Shifting Paradigms of Parochialism: Lessons for International Trade Law*

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John Sexton characterized the endeavour of teaching globally as an academic calling for the 'global common enterprise.'[1] He explains that the rule of law plays an integral role in integrating a 'global village' and bridging different legal and cultural traditions.[2] It is in this exchange that involved parties may begin to question their own laws, redefine legal applications through comparative inquiry and adapt their legal systems for the sake of a larger common enterprise.

Much of the study of international private law has focused on exploring differences in legal systems in light of domestic issues or harmonization.[3] Much less

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[1] John Sexton, *The Academic Calling: To Global Common Enterprise*, 51 J. Legal Educ. 403 (2001).

[2] *Ibid.* at 403 (stating that '[t]he rule of law will permeate an emerging global village, touching societies it never has touched . And the success of this new community will depend in large part upon the integration and accommodation of disparate traditions through law.').

[3] See generally, Mark A. Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 SAN DIEGO L. REV. 1053 (1998) (exploring ways in which to create a NAFTA curriculum that will foster harmonization within the context of NAFTA); Steven Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. LAW 401 (1995) (stating that NAFTA will encourage harmonization among the three countries at various levels and that university programs can be key to fostering harmonization). But see, Adelle Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 58 (1998) (proposing a different

attention has focused on accepting these differences as part of the global legal structure and on examining the traditions engendering these differences as a source of understanding parochial interests.[4] Exploring the cultural and legal differences among trading partners brings light to a world of 'hybrid legal spaces,' adding complexity to the adjudication of commercial, foreign investment and even trade disputes.[5]

This paper asserts that globalized legal education can explore differences in laws not only as a means for harmonization or convergence or for finding solutions in domestic law, but also as a means of fostering understanding of domestic parochial interests within a society. Particularly in the context of regionalism, it is in building alliances that extend beyond the parochial network that a new common tradition may form.[6] In exchanging parochial attitudes, students may begin to appreciate that compliance with international principles is driven in part by the recognition that through voluntary cooperation, domestic interests may also be best served.

While thinking 'globally' appears too vast and amorphous of a concept to translate into practical terms, thinking 'regionally' offers an opportunity for a real exchange by tapping into common regional interests and, in turn, a true exchange in culture, values and social norms.[7] In the context of the North American Free Trade Area (NAFTA) for example, the United States, Canada and Mexico have not only increased trade[8] but also have attempted to find ways of coordinating regulations in order to enhance economic exchange. Furthermore, this coordination has emerged not only in the form of harmonization but also as convergence. For example, NAFTA

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starting point for the globalization in legal education—one that focuses on the 'ambiguities of globalization.'); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. INT'L L. 1103, 1116 (2000) (characterizing the influence of judicial applications of various domestic constitutions as an important part of the 'cross-fertilization' within a domestic legal system).

[4] See Patrick Glenn, *Symposium on Continuing Progress in Internationalizing Legal Education—21st Century Global Challenges: Integrating Civil and Common Law Teaching Throughout the Curriculum: The Canadian Experience*, 21 PENN. ST. INT'L L. REV. 69, 74 (2002) 74 (recognizing that while teaching of multiple laws is challenging, 'the object of transnational legal education is not legal unification or even facilitating convergence, but rather understanding of difference and the underlying reasons for difference').

[5] See generally, Paul Schiff Berman, *Global Legal Pluralism*, 80 SOUTHERN CALIFORNIA LAW REVIEW, (forthcoming 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =985340 (applying a pluralist framework to international law and arguing that this framework can help 'manage a world of hybrid legal spaces').

[6] See H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD at 49 (discussing that globalization allows for an extension of traditions that are beyond the state).

[7] See Patrick Glenn, *Conflicting Laws in a Common Market? The NAFTA Experiment*, 76 CHI-KENT L. REV. 1789 (2001) (explaining that regionalization is an important factor in the elimination of physical, political and legal borders because 'we define the new regions not so much in terms of geophysical boundaries...but in terms of new political and legal boundaries that surpass those of the state.').

[8] For example, total U.S. merchandise trade by truck between the U.S. and Canada increased by 113% from 1993 to 2002 and between the U.S. and Mexico, by 319%. *See* Bureau of Transportation Statistics, *located at* http://www.bts.gov/cgi-bin/breadcrumbs/PrintVersion.cgi?date=27150819.

parties have attempted to find commonalities among their policies rather than purely establish identical regulations or laws.[9] For example, since 2001, regional integration has extended into the energy sector through increased cooperation in setting efficiency and labelling standards under the North American Energy Working Group (NAEWG).[10] Increased investment through cooperative alliances and joint ventures has also contributed to stronger ties among the NAFTA partners.[11]

Parochialism generally has a negative connotation for supporters of free trade. Nonetheless, at some level, free trade may itself strengthen internal pressures to establish parochialism through powerful domestic networks. Such networks may form because of a perceived need among network members that if united, they may fight against 'outsiders' who want to dominate them.[12] However counterintuitive it seems, parochial interests are a part of the global structure. Therefore, in teaching international trade law, one should strive to help students understand the relevant parochial interests and the political and economic forces that drive them.

I. Domestic Parochialism

The effect that parochialism has on compliance with international trade agreements lends itself to inquiry into what drives parochial attitudes. The social sciences teach us that parochialism generally arises from the tendency for people to favor groups in which they are members, at the expense of outsiders and even their individual interests. Professors Schwartz-Shea and Simmons describe this tendency as one flowing from a perceived 'self-interest' that in aiding the group that includes themselves, they will promote their individual interests.[13] Jonathan Baron identifies this 'self-interest' as a 'self-interest illusion', which explains why individuals are more willing to sacrifice individual interests for those of certain groups but not for larger-encompassing groups.[14] He explains that a sense of altruism drives parochial attitudes—that individuals may find affinity with groups to which they identify

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[9] *See* Ronald D. Knutson and Rene F. Ochoa, *Convergence, Harmonization* and *Compatibility under NAFTA: A 2003 Status Report, available at* http://www.farmfoundation.org/farmpolicy/knutson-ochoa.pdf. (last visited Feb. 1, 2007) (distinguishing convergence from harmonization by explaining that convergence requires 'commonality of policy' rather than the implementation of uniform programs or regulations through harmonization).

[10] Stephen Weil and Laura Van Wie McGrory, *Regional Cooperation in Energy Efficiency Standard-Setting and Labeling in North America, available at* http://www.osti.gov/bridge/servlets/purl/ 824274-0MHxDS/native/824274.pdf. (last visited Feb. 2, 2007).

[11] *See* David Sparling and Roberta Cook, *Strategic Alliances and Joint Ventures under NAFTA: Concepts and Evidence* (stating that strategic alliances and joint ventures are the 'new international business norm'), *available at*, http://www.agecon.ucdavis.edu/aredepart/facultydocs/Cook/ rankfoodii/june25final.pdf. (last visited Feb. 1, 2007).

[12] *See generally infra* section I.

[13] See Schwartz-Shea, P. & Simmons, R.T., *Egoism, Parochialism* and *Universalism*, RATIONALITY AND SOCIETY, Vol. 3, No. 1, 106-132 (Jan. 1991).

[14] *See* Jonathan Baron, *Parochialism as a Result of Cognitive Biases*, Oct. 1, 2005 at 3, *available at* http://www.econ.ku.dk/tyran/Workshop%20BPE/Baron.pdf. (last visited Feb. 1, 2007).

ethnically, culturally, religiously or even politically. As a result, powerful networks may arise domestically. Professors Samuel Bowles and Herbert Gintis define two levels of parochialism in network formations:

1. more obvious network formation based on perceived common traditions in ethnicity, cultural values, politics and religion; and
2. one based on underlying economic advantages within the 'problem solving capacities of networks.'[15]

Members may identify with such powerful networks because of these common traditions or advantages. In this context, parochial attitudes may result from a lack of memory that in fact origins have been pluralist in nature.[16]

The power of these networks remains puzzling in a world of increased globalization. These powerful networks resist integration with other networks, especially those outside their geographical borders. One reason for this phenomenon may be that such networks, though insular, may 'solve economic problems that are resistant to market or state-based solutions.'[17] Despite the more obvious cultural, religious, or political affinities that members of such networks seem to share, there is a recognizable economic advantage to remaining insular and loyal to the network. However we choose to characterize parochialism, it permeates movements at the domestic level which resist globalization at the multilateral and even regional levels. For the purposes of this paper, this attitude is characterized as *domestic parochialism*. In discussing parochialism in this context, the focus is on individual attitudes and the way they translate into the larger national scale. There are obvious limitations to applying observations made originally on individuals to a nation consisting of a multitude of special interest groups. However, a full discussion of these limitations is beyond the scope of this paper.

Free trade agreements challenge the power of such networks. In particular, the lowering of tariff and non-tariff barriers forces nations to become less protectionist and to suspend their parochial attitudes. While eliminating economic protectionism may be at the core of free trade, trade agreements do not guarantee it even if the national will to become a member of a larger, global community is present. The concept of national treatment, for example, as required under Article III of GATT or in

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[15] Bowles and Gintis, *Persistent Parochialism*, at 2 (stating that '[m]embers, of course, do not normally express their identification with networks in terms of their economic advantages. Rather, they typically invoke religious faith, ethnic purity, or personal loyalty. These sentiments often support exclusion or shunning of outsiders.') . The authors explain that among 'the problem-solving capacities of networks are the powerful contractual enforcement mechanisms made possible by small-scale interactions, notably effective punishing of those who fail to keep promises, facilitated by close social ties, frequent and variegated interactions and the availability of low cost information concerning one's trading partners.' *Ibid*.

[16] H. Patrick Glenn, *Transnational Legal Theory and Practice Essay*, 29 FORDHAM INT'L L. J. 457 (2006).

[17] Bowles and Gintis, *supra* note 15 at 3.

various chapters of the NAFTA is a principle directed at combating protectionism at its core.[18] However, distinguishing between national treatment violations and domestic regulatory measures can be problematic for international trade adjudicatory bodies. Regulatory measures, even if found to be legitimate because of a public purpose, may be protectionist in nature and in turn serve parochial interests.

II. Regionalism, Hybridization and Larger Problem-Solving Networks

Economic integration through regionalism may help propel the emergence of new and hybrid cultures.[19] Hybridization, as characterized by Jadish Bhagwati, generates cultural, social and economic alliances which can help form larger regional networks.[20] Furthermore, hybridization can create hybrid legal cultures. This can occur, for example, through assimilation of different legal norms and procedural mechanisms. Also, jurisdictional overlaps may emerge when different legal regimes have jurisdiction over a common issue. For example, NAFTA allows disputes arising both under NAFTA and the WTO to be brought under either jurisdiction at the discretion of the involved parties.[21] In the context of the NAFTA partners, a *NAFTA parochialism* may be the source of power within a multilateral framework.[22]

a. *NAFTA Parochialism*

Assuming the existence of different well-established domestic networks, the question remains of how to coordinate and reconcile the various interests they espouse. The challenge this presents can lead to more division and differentiation among the networks. For some international lawyers, harmonization may be one solution. However, harmonization attempts to supplant local norms with universal ones and, in turn, has a hegemonic effect which can just fuel local networks in their resistance to

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[18] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 *amended by* General Agreement on Tariffs and Trade-The Uruguay Round: Agreement Establishing the World Trade Organization, Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter GATT], art, III. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments–Results of the Uruguay Round, app. 1, 33 I.L.M. 1125 (1994). *See also* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 296–456, 605–800 (1993) [hereinafter NAFTA], arts. 1102, 1202, 1405, 1703.

[19] Jagdish Bhagwati, IN DEFENSE OF GLOBALIZATION at 107 (describing various anti-globalization forces which the author terms as 'global pessimists' and opining that 'economic globalization is a culturally enriching process.').

[20] *Ibid.* at 109 (illustrating examples of cultural 'hybridization' resulting from globalization).

[21] *See e.g.* NAFTA, *supra* note 21, art. 2005. *See also* Berman, *Global Legal Pluralism*, *supra* note 5, at 41 (discussing jurisdictional overlaps).

[22] *See* Patrick Glenn, *Conflicting Laws*, *supra* note 7, at 1791 (2001) (distinguishing the NAFTA experience form the European Union and characterizing the member states of NAFTA as 'internal common markets').

integrate regionally or globally.[23] For the NAFTA partners, harmonization may not necessarily resolve their cultural, political, economic and legal differences. Perhaps resolving these differences is not the goal at all. Another approach could be one in which parties may draw on their commonalities to create institutions that work toward addressing shared interests. In this way, such institutions would implement procedural and normative mechanisms that would embrace the pluralist nature of their shared common space.[24]

Despite their differences, NAFTA partners do share some historical and political characteristics. They are all federalist in nature even if the distribution of power and authority may vary from country to country.[25] Each recognizes the political independence of their internal states while recognizing that the power of the states is limited for the common good of the nation, especially in terms of commerce. For example, in the United States, the dormant commerce clause limits the power of the states in interstate commerce.[26] However, the states retain their power in other areas. Mexico, on the other hand, places much political authority in the national legislature and its national administrative agencies.[27] Canada has perhaps the most decentralized system of the three NAFTA member states.[28] Commerce power of the Canadian federal government, for example, is much narrower than in the United States. Canada, as a nation, has attempted to become more centralized as well.[29]

All three also share some historical experiences. They were once colonies of European colonialism that, despite periods of royal or dictatorial dominance, eventually developed into republics and not kingdoms. They even have occupied and fought over the same territory at different points in history. For example, the 1848 Treaty of Guadalupe Hidalgo ceded to the U.S. certain Mexican territories that today include the states of Colorado, Arizona, New Mexico, California, Nevada, Utah and Wyoming. While each nation has developed distinctively, they share some common traditions that, if fostered, can help form the basis of a quilt of hybridization. In enhancing these common threads, such hybridization can lead to the development of a

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[23] *See* Berman, *Global Legal Pluralism*, *supra* note 5, at 28 (describing harmonization as failing to meet the realities of diversity among societies and as potentially being hegemonic).

[24] *Ibid.*

[25] *See* Mark A. Drumbl, *Amalgam in the Americas*, *supra* note 3, at 1062-1072 (1998) (describing generally the differences in political structures and legal systems between the three member states of NAFTA).

[26] *See generally* Gibbons v. Ogden 22 U.S. 1, 203 (1824); Wilson v. Black-Bird Creek Marsh Co., 27 U.S. 245 (1829); Cooley v. Board of Wardens, 53 U.S. 299 (1851); DiSanto v. Pennsylvania, 273 U.S. 34 (1927); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) .

[27] *See* Drumbl, *Amalam in the Americas*, supra note 3, at 1062-1072. For more on the Mexican legal and political system, *see generally* Steve Zamora (with Cossio, Pereznieto, Roldán and López), MEXICAN LAW, Oxford University Press, 2004.

[28] *See* Drumbl, *Amalam in the Americas*, supra note 3, at 1072.

[29] *See generally*, Martha A. Field, *The Differing Federalism of Canada and the United States*. 55 LAW AND CONTEMPORARY PROBLEMS 107 (comparing federalism in the United States and Canada).

new common tradition that surpasses parochial interests, without necessarily replacing them and in which parochial networks may form alliances. That is, domestic parochialism may be replaced by a *NAFTA parochialism*.

Defining the parameters of regionalism *vis a vis* the multilateral trade regime is not easy. Trade distortions could emerge as a result of too much emphasis on regional interests or political alliances and these could certainly lead to detrimental effects for the global community more generally. After all, one of the reasons for implementing the GATT was to avoid another World War primarily caused by powerful political military alliances.[30] Regional strength should only exist within a strong multilateral system. In the context of trade, this relationship is continually being tested through WTO decisions that implicate regional partners without clear recognition of the regional issues at play. [31] For example, there are jurisdictional overlaps in the adjudication of disputes concerning antidumping and countervailing duty measures as well as alleged national treatment violations.[32] In *Mexico—Tax Measures on Soft Drinks and other Beverages*, for example, the WTO panel and later the appellate body decided that Mexico's tax on soda bottlers using high fructose corn syrup rather than sugar was protectionist.[33] This same issue has been considered in a Chapter 11 foreign investment NAFTA claim by the US investor affected by the tax.[34] Though the issue has not yet been resolved by the NAFTA arbitration tribunal, NAFTA Chapter 11 tribunals have in the past deferred to WTO decisions regarding national treatment violations under Article III of GATT.[35]

More recently, however, the Chapter 11 NAFTA tribunal in *Methanex Corporation v. Government of the United States* dealt with a California regulation that, because of alleged health and environmental risks, banned the use of methanol in

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[30] *See* JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 21 (2000) (stating that the goals behind the GATT agreement included 'the prevention of war and the establishment of a just system of economic relations' as well as 'the economic benefits that might derive from international trade and economic stability') . *See also* Colin Picker, *Regional Trade Agreements v. The WTO: A Proposal For Reform Of Article XXIV To Counter This Institutional Threat*, 26 U. Pa. J. Int'l. Econ. L. 267, 280 (2005) (discussing interwar concerns regarding regionalism).

[31] *See* Elizabeth Trujillo, *Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures and the WTO*, 40 CORNELL INT'L L. J. 201 (2007), *also available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933447.

[32] For a discussion of jurisdictional overlaps among domestic, NAFTA and WTO regimes, see Elizabeth Trujillo, *Defining Jurisdictional Overlaps in the Midst of Regionalism* (draft available with author).

[33] *See* Mexico-Tax Measures on Soft Drinks and other Beverages, WT/DS308/4, June 11, 2004 and WT/DS308/R, October 7, 2005 [hereinafter *Mexico—Tax Measures*] . *See also* Trujillo, *Mission Possible, supra* note 31.

[34] *See* Corn Products International v. Government of the United Mexican States, Request for Institution of Arbitration Proceedings, Oct. 28, 2003 [hereinafter *Corn Products*].

[35] *See* Trujillo, *Mission Possible, supra* note 31, part III for a discussion of NAFTA Chapter 11 decisions discussing WTO adjudication of national treatment violations.

reformulated gasoline. Here, the Chapter 11 tribunal clearly stated that NAFTA tribunals are not required to look to WTO panel decisions as precedent for their own decisions.[36] Determining which regulatory measures are legitimate (and therefore not in violation of commitments under GATT) is a challenge for international trade adjudicatory bodies. Regulatory measures aimed at placating domestic parochial attitudes can masquerade as legitimate and nonprotectionist. Therefore, creating larger capacity networks that incorporate the economic advantages to globalization is important at the domestic level.

b. *Reconciling Pluralist Interests*

Professor Patrick Glenn distinguishes between legal systems exclusive to the nation state and legal traditions that are more encompassing and 'transcend state law.'[37] He explains that '[s]tates of immediately cognate traditions may bind together in some supranational form, in an effort to catch up to their own, constitutive traditions.'[38] Hybridization through regionalism offers an opportunity for new common traditions to emerge, pluralist in nature, but unified in a common economic interest.[39]

Professor Paul Schiff Berman envisions a world of hybrid legal spaces in which pluralism serves as a means of managing, rather than eliminating or supplanting, hybridity.[40] He explains that 'normative conflict among multiple, overlapping legal systems is unavoidable' and can lead to alternative forms of conflict resolution and change.[41] Embracing hybridization as an essential part of international law challenges traditional views of state sovereignty and diminishes the power of internal networks. From this perspective, the goal of international law is no longer defining its parameters as a separate legal space, but rather finding procedural and, in some instances, normative mechanisms of managing and coordinating various legal norms and institutions. For example, NAFTA itself contains trade requirements such

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[36] *See* Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Aug. 9, 2005, Part III, ch. B, ¶ 37, *available at* http://www.state.gov/documents/organization/51052.pdf. [hereinafter *Methanex*] . *See also* Trujillo, *Mission Possible, supra* note 31, at parts III & IV (discussing the tendency of NAFTA tribunals to defer to WTO decisions and the interesting complexities that these jurisdictional overlaps present. This article also reflects on the impact of *Methanex* in future NAFTA tribunals and their decisions *vis à vis* similar WTO decisions).

[37] Patrick Glenn, *Symposium on Continuing Progress in Internationalizing Legal Education*, *supra* note 4, at 69 (stating that '[t]he notion of a legal tradition is one which transcends state law, but there is no accepted or likely-to-be accepted language of the "multi-traditional" or "pan-traditional".') . *See generally*, H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD, *supra* note 6, at ch's 1 and 2.

[38] *See* H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD, *supra* note 6, at 49.

[39] *See* Patrick Glenn, *Conflicting Laws*, *supra* note 7, at 1789 (2001) (explaining that regionalization is an important factor in the elimination of physical, political and legal borders because 'we define the new regions not so much in terms of geophysical boundaries...but in terms of new political and legal boundaries that surpass those of the state.').

[40] Berman, *Global Legal Pluralism*, *supra* note 5, at 8.

[41] *See ibid.*

as national treatment which could be adjudicated in different legal regimes such as in the case of *Corn Products International v. United Mexican States* and the WTO case *Mexico-Tax Measures.* The various legal regimes under NAFTA may overlap with domestic regimes as well, such as in *Loewen Group, Inc. and Raymond Loewen v. United States*, where a NAFTA Chapter 11 tribunal addressed a Mississippi court decision regarding a Canadian investor in that state.[42] At times legal regimes adjudicating the same cases may arrive at different decisions. A domestic court or agency may rule in a different manner than a NAFTA tribunal as may a WTO panel, as in the Softwood Lumber cases.[43] Such jurisdictional overlap is becoming commonplace. Pluralism embraces such jurisdictional hybridization and allows for a 'dialectical approach' to resolving international disputes.[44]

Professor Ruti Teitel, in examining approaches to comparative constitutional law, expresses concern that the traditional functionalist approach to comparative inquiry fails to resolve modern practical problems arising from hybridization.[45] Rather, a dialogical inquiry is preferable in this context because of its potential for generating 'cosmopolitan effects that mat well transcend any individual state.'[46]

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[42] Loewen Group, Inc. and Raymond Loewen v. United States, Award on Merits (NAFTA Ch. 11 Arb. Trib., June 26, 2003) (dismissing the claims on its merits because claimants failed to show no remedy under U.S. municipal law).

[43] *See generally*, *In re Certain Softwood Lumber Products from Canada*, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03 (NAFTA Ch. 19 Binational [U.S.-Can.] Panel Aug. 13, 2003, June 7, 2004, Dec. 1, 2004, May 23, 2005, Oct. 5, 2005, & Mar. 17, 2006), *In re Certain Softwood Lumber Products from Canada*, Final Affirmative Antidumping Determination, USA-CDA-2002-1904-02 (NAFTA Ch. 19 Binational [U.S.-Can.] Panel July 17, 2003, Mar. 5, 2004, & June 9, 2005), *In re Certain Softwood Lumber Products from Canada*, Final Affirmative Threat of Injury Determination, USA-CDA-2002-1904-07 (NAFTA Ch. 19 Binational [U.S.-Can.] Panel Sept. 5, 2003, Apr. 19, 2004, & Aug. 31, 2004) and *In re Certain Softwood Lumber Products from Canada*, Order, ECC-2004-1904-01 USA (NAFTA Ch. 19 Extraordinary Challenge Comm. Aug. 10, 2005). *See also*, Appellate Body Report, United States--Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5, WT/DS257/AB/RW, para. 96 (Dec. 5, 2005). For a discussion of the Softwood lumber case and the potential conflicts between the NAFTA and the WTO regimes, see generally *International Decision: Softwood Lumber Dispute (2001-2006)*, 100 AM. J. INT'L LAW 664 (2006).

[44] *See* Berman, *Global Legal Pluralism*, *supra* note 5, at 32-33 (stating that 'a pluralist approach understands that interactions between various tribunals and regulatory authorities are more likely to take on a dialectical quality that is neither direct hierarchical review traditionally undertaken by appellate judges, nor simply the dialogue that often occurs under the doctrine of comity.').

[45] Ruti Teitel, *Comparative Constitutional Law in a Global Age*, Book Review of COMPARATIVE CONSTITUTIONALISM: Cases and Materials, eds. Norman Dorsen, Michel Rosenfeld András Sajó & Suzanne Baer (2003), 117 HARV. L. REV. 2570, 2584-2586. In reviewing a book on Comparative Constitutionalism by Michel Rosenfeld András Sajó & Suzanne Baer, the author compares the functionalist and neofunctionalist approaches in comparative constitutionalism to a more modern, the 'dialogical approach.' The author explains that the dialogical approach allows for theories on comparative constitutionalism 'as a dynamic interpretative and discursive practice.' *Ibid*.

[46] *Ibid.* at 2586-2587.

In a similar way, there is no consensus on whether the WTO has institutionalized universal normative standards for dealing with issues of international trade. It is even less clear if in fact the WTO panels are establishing universal norms of trade law for the international economic community.[47] Perhaps at one level, the GATT sets the floor for norms accepted in international trade, both multilaterally and regionally. Principles of national treatment, most-favoured nation treatment and market access are examples of such normative standards. The adjudicatory bodies of the WTO and the NAFTA, for example, grapple with these principles and make their decisions based on standards of international law and the Covered Agreements of the WTO.[48] However, many of the problems dealing with these principles arise within the domestic context of government measures such as regulation or even deregulation. Within these contexts, the role of the WTO as a regulatory model setting trade norms is questioned.[49] In this role, the WTO may disassociate problems from their domestic or regional context much in the same way that a neofunctionalist approach to comparative constitutionalism 'abstracts problems from their particular contexts to arrive at a constitutionalism hardly identifiable with politics or place.'[50] Because of the need for domestic regimes to enforce the decisions of adjudicatory bodies in free trade agreements, WTO panels and regional tribunals cannot entirely disassociate international issues from their domestic or regional contexts if their decisions are to have real clout. A dialogical approach may help to resolve disputes arising in different jurisdictional regimes and encourage dispute resolution bodies to inform each other on related issues.[51]

III. The Classroom Exchange Promotes Hybridization

What does hybridization through regionalism say about cross-border legal education and, more specifically, for the future of NAFTA lawyers? It is the axis around which any course in NAFTA may encourage a dialogue among participants whose countries

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[47] *See* Berman, *Global Legal Pluralism*, *supra* note 5, at 26 (discussing universalism); *See also* Trujillo, *Mission Possible*, *supra* note 31.

[48] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments–Results of the Uruguay Round, app. 1, 33 I.L.M. 1125 (1994).

[49] *See generally*, John O. McGinnis and Mark L. Movsesian, *Commentary: The World Trade Constitution*, 114 HARV. L. REV. 511 (2001) (describing regulatory model and distinguishing it from the antidiscrimination model). *See also* Trujillo, *Mission Possible* at section II.b (comparing the regulatory and the antidiscriminatory models of the WTO.

[50] *See* Teitel, *Comparative Constitutional Law in a Global Age*, *supra* note 45, at 2577 (specifically discussing the casebook, COMPARATIVE CONSTITUTIONALISM, as applying a neofunctionalist perspective to comparative constitutional law). The author goes on to state that 'the functionalist approach to the definitional query is to abstract constitutional problems from their contexts. This approach does not pay adequate attention to the extent to which constitutional problems are informed by politics and culture.' *See ibid.* at 2578.

[51] *See also* Berman, *Global Legal Pluralism*, *supra* note 5, at 13 (citing Robert Ahdieh in explaining that a dialogical relationship among domestic and international tribunals may help 'develop a joint jurisprudence partly in tandem and partly in tension with each other.').

are different and yet are trading partners. A classroom consisting of U.S., Mexican and Canadian students is a good forum for inculcating a sense that they are members of a larger problem-solving capacity network, larger than the domestic or local one to which they may be accustomed.

Though this paper focuses primarily on my own experience in developing a transnational course, it also expresses some more general reflections regarding cross-border legal education. In setting up the framework of a transnational NAFTA course, I worked with my Mexican colleague, Professor Gabriel Cavazos from the ITESM who was teaching a NAFTA course in the LL.M. Program in International Trade Law (*el Instituto Tecnológico de Monterrey, Maestría en Derecho Comercial Internacional*) in Monterrey, Mexico. First, we outlined the objectives of such a course. The objective was to provide something that our students would not be able to get in a more traditional NAFTA course. We identified a few key points:

1. Students should achieve a basic understanding of the basic principles of international trade law more generally and of NAFTA more specifically and how these principles pertained to and affected their own local parochial interests and the interests of their future clients.[52]

2. Student should learn basic differences in the political structures and legal systems of their counterparts. But they should also understand where commonalities are, to the extent they exist, including historical, political and economic ones.

3. Finally, students should experience first hand 'an exchange' to help them see for themselves where there are differences and where they may draw on their commonalities. We chose a simulated arbitration as a joint exercise. We used *Corn Products* because it allowed students to work together with an unresolved Chapter 11 NAFTA investor-state arbitration case that also contained issues being adjudicated before a WTO panel. This allowed us to raise many issues pertaining to protectionism more generally and jurisdictional overlaps between the NAFTA and the WTO dispute resolution bodies and their regimes.

Some of the more practical questions we needed to address related to methodology and collaboration more generally, the 'exchange' that should occur and the role of technology. In teaching transnationally, collaboration first begins with the willingness of the professors as well as that of their institutions. In our case, there had already been some ongoing negotiations between our universities regarding the possibilities for establishing joint programs and faculty exchanges for collaborative research. At the very minimum, the backdrop for such a course should be one characterized by what John Sexton calls a 'minimalist model' in which the faculty

[52] Interestingly, in my experience with this course, students have been primarily from Michigan, Ontario and Nuevo Leon—all regions deeply affected by the implementation of NAFTA . Many of the students had experienced first hand these affects.

members and the institutions themselves act independently, while collaborating under 'an umbrella entity' which facilitates the exchange.[53]

Second, we had to consider what exactly we were exchanging through this course.[54] To the extent that a transnational course is based on an exchange of legal skills and cultural perspectives to resolve common problems, we also needed to find ways of drawing on our commonalities in order to achieve a cohesive educational experience for our students.[55] This began with the professors sharing outlines and syllabi of the course as if each were to teach it independently of the other. We integrated these into one course syllabus that we then adapted for our own class. Naturally, one of the most obvious obstacles to overcome in such an exchange is the language barrier. In our case, this was a moot point since we had the good fortune that the Mexican LL.M. students as well as Professor Cavazos were fluent in English.[56] However, the students manifested their linguistic differences in other ways—through syntax and interpretation of legal issues and even in differing analytical approaches to the relevant international law.

Differences in methodological teaching approaches also had to be considered. Whereas U.S. legal education focuses primarily on interactive learning such as the Socratic method or problem-solving approach, Mexican law schools tend to show a preference for lectures rather than cooperative learning (though in some schools like ITESM, other methods are being used as well).[57] Professor Cavazos and I decided that each professor should teach in his or her preferred way the basic principles of NAFTA, but we coordinated the scheduling of the topics being taught, the book being used and outside reading materials. We invited a guest lecturer from the department of economics and business administration from ITESM for the first videoconference session who lectured on the effects of NAFTA on Mexico. This allowed the UDM students to understand more clearly the impact of NAFTA on our Mexican counterparts.[58]

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[53] *See* Sexton, *The Academic Calling: To Global Common Enterprise, supra* note 1, at 405.

[54] *See generally* Margaret Y.K. Woo, Reflections on International Legal Education and Exchanges, 51 J. Legal Educ. 449 (2001) (discussing the essence of international legal education and exchange).

[55] *See ibid.* at 451 (stating that 'exchanges' in the context of international education consists not only of exchanges within substantive law areas, but also an exchange of skills, values and the cultures within the differing legal systems).

[56] Although the author is also fluent in Spanish and some of the American students spoke Spanish as well, the joint portions of the course were conducted in English. Also, the ITESM students were graduates students studying in the LL.M. program for International Trade ITESM.

[57] *See* Woo, *supra* note 54, at 453 (discussing different teaching methodologies, some based on a passive approach and others on active learning). *See also* Drumbl, *Amalgam in the Americas, supra* note 3, at 1079-1099 (comparing the education systems of Canada, the US and Mexico) . Several professors at the ITESM were also educated in the U.S. and that influence can be felt in a gradual shift in the traditional Mexican teaching methods.

[58] We did not have a Canadian or U.S. lecturer, but such participation would be useful in the future.

Third, we had to consider the role of technology in bridging not only geographical distances, but also language barriers. By characterizing our course as a *web-based course,* we could facilitate the exchange among the students at both schools and use it as a supplement to learning in the classroom. It was also a means for teaching foreign students while teaching our own.[59] We used the web to communicate with students as if they were all in one classroom. Through video-conferencing, students from both schools presented mock oral arguments on the *Corn Products* investor-state case to a simulated tribunal, consisting of students from both schools. In this way, all participants could appreciate the different styles of advocacy presented by lawyers from the continental and common law traditions.[60] For example, the Mexican students had a more formalist reading of the NAFTA and WTO treaties as normative instruments. In contrast, the tendency of the U.S students was to attempt to look at precedent, despite the lack of formal *stare decisis* in this area.

In using a simulated arbitration, comparative inquiries can be useful not only for understanding the similarities and differences among legal systems, but also as a backdrop for deciding which aspects of different legal traditions to adopt in resolving the many different problems arising under international trade law. An exercise in the arbitration process offers an opportunity to engage in a dialogical approach to WTO and NAFTA jurisprudence rather than a functionalist one.[61] Ruti Teitel describes the functionalist approach in the constitutional law context as presuming a "normative constitutional vision across societies"[62] whereas a dialogical discourse allows for a dynamic interpretative that focuses on the judicial processes and interpretation and may draw from various sources of law.[63]

In a similar way, adjudicatory practices of the WTO panels and NAFTA Chapter 11, 19 and 20 tribunals, for example, can be viewed as dynamic and evolving, finding their authority both in normative standards of international trade law, to the extent they exist, and in a more fluid multilateral system that amasses several legal traditions and political cultures.[64]

IV. Lessons Regarding Educational Exchanges and Parochialism

In conclusion, several lessons emerged from this legal educational exchange. First, it appears that whether the NAFTA arbitration fosters a functionalist approach or a

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[59] *See* Ruth Buchanan and Sundhya Pahuja, *Using the Web to Facilitate Active Learning: A Trans-Pacific Seminar on Globalization and the Law*, 53 J.LEGAL EDUC. 578 (2003) (discussing the different ways that the Internet may be used to facilitate teaching).

[60] *See* Drumbl, *Amalgam in the Americas*, supra note 3, at 1062-1072 (describing differences in the civil law approaches and the common law approaches in all three countries).

[61] Ruti Teitel, *Comparative Constitutional Law in a Global Age, supra* note 45, at 2584-2586 .

[62] *Ibid.* at 2576.

[63] *Ibid.* at 2584-2586. Professor Teitel states that the dialogical perspective "theoriz[es] comparative constitutionalism as a dynamic interpretive and discursive practice." *Ibid* at 2584-2585.

[64] *Ibid.* at 2585 . *See also supra* section IIb.

dialogical one to resolving international trade issues depends, at some level, on the legal tradition of the interpreter. That is, a civil lawyer may tend to deal with a legal problem from a different perspective than that of a common law attorney. During our simulated arbitration, it was notable that the Mexican students tackled the alleged violations first by using literal treaty interpretations of the NAFTA treaty itself as well as the WTO agreements rather than prior disputes. They focused on the 'correct' understanding of the relevant provisions governing the alleged violations. On the other hand, the U.S. students would begin with the facts themselves, using the rule of law as the guide to better understand relevant facts as they pertained to the relevant provisions.[65] The UDM students looked to prior NAFTA Chapter 11 cases and even WTO decisions in trying to find the best interpretation of the NAFTA provisions, despite being aware that there are no formal *stare decisis* in this context. This illustrates one of the big differences between the two legal systems – the role of the judiciary. In Mexico, the primary sources of law do not include case law and the legislatures and national agencies have a more authoritative role in creating new law than the courts do. By contrast, the role of the U.S. judiciary is much more pronounced; courts can set precedent and create new law.[66] Interestingly, as the discussions among the students from both schools developed over time, the Mexican students also began to look to precedent. The UDM students, on the other hand, began trying to understand the 'plain meaning' of the relevant provisions of NAFTA and were concerned about the arbitrators creating expansive interpretations that were beyond their scope.

Second, despite the occasional comment regarding general disillusionment with compliance in international agreements, the students treated each other with respect. Their willingness to learn from one another was evident. This willingness and interest to learn from their foreign counterparts ultimately created a forum for healthy discourse. No one side dominated the discussion and no one legal tradition supplanted the other. The students even recognized moments of differences in legal approaches and adapted their own way of thinking to better understand their counterparts. In this way, the simulated arbitration was dynamic and pluralist in nature, leaving room for multiple interpretations.

Finally, there were lessons about the effect of parochial attitudes on international adjudicatory processes. We saw that it is important for us as international lawyers and educators to recognize not only that parochialism exists, but also that it serves a perceived purpose for those benefiting from being a member of a problem-solving capacity network. In *Mexico—Tax Measures*, for example, the Mexican government argued before the WTO panel and Appellate Body that Mexico

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[65] *See* Drumbl, *Amalgam in the Americas*, *supra* note 3, at 1066-1069 (explaining differences in approaches to legal problems between a common law attorney and a civil law attorney) . Generally speaking, civilian lawyers will as an initial matter focus on the "plain meaning" of the text and interpretation of code provisions are taken out of their historical context and applied according to "the current sense of justice and ...to its purpose." *See ibid.* at 1067.

[66] *Ibid.* at 1066; 1070 . Professor Drumbl emphasizes that the important role of the 'common law judge creates a need for some consistency in how judges exercise their power.' *See ibid.* at 1070.

had a special interest in protecting its sugar industry, especially in the context of a larger sugar dispute between the United States and Mexico. Whether placing a tax on soda bottlers using high fructose corn syrup is the most efficient means of aiding the Mexican sugar industry is arguable and best left to the economists.[67] However, at a more individual level, NAFTA students studying this case, though from different countries, did in fact sympathize with Mexico and the challenges of adapting a traditionally protected sugar industry, deeply drenched in local politics, to free market principles. They understood first hand the difficulties of transitioning regulated markets and adapting them for free trade as well as the challenges for foreign investors in those markets. Students were able to set aside their own parochial attitudes and perceptions of their counterparts and debate common issues arising out of a shared sphere of regionalism.

Such an exercise presents an opportunity for creating a shift in parochialism paradigms, one from domestic parochialism to one that incorporates several regional exchange networks and may help to generate a new common tradition.[68] This new common tradition may be one that invokes cultural, political and economic ties, leading to hybridization. In doing this, domestic parochialism will be only one part of a quilt consisting of a patchwork of parochial interests. Such regional parochialism should not be the basis for diverging from the multilateral regime, but rather, should

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[67] *See e.g.* Alan Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 UNIV. CHI. L. REV. 1 (1999) . *See generally*, Anne O. Kreuger, ECONOMIC POLICIES AT CROSS PURPOSES: THE UNITED STATES AND DEVELOPING COUNTRIES at 251.

[68] *See also* Steve Zamora, *NAFTA and the Harmonization of Domestic Legal Systems*, *supra* note 3, at 401 (explaining that NAFTA creates not only economic ties but also 'brings three disparate societies into closer contact' through 'formal and informal transactions between citizens of the NAFTA countries' in a phenomenon he describes as the 'NAFTA exercise.').

ground itself within the multilateral framework. Strengthening and defining this framework is also necessary. However, at a more individual level, students of NAFTA participating in a joint course, though from different countries, can in fact set aside their own parochial attitudes and participate in shared hybrid regional space. In doing so, legal education can play an important role in helping to engender a new common tradition for all parties involved.