdrop.[234]

Regardless of whether it is attached to NAFTA, the creation of a North American Regional Development Fund could be carried out in ways that would not require the establishment of a supranational agency. For instance, the fund could be administered by the World Bank or the Inter-American Development Bank, which already have secretariats that are experienced in funding projects in Mexico. The returns on such a fund, however, are likely to be less positive than if Canada, Mexico, and the United States create a charter for a new funding agency that would be under the control of the governments of the three countries. A free-standing fund would be more flexible, permitting the parties to adopt appropriate funding strategies and guidelines that are in accordance with policies that the governments would have to negotiate and embrace. The experience with the EU's regional development program demonstrates that there is considerable inter-governmental bargaining in the allocation of regional funding.[235] Even though only three governments would be involved in a North American Regional Development Fund, considerable bargaining would have to take place in allocating funds to particular sectors and regions and establishing funding guidelines, cost-sharing requirements, etc. Such bargaining is beneficial since the political will of each nation will be necessary to make such a fund work as an ongoing reality.

To be clear, the proposal of a North American Regional Development Fund is not only to fund infrastructure and education projects in Mexico. Less-developed regions of Canada and the United States would also receive funding, but given the relative needs of the three countries, it is likely that Mexico would receive seventy to eighty percent of the funding, while providing a minority (on the order of ten percent) of the capital.

E. Political and Institutional Obstacles to the Creation of a North American Regional Development Fund: Domestic Political Challenges

With the United States economy teetering on the verge of recession, and Canadians relatively lukewarm about the importance of Mexican economic development to that country's interests, it will be an uphill climb to achieve support for any initiative, such as a North American Regional Development Fund, that would transfer funds to support Mexican economic development. The pressure for job creation and

234. Wise, *supra* note 221, at 29–31.

235. *See supra* Part I.C (examining the EU Regional Development Fund).

economic welfare in the United States is dramatic, and the refrain of the 2008 presidential campaign has been to build our own society and economy, rather than devote our energies to other nations. Nevertheless, the election of a new administration in Washington, whether Democratic or Republican, offers an opportunity for new leadership to take a fresh look at the value of North American cooperation and at the limitations of U.S. policies towards Mexico. A large segment of the U.S. population has been led to believe that the country is entitled to act unilaterally on a wide range of issues and in many different forums. New, persuasive leadership is required to bring the country to an understanding of the value of trilateral cooperation in the long-term interests of the United States.

The political challenges of a North American Regional Development Fund will be no less challenging for Mexico. Just as the United States has historically avoided providing meaningful foreign aid to Mexico, Mexico has shown a marked reluctance to seek U.S. aid, which would compromise its independence. It is this reluctance that Timothy Canova has in mind when he states that "clearly there is something quite dysfunctional in the U.S.-Mexican relationship."[236]

For Mexico as well as for the United States, significant funding through a Regional Development Fund is much preferable to the type of security funding in massive amounts that the United States is more willing to provide once a country begins to fall apart. Thus, in the Mérida Initiative,[237] President Bush sought an appropriation from Congress of $500 million in military assistance for Mexico to help the country fight drug cartels.[238] The United States is spending over nine billion dollars per year on border security, much of it related to unauthorized movement of persons from Mexico.[239] We would do much better to invest in Mexican economic development in the near future, making such expensive security measures unnecessary.

Finally, it should be noted that Mexico's participation in a North American Regional Development Fund would carry not only a price in terms of its financial contributions to a fund, but also in terms of

236. Canova, *supra* note 21, at 381.

237. *See The Mérida Initiative: Assessing Plans to Step up Our Security Cooperation with Mexico and Central America: Hearing Before the S. Comm. on Foreign Affairs*, 110th Cong. 10 (2007) (testimony of Thomas A. Shannon, Assistant Sec'y for Western Hemisphere Affairs), *available at* http://www.state.gov/p/wha/rls/rm/07/q4/95278.htm.

238. Stewart M. Powell, *Bush Pitches Funding Plan for Military Aid to Mexico*, HOUS. CHRON., May 8, 2008, at A10.

239. Kimberly Amadeo, U.S. Federal Budget—Military Spending, http://useconomy.about.com/od/usfederalbudget/p/military_budget.htm (last visited Sept. 15, 2008).

institutional changes in Mexico. Funding for infrastructure and educational projects would require strict terms of transparency, as well as continued enhancement of Mexico's ability to conduct honest, independent accounting of government projects. In addition, it is likely that extensive administrative and legal reforms of the sectors to receive funding would enter into the negotiations. Hufbauer and Schott have argued that the creation of a regional development fund should be tied to Mexican domestic economic reforms,[240] such as increased contributions of tax revenues to finance government expenditures. Mexico has a great deal of experience in negotiations with multilateral organizations over matters such as these, and is capable of working out solutions in the context of trilateral negotiations within a North American funding agency that would be acceptable to the three governments. In fact, the reforms that might accompany such funding measures may be as important as the funding itself.

240. *See* HUFBAUER & SCHOTT, *supra* note 4, at 472–73.