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## **An Elusive Problem: Distinguishing Government from Governance to Analyze North America**

### **The Challenge of Defining North America**

The central thrust of this research project is to determine to what extent and in what ways North America exists as a meaningful political entity. Given the propensity of political scientists to anchor their analysis in existing political institutions, the deeply institutionalized European Union casts a long conceptual shadow over all recent attempts to form regional groupings of states, setting a standard against which its counterparts are judged. Measured against that model, the triad of Mexico, the United States, and Canada bore little resemblance to a political community during the same decades after World War II that the European Community was evolving. North of the Rio Grand, a strong argument could already been made that Canada and the United States had become and asymmetrical partnership the norms of a virtual constitution. By January 1, 1989, when the Canada-United States Free Trade Agreement (CUFTA came into force, what Ronald Reagan then called “the economic constitution of North America had become plain to see but this North America did not include Mexico.

If North America was thought of with Mexico included, it hardly seemed to be any kind of entity, whether economic, cultural, social, still less political. Yet the implementation, in 1994, of the North America Free Trade Agreement (NAFTA) by Mexico, Canada, and the United States did much to make visible what had been invisibly developing over many decades: a continental entity that was in various dimensions somewhat more than the sum of its three states. While it remains true that the overwhelming majority of politically significant processes and institutions on this vast territory operate within its three countries’ national boundaries, it is also obvious that their frontiers are far from impermeable. Indeed the people, goods, services, energy, information, and natural resources which are constantly moving across the Canada-U.S. and Mexico-U.S. frontiers and between Mexico and Canada create a multitude of transboundary relations -- social, economic, and political -- whose governance we propose to discuss.

Transborder relations in North America are characterized by the kaleidoscopic variety of their governance characteristics.

- Even while Britannia still ruled the waves and controlled her Dominion in British North America, the Canadian capital markets had largely integrated themselves within New York’s imperium, adapting to its rules;

- by 1909, the management of common water issues involving the lakes and rivers bisected by the Canadian-American border had been brought under the governance of the International Joint Commission (IJC);
- Also before “free trade” agreements redefined the continent’s political economy, the driver of the American economy -- its pioneering automobile industry -- had established a single, carefully managed Canadian-American sector which gradually shifted production into Mexico to exploit its third-world labour costs;
- By contrast, the steel industries in the three countries remained largely autarchic until formal trade liberalization induced the integration of the two peripheral sectors within the American;
- Various agricultural sectors, which had been exporting to their neighbouring markets, watched transborder agribusiness integration accelerate once tariffs were reduced by CUFTA and NAFTA.
- Beyond reducing tariff barriers to trade, the negotiation of these two intergovernmental agreements did inaugurate a new phase in continental intergovernmentalism. The skewed quality of Mexico’s (compared to Canada’s) asymmetrical relationship with Washington declined, and Mexico City developed an active relationship with Ottawa. Continental governance was given a minor fillip by the new institutions set up under CUFTA and then NAFTA.
- In contrast with this “continentalism from above,” the transborder activity of civil society organizations had little substance. Even when given their own institutional homes in continental environmental and labour commissions, the environmental and labour movements in the three countries reverted, after an initial burst of anti-free-trade solidarity, to being overwhelmingly parochial.
- The increasing American preoccupation with terrorism, which came to a head on September 11, 2001, reversed any trend towards offloading individual governmental functions in favour of a more freely operating continental marketplace. As Uncle Sam militarized its border controls, its two neighbours bolstered their security-state capacities in response to Washington’s quest for a common security perimeter.
- While US demands for high anti-terrorist standards further equalized the Canadian-American and Mexican-American relationships, the Pentagon’s reorganization of its various fighting services into a single Northern Command reaffirmed an earlier pattern established in the Cold War: Canada was induced to cooperate militarily with Washington while Mexico maintained its non-aligned stance.

These vignettes suggest that, while NAFTA played some role in the political construction of North America, there are many other ways in which transborder relations point to a continental reality of considerable political significance. How one might approach analyzing this reality is our concern in this paper.

To undertake a study of transnational governance in North America is to plunge into a world doubly wracked by conceptual indeterminacy. For starters, there has been no consensus about what constituted ‘North America.’ Until recently, the term referred to the landmass north of Mexico, in other words, the areas on the continent belonging to the United States of America and Canada, though most people would probably have excluded from ‘North America’ such U.S. overseas possessions as the state of Hawaii, the territory of Puerto Rico, or the military base at Guantánamo Bay. While there may have been doubts about how far North America extended eastwards or westwards into the sea, there was general agreement that it did not extend to the south. ‘Norteamericano’ meant ‘gringo’ not just in Latin America as a whole but in Mexico, Clarkson and Torres-Ruiz: *NAm Governance* v 05

where it was used both descriptively as a word of self-exclusion and normatively as a pejorative for “ugly American.”

Meanwhile in Canada, “North American” referred to things Canadian-American. The “North America” in the North American Air Defence Agreement (NORAD) meant Canada integrated in the United States’ air defence against the Soviet Union. The word “continent” referred to the agglomeration formed by the United States and Canada, and “continentalism” was a pejorative epithet applied by nationalists to those who advocated Canada’s further integration in the American economic, cultural, or political systems.

Up to 1985, North America was barely visible to the naked eye. Apart from the migrations of the monarch butterfly, which gave the continent a minor ecological identity, the triad of countries had no particular presence on the international stage. Despite the considerable extent to which a transborder political economy existed along with elements of transborder governance, only the most intrepid observer could discern a continental polity in the making. Continental invisibility became visible in two stages.

A partial leap forward in integration was achieved by the controversial CUFTA. “North America” as a legally constructed economic régime defined by the agreement did now comprise the US territory of Puerto Rico as well as the state of Hawaii.

The negotiation and implementation five years later of NAFTA brought a conceptual redefinition of ‘North America,’ whose southern boundary abruptly shifted to Guatemala’s northern frontier. With the addition of Mexico, the new construct could be identified as a regional bloc which observers endowed with its own socio-economic and political identity. Formally, ‘Norteamericano’ now included Mexicans, who nevertheless continued to use the term as a synonym for American. North America became a recognized production area for some transnational companies. For some, such as [General Motors], Mexico, which had been part of its Hispanic Latin America marketing region, became part of its Anglophone North American production operations.

With the catastrophe of September 11 seven years later the United States defined continental defense to include Mexico and the Caribbean as well as Canada. Having once applied a different approach to its northern border with Canada (open, easy, undefended, informal, and designed to increase economic flows) from its approach to its southern border with Mexico (militarized, walled off and aimed to decrease migration flows), Washington moved towards applying a common, anti-terrorist technique to both its territorial frontiers.

Analyzing North America in the wake of the last two decades’ political transformations presents a major conceptual challenge. With no strong institutions, North America’s formal structures can only bear part of the research weight. Since much of the transborder reality takes place within corporate networks, “government” cannot be the prime focus. Relations among the three governments nevertheless remain of central importance. To help us analyze this series of complexities, we propose a particular reading of the concepts “government” and “governance.”

## **The Challenge of Defining Governance: A New Label for a New Wine**

Even more indeterminate than the territorially based notion of North America is the idea of “governance,” which has insinuated itself so smoothly into academic, popular, and professional discourse in the past two decades that it has come to be applied to almost every aspect of societal life. This text aims to specify how we are using the notion of ‘governance’ to study various manifestations of trans-border politics in North America, some of which evolved well before free trade, others that developed in the shadow of NAFTA, and those that were prompted by the terrorist attacks of September 11, 2001.

Once upon a time – and *not* so many years ago - political science did perfectly well with the notion of *government*, which denoted the institutions and processes of legitimately sanctioned (that is, constitutionally established and/or internationally recognized) public policy-making, regulation, adjudication, and enforcement. Understood in this traditional way, government was the prerogative, responsibility, and monopoly of the nation-state and its sub-central and municipal components. Typically, its functions and processes included the activity of legislatures and executives, of bureaucracies financed by government revenues, of courts, and of the enforcement mechanisms assigned to the state’s police and armed forces.

This is not to say that politics outside the narrow confines of government was ignored. Political parties were studied as the prime democratic link between the citizenry (which could manifest its political will at election time) and its government (which could be redirected following a change in the ruling party). No one was naïve enough to assume that the connection between government and society was cut off the moment an election’s results were announced. Considerable research was devoted to those interest groups, which championed the positions of business in the market place lobbying to influence government policies, and to those citizens’ groups, which campaigned for legislation to ameliorate various societal causes such as the plight of pensioners, natives, or the handicapped.

In the conventional blackboard diagram of first-year social-science classes, government was depicted at the apex of a triangle that connected by arrows with the other two apices -- market and society. This textbook representation epitomized the triumph and tragedy of positivist thought. Triumph, because it drove a dazzling clarity into what appeared to the untutored eye as the hopelessly confusing blurring of roles and functions. Tragedy, because it proclaimed the three-way dominance of political science, economics, and sociology -- three disciplines which asserted their exclusive scholarly dominion over analyzing whatever went on within each of the triangle’s three tips, as if politics, the economy, and the greater society were not in reality inextricably intermeshed beyond the blackboard’s seductively two-dimensional space.

Nor were scholars in those days oblivious to the political realities of organizations outside government. Business corporations, whether domestically- or foreign-owned, made decisions and promulgated rules that affected not only their own workforce, but also potentially important social issues as well. As power systems in themselves, firms have long exercised control within the confines of their own companies, thus making corporate *government* a question for students of management to analyze.

When businesses in an economic sector establish an entity to manage their common interests, such as the Canadian Bankers Association, it exercises power both *internally* and *externally*. Internally, it affects its members' self-government -- an issue with which we are concerned when these regulations have transborder effects, as with changes in Canada and Mexico's accountancy or stock exchange regulations that are made in response to changes in those of the United States. Externally, public power may be affected by the Association's lobbying domestic or foreign governments in order to influence their policies. These are all activities on the margins of government that were studied under the rubric of interest group politics and are now called governance.

Until a few decades ago, the exercise of power beyond national frontiers was analyzed principally on two levels. On one, *intergovernmental* relations (IR) and domestic politics were understood to occur in largely watertight compartments. Accordingly, IR was about the efforts of nation-states to achieve their goals in the anarchic space between them, which was managed by diplomats or fought over by armies. Alternatively, *international* organizations (IOs) were established by sovereign states to manage certain collective issues, such as war (North Atlantic Treaty Organization) or peace (United Nations) or culture (UNESCO, the United Nations Economic, Social, and Cultural Organization). While these IOs varied in their relative power -- the International Monetary Fund (IMF) was strong (in the sense that it could impose policies on countries suffering economic crises) while the International Labour Organization (ILO) was weak (since it could not enforce its conventions prescribing workers' rights on recalcitrant regimes) -- they all operated at the behest of their member-*governments*.

This text diverges from much current writing pertaining to the international domain, which tends simply to replace the notion of *government* with that of *governance*. For instance, discourse on the European Union often refers to all continental-level politics as governance, despite the fact that some of the EU's institutions and processes exhibit such authoritative characteristics of government as the binding directives made by the European Commission or the judgements issued by the European Court of Justice, which have direct effect in the legal systems of the member-states. In 1997, to take another instance, the World Bank issued a report proclaiming the importance of "governance" for eliminating poverty in the Third World. Having spent almost two decades twisting the arms of developing countries to cut back their state apparatus, it was implicitly recognizing the damage it had caused. The World Bank's new elixir turned out to be restoring good, old-fashioned government: democratic practices, transparency and accountability.

Similarly, in Canada, the notion of governance is often defined these days as a label that could equally be applied to the old wine of government: "The institutions, processes, and traditions by which power is exercised and directions are set for society."<sup>1</sup> The Law Commission of Canada explicitly views governance as a normative issue of quality -- transparency, legitimacy, accountability -- and so considers governance to be an integral and coexisting aspect of the more mechanical workings of government.

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<sup>1</sup> Sandford Borins, Nicholas d'Ombrain, Paul G. Thomas, and David Wolf. 2000. *Change, Governance and Public Management: Alternative Service Delivery and Information Technology* (Ottawa: Public Policy Forum and KPMG 2000), 25.

This study is an effort to get a fix on what is “North America” beyond the internal operations of its three nation states. By looking at transborder realities – social movements; economic exchanges of goods, services, and capital; political agreements to regulate these interactions -- it asks whether the sum of these parts constitutes a significant entity. To understand transborder politics in North America, we need to unpack the nuances of how policies are made and how politics are conducted in issues that play out both inside and outside formally constituted legislatures, executives, bureaucracies, courts, and the armed forces.

In our approach to dissecting these phenomena, we adopt a linguistically conservative position. Taking as our premise that the original core uses of the notion of *government* remain both descriptively and normatively valid, we seek to keep both the baby (government) and the bath water (governance) in which it sits while distinguishing between them in terms of causal effectivity.

To put both concepts to useful analytical work, we need first to set aside the normative content implicit in some practitioners who use “governance” as code. The advocates of the new public management believe they could bring more efficiency to government by importing business methods of downsizing, offloading, and outsourcing. Formulations such as “governments should steer, not row” express the neoconservative stance that both contests the scope of state power and conjures up visions of self-administration by “stakeholders” in the market and civil society. We are not using governance with this ideological load. Rather, we call governance those activities of political parties and interest groups that take place on the boundary of formally constituted government. The boundary will necessarily be difficult to define. Extra-parliamentary activities such as election campaigns and citizen group pressures would be considered governance. Parliamentary debates and hearings involving the successfully elected representatives would be part of government.

There are domestic institutions and processes that have evolved over the past few decades into qualitatively separate phenomenon. One such new institution is the public-private partnership in which government authorizes a private-sector entity to buy, finance, construct, and/or manage a public-sector asset such as a highway. Strictly speaking, public-private partnerships are not entirely new. Before the nation-state matured, monarchs issued charters for companies to carry on enterprises of various types. The East India Company was a private political empire that actually provided government to vast territories including the market and people that operated within them. However, as the bureaucratic state extended the scope of its power during the nineteenth century, it took back the political functions previously granted to such corporations. In more recent times, neoconservatism’s simultaneous repudiation of the providential state and glorification of the market place has pushed public administrators to try to reconcile growing demands for government action with constrained budgets by devolving to the private sector such functions as constructing or maintaining infrastructure.

Across national boundaries, new forms of political decision-making are emerging as transnational corporations (TNCs) and civil society organizations (CSOs) negotiate directly with governments. This new transnational governance manifested itself dramatically with the WTO’s intellectual property rights regime’s impact over the pricing and production of pharmaceuticals

to treat AIDS in the Third World. In this case, *Médecins Sans Frontières* (MSF) negotiated with both governments and the pharma TNCs to bring down the price of drugs for HIV/AIDS patients in the South. Much government aid – whether financed directly by individual states or collectively by government-funded international organizations – is actually delivered in the field by CSOs, such as the International Red Cross and would also count as governance.

Professional associations – bankers, insurance brokers, lawyers, architects, doctors – administer and police their memberships. To the extent that an association authoritatively implements norms that bind its membership – debarring a lawyer for violating some standard – it is providing government. From the outside, the association's relations with the state is governance. Similarly, corporations, when hiring, promoting, disciplining, and firing employees, are governing their corporate space since their decisions have binding effect. When they engage in efforts to persuade the government to lower its tax rates, we observe governance at play. A stock exchange, which delists a company that has not met certain criteria, is practising government in its internal space. When arguing for a change in its state's accountancy regulations, it is involved in governance.

In some cases, market or civil-society actors take responsibility for implementing the policies that are formulated in their sector. Here, the traditional hierarchical autonomy of government has been replaced by a more heterarchical relationship in which government interacts more cooperatively than authoritatively with governance entities in the marketplace or civil society. Although it is not new that non-governmental players take the initiative in pushing an issue onto the governmental agenda, it is new that government has become both accustomed to living with this kind of governance and at times reliant on it.

Of course, the bulk of public policy-making is still the preserve of the various national, sub-central, or municipal levels of government. Governance affects this traditional government activity when TNCs and CSOs, domestic and foreign, impinge on the state's decision-making. *In sum, government can be seen when power is exercised with binding effect. We take governance to be the exercise of power and influence outside or on the boundary of government structures through interactions among various political, social, and economic actors.* Governance is our concern when the traditional government institutions – legislatures, bureaucracies, or executives -- are not exercising power exclusively but are engaged in partnerships with networks and coalitions, with agencies, TNCs, and CSOs. To the extent that a company or its business association or a CSO interacts with a municipal, provincial, or federal government official, it is engaging in what we will call in this study governance.

In embracing this distinction between government and governance, we have also to accept that the boundaries between the two concepts are contestable and variable. Analysts will disagree in their definitions of what reality fits within which category. As political circumstances change, some phenomena may shift from one category to another over time. A specific government activity becomes governance every time a public sector entity gets privatized. Alternatively, what may once have been governance may become government, as was the case when the Hudson's Bay Company, which ruled a vast territory across British North America, lost these political functions to the newly constituted Dominion of Canada in the latter half of the 19<sup>th</sup> century. Throughout the second half of the 20<sup>th</sup> century, the European Community has been

erecting a system of institutions, which began as governance and progressively approached government in their left.

In sum, we have identified government by (1) its structures' and actors' formal legitimacy, which comes externally from a state's recognition by the international community and internally from its legally legitimate constitution and (2) by the directly authoritative and inherently coercive force of its decisions, regulations, and norms. The structures and actors that we consider governance may also contribute to the generation of a government's norms, rules, goals, and processes of decision-making, but the scope of domestic governance is generally narrower and rarely territorially fixed. Both can involve very specific issues or a whole system. In general, government has more permanence and stability, while governance may be more transient: what is here today may be gone tomorrow.

### **Government and Governance in North America**

These reflections on government and governance are prologue for explaining the problematic in our research project on the complexities of how the trinational entity called North America is governed. We are not attempting to describe the functioning of the three federal governments of Mexico, the United States and Canada, nor examined how their hundreds of sub-central and municipal components operate. We are interested in the extent to which integrative economic forces, continental institution building, and recent developments in security policy are generating some transboundary political content.

Given the high levels of social and economic integration in the zones along the Canada-U.S. and Mexico-U.S. borders, this question would have been an interesting and legitimate object for research in the 1960s or 1970s, well before Ronald Reagan came up with what appeared in his 1980 presidential campaign to be an off-the-wall proposal for a North American economic accord. The management of common problems such as air pollution, water consumption, and crime networks had already spawned both formal institutions such as the IJC and informal practices that we would now call governance. In other words, strong elements of governance already characterized the zones running along both the United States' northern and southern borders.

Furthermore, a top political priority in both Canada and Mexico has always been to deal government-to-government with their once belligerent, still dominant, generally hegemonic, and at times overwhelming neighbour. Over the decades, their respective bilateral relationship with the U.S. established rules and norms that produced regularized methods of addressing new issues and resolving conflicts. Multifaceted as these bilateral relationships were, some components such as Canada-U.S. military integration, matched Stephen Krasner's definition of a regime as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."<sup>2</sup> This early intergovernmentalism was predominantly based on a hub-and-spoke relationship between Washington and its two peripheries.

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<sup>2</sup> Stephen D. Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983), 2. Clarkson and Torres-Ruiz: *NAm Governance* v 05



Virtually nothing ‘governed’ the entire trinational space – other than those transnational corporations that were already treating North America as a single production, distribution, and marketing zone. Given the peripheries’ very different histories and social roots, Mexico-United States issues were addressed by each capital in a completely different manner from Canada-United States matters. In their relations, Ottawa and Mexico City shared few common interests as very separate governments.

These three dyadic relations were putatively combined into a single entity when the United States, Canada, and Mexico implemented NAFTA. This “*economic* constitution of North America,” to adapt President Ronald Reagan’s moniker, was designed to accelerate the economic integration of the three economies into one continental marketplace. Leaving aside the continuing debate about whether the economic goals for investment, trade, wage, and productivity levels have been achieved, there is a general consensus that increased levels of continental economic integration have resulted from the higher rate of cross-border TNC expansion through mergers, acquisitions, and new investment and the resulting greater trade flows due in large part to intra-firm transactions. This book does not trespass on our economist colleagues’ terrain. While interesting in itself, their debate is tangential to our concern, which focuses on whether trends creating one continental market – economic continentalization -- have also created new forms or changed existing patterns of transborder governance in the continent.

With such norms as “national treatment” trumping domestic legislation, with its set of rights for transborder investors, with its embryonic institutions and judicial processes, NAFTA can also be considered as North America’s *political* constitution, whose legitimacy is anchored in its three members having negotiated an agreement which each then ratified or implemented according to its own constitutional practices. Although it created little in the way of continent-wide government structures, NAFTA established some very important rules that function principally to restrict Canada and Mexico’s policy autonomy and in practice have eliminated policies differing from or criticized by the United States. Institutionally, NAFTA provided for little more than periodic meetings of the three countries’ trade ministers referred to as the NAFTA Trade Commission and specified certain procedures for dispute settlement with varying judicial clout. It established a few dozen committees and working groups which have turned out to be largely ineffectual and also put in place two governance structures: the commissions for the environment and labour matters.

Spin offs to our interest in economic integration include whether NAFTA has generated a political integration with sufficient government or governance to make talk of a North American community plausible. As we pursue a dozen probes into the political economy of North America, we will also inquire about the evolution of the asymmetry in its power relationships. Concerning the huge discrepancy between the power of the United States and that of its neighbours, we hope to show whether US dominance of its neighbours has increased or diminished and, as a corollary, whether the two peripheries lost or gained autonomy. Growing asymmetry would suggest a process of hegemonification in which US power has extended its reach over its two peripheries. As for the significant differences between Canada’s and Mexico’s relationships with the United States, we will also try to determine whether the skewedness of the two bilateral relationships has declined or increased under NAFTA’s aegis.

Bearing in mind NAFTA's limited structures and processes, it is not obvious that the Europe-inspired hypothesis of economic continentalization generating a regional political superstructure is valid on the western side of the Atlantic. Scholars who look at North America through normative lenses ground in the institutional formalism of the European model tend to view NAFTA as an early-stage European Community. While it is possible, though highly unlikely, that Washington might accept participation in institutions which reduce the power advantages that it enjoys with its two neighbours, our questions have nothing to do with recommendations for a hoped-for future. In contrast to much of recent writing on proposals for NAFTA's institutional reform, this inquiry eschews normative recommendations in order to focus more pedestrianly on the way things have worked in the decade since NAFTA came into existence.

Recognizing that the member-governments of NAFTA operate on a range of at least five planes from the local, provincial, and federal, through to the continental and global level, we focus on the fourth to inquire what kind of continental government or governance exists in North America. There would be continental government if any legitimate binational or trinational institutions can make decisions that have direct effect in the member-states. If there are binational or trinational institutions that can take actions affecting the behaviour of the member-states, we may be able to talk of continental governance.

NAFTA does have elements of continental *government*, if only in trace amounts. Its Chapter 11 assigns judicial sovereignty to international tribunals in one very specific situation: where investors from one NAFTA country launch a suit against another NAFTA government for measures that they deem to have expropriated their assets. Member states are legally bound to obey these tribunals' rulings, which can invalidate democratically sanctioned statutes passed by the formally sovereign governments of Canada, the United States, or Mexico.

Trinational North American *government* could also be inter-governmental if the three countries made decisions working co-operatively rather than under supranational guidance. Different parties may give different values to such "continentalism from above." Canadian and US participants see NAFTA's Financial Services Committee as a congenial forum for networking, whereas Mexican officials view it as vital for getting information on regulatory changes in the other jurisdictions. Even if a working group has more importance for one party than for another, NAFTA's committees have been generally insignificant when it comes to continental policy-making. Established by the NAFTA heads of government following the Quebec City Summit of the Americas in April, the North American Energy Working Group (NAEWG) is a committee of governmental officials implementing a modest mandate: to generate reliable common data for analyzing energy problems across the trinational space.

NAFTA's judicial processes for settling disputes between the member states have disappointed those who were hoping that the United States would be placed on a level judicial playing field alongside its two neighbours before the goddess of justice. Chapter 20's dispute settlement provides for establishing panels to examine complaints by one party against another in fulfilling NAFTA's commitments. These panels produce recommendations that are forwarded to the North American Free Trade Commission, which decides what to do with the ruling. Since these Chapter 20 processes only generate recommendations they can be considered as a modest form of continental judicial governance.

Negotiators of North American integration claimed that the binational panel system set up in Chapter 19 to review domestic trade remedy determinations provided a binding form of continental justice. In the case of Canada and Mexico, when a panel has been formed over an American complaint of a neighbour's anti-dumping (AD) or countervailing duty (CVD) action, the Canadian and Mexican governments have complied with the panel's finding. In our terms, this authoritative disciplining of a national government can be seen as continental government. However, in the case of the United States, the record of compliance is different. The U.S. has not always shown itself willing to comply, and particularly not when the U.S. International Trade Commission's determinations have been remanded. The endless rounds of the softwood lumber dispute clearly show that NAFTA's Chapter 19 is no match for U.S. politicians' and lobbyists' insistence on U.S. sovereignty prevailing over their government's international obligations. This suggests that what may be hegemonification by stealth for the periphery is merely continental governance for the hegemon.

While NAFTA does not have a continental legal system parallel to the European Court of Justice, the many panels set up under Chapter 19, the few set up under Chapter 20 and the several controversial Chapter 11 arbitrations are creating an epistemic community of continental legal practitioners. Comprised of a mix of retired judges, lawyers, and trade academics, this small community is generating a professional consciousness and an expertise that may be making North American trade law a core force in the quiet evolution of North American economic governance.

The many studies that research the impact of globalization or regionalization on national autonomy generally operationalize the state as the dependent variable – the object of external forces. In this book, the extent to which the new continental realities have affected each state's policy-making or governing capacity will be of tangential, not of central interest. We are more interested in the creation of new judicial space in NAFTA's investor-state dispute settlement processes than in the three member-states' equivalent loss of legal sovereignty. Yet evidence of constraints imposed on domestic policy-making may ipso facto show us something about continental governance. Hence our interest in aspects of domestic agenda setting, such as the struggle over whether to require genetically modified foods to be labelled for consumers. Such an issue may reveal how business-driven continental governance operates in the biotech industry. Continental business governance can also be seen by the three countries' entrenchment – under pressure from the petroleum sector --of perverse energy subsidies, which favour burning ozone-depleting fuel and discriminate against cleaner alternative energy.

It is apparent to anyone reading the daily press that the political heart of North American governance remains the two bilateral, intergovernmental relationships between the hegemon and its smaller, weaker, and poorer peripheries. We will explore some ways in which the Mexico-U.S. and Canada-U.S. relationships have been affected by NAFTA and related events. It also appears that the new agreement has institutionalized a connection between the two peripheries that has already had important consequences. Operating within a common legal framework may make Ottawa and Mexico City compete on some issues for access to the hegemon's decision-making circles, but it may also induce co-operation between the two peripheral governments on other issues when dealing with Washington. For its part, Washington may be harmonizing its

own approach to the formerly quite different relationships and thereby reducing their skewedness.

Public officials are often in constant e-mail communication with their counterparts in the two other governments. This informal communication may be a potent instrument for quietly harmonizing regulatory standards and practices. As a type of continental governance, this invisible process may move the periphery to adopt the hegemon's practices. If the Canadian or Mexican officials know their brief better than do their American counterparts – a frequent occurrence with newly-installed Americans following a new president's arrival in the White House, the ensuing convergence may be on lines favourable to the periphery. Such was the case following the terrorist attacks on September 2001 when Canadian officials were able to brief their anxious but less experienced US interlocutors about Ottawa's long-standing proposals for improving the speed and safety of cross border traffic. "Made in Canada" does not necessarily mean "good for Canada": if competitiveness and efficiency constitute the prime consideration on the officials' minds, issues of national autonomy may be ignored in order to promote market freedom on a continental scale.

Plainly, it is very difficult for anyone – and especially academic researchers -- to observe, document, weigh, and analyze the hundreds of hourly communications taking place among officials over the Internet or the telephone lines. Even more difficult than informal transactions are any deliberately secret exercises of power. When agents of a U.S. anti-narcotic campaign violate Mexican law by kidnapping a suspect and whisking him off to stand trial in Texas, transborder government of a darker, more imperial type is occurring.<sup>3</sup> When Mexican drug lords have an American border-patrol agent assassinated, the news media alert the public that an even darker form of private government has taken on transborder dimensions.

### **The Management of Border Regions**

North American *governance* can be identified when processes take place independently of the three federal governments in a zone of decision-making and consultation that transcends one or both of the international boundaries. Long before NAFTA was even dreamed about, substantial efforts had been made to manage the flow, level, and quality of water in the lakes and rivers bisected by the Canadian-American and Mexican-American borders. While the IJC, set up in 1909 thanks to the Boundary Water Treaty of that year, is well known, the actual management – often missed management -- of water matters on both borders is carried out by hundreds of collaborative arrangements involving agencies, business corporations, scientists, and environmentalist groups concerned about their local or regional eco-systems.

From the 19<sup>th</sup> century on, efforts to share, manage, and develop North American transboundary water resources have been evolving, and have given rise to several treaties and corresponding binational institutions. As will be discussed in Christiane Buie's paper on this panel, the management of North America's water resources is a vast, complex, and multi-layered regime of national and international institutions, legal frameworks, and social and economic values which, according to circumstance, converge and diverge in an irregular and unpredictable fashion. As

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<sup>3</sup> *New York Times* (Feb. 1, 2005).

such, the management of water resources presents us with an interesting case of a peculiar dynamics between different levels of government and public participation in political processes, which has changed institutional organization.

### **Continentalism from Below**

NAFTA's two semi-autonomous, free standing commissions, which were set up to mitigate the adverse effects that economic liberalization was expected to have on environmental and labour conditions, are examples, however modest, of a form of governance that emerges from what we refer to as continentalism from below. We regard this as a form of continental governance, given the fact that some of their staffing is supranational, and their recommendations are considered by the NAFTA states.

The Commission for Environmental Co-operation (CEC) has generated some innovative collaboration between scientific, business, and citizens' groups and issued some news-making reports, but its achievements seem mainly to lie in stimulating civil-society environmentalism in Mexico. For its part, NAFTA's Commission for Labour Cooperation (NACLC) has proven so disappointing in enforcing labour rights that its main achievements appear negative: the frustration that labour unions from the three countries have experienced in trying to use NACLC's processes to defend their rights has generated some genuine trilateral solidarity among them when they have organized industrial action against certain TNCs with operations in the three countries.

At this level of socio-political reality, we want to know to what extent NAFTA has fostered what has been called "continentalism from below" -- that is, transnational solidarity and co-operation among civil society organizations. Where NAFTA has no rules that seem of direct relevance and offers no institutional toehold -- as is the case for Native peoples -- no continental solidarity has developed. The CEC and NACLC --have fostered minor trilateral interconnections among environmentalists and labour unions. These solidarities generate governance when they are expressed in concerted action to launch a complaint against a NAFTA government for not enforcing an environmental or labour law, but the phenomenon can only be allotted minor importance, given the two institutions' tightly circumscribed authority.

### **Continentalism in the Marketplace**

With NAFTA's explicit aim to enhance continental economic integration, we should find evidence of governance in what we call "market continentalism." Beyond the powerful intervention of corporate actors in the negotiation of and lobbying for the free-trade agreements, which Erick Lachapelle analyzes in his paper for this panel, we engage in the examination of a few sectors of the market to identify evidence of governance that has a continent-wide substance. To illustrate some of the complexities we are trying to unravel, we offer the following examples taken from our research.

#### Traditional heavy industry.

Steel, which provides the backbone of the old manufacturing economy, did not do well under NAFTA, which failed to eliminate the protectionist safeguard, anti-dumping, and countervailing-duty measures with which U.S. steel makers had been harassing Canadian steel exports. When, in their frustration, the Canadian firms invested heavily in the U.S., they produced a phenomenon similar to Toyotafication. But instead of retaining their own identity and lobbying as Canadian firms for their national sector's interests, they became more active as U.S. members of such industry associations as the American Iron and Steel Institute did. As players in the American economy, they lobbied -- along with the American steelworkers' union, which had fortuitously been run by Canadian presidents recently -- to exempt Canada (and also Mexico) from new U.S. safeguard duties imposed on foreign steel imports. This suggests that in the steel sector, there is significant new market governance in which Canadian, and more recently Mexican, firms have been forced partially to Americanize themselves within the U.S. economy, rather than create a continent-wide industry.

#### The politics of agenda control and the struggle over a new issue.

The struggle over whether genetically modified (GM) food should be labelled may tell us something else about continental governance. In each country, this fight over the political agenda pits the industry (agribusiness which has developed GM seeds or livestock), farmers (who grow and market this genetically engineered produce), the food-processing companies (which value cheaper inputs), and the governments (which have supported these applications of science to the agricultural economy) against the medical and consumers' organizations that are calling for citizens to have full information about the food on the store shelves and therefore the ability to decide what they eat. Elements of U.S.-controlled continental governance can be detected when TNCs like Monsanto intervene in the Canadian debate or when, under pressure from the U.S. and Canadian governments, the Fox government removed a bill in the Mexican congress that would have required the labelling of GM food.

#### The politics of agenda control and the struggle over an old issue.

The struggle over GM labelling is about keeping a new issue *off* the governments' agenda. Equally revealing is the struggle to keep an existing issue *on* the agenda. This is the question of national governments' subsidizing the energy industry, which keeps fuel prices down and so encourages consumers to exacerbate global warming. Continental governance comes into the picture if NAFTA perversely encourages all three governments to subsidize their petroleum industries and to resist social interests calling for a sustainable energy system that can avert the approaching disaster of global overheating. The new NAEWG is supporting its members' efforts to increase old-energy exports from Canada and Mexico to the U.S.

### **Continental Business Governance under Global Rules**

Corporate government -- how firms govern themselves -- is generally considered their private responsibility, assuming they follow the government's laws and their own business associations' guidelines. The collapse of the gigantic Enron and WorldCom caused such devastation to their ruined employees, that corporate privacy became a public issue, causing the US government to intervene and change the rules for business governance. With North America's extremely high

levels of capital-market integration, if Washington or the Securities and Exchange Commission rewrite the law or business codes, the Canadian and Mexican markets find themselves under pressure to be governed by Uncle Sam's domestically-oriented laws and codes. Although this appears to be an issue of continental governance, all capitalist countries' stock markets are under similar pressures to conform to American standards.

### The new information economy.

Research on intellectual property rights (IPRs) is showing how the question of patents for branded drugs has been driven not just by U.S. but also by European pharmaceutical TNCs, which have been battling against legislation protecting the generic drug companies in every country to obtain longer periods of monopoly protection so they can exploit their brands. In this process, the then Prime Minister Brian Mulroney, without waiting for the trade negotiations to redefine intellectual property rights, adjusted Canada's laws, which had favoured the production of cheaper drugs by the generic firms, in order to comply with American demands. Subsequently, the United States and the EU had their positions favouring longer patent protection for branded drugs accepted both for NAFTA and the WTO. This forced Mexico to follow suit and adopt the new rules as well.

NAFTA was negotiated just when GATT's Uruguay Round was reaching its successful conclusion. The creation of the World Trade Organization one year in 1995 raises many analytical complications for students of North American governance. Even if the intellectual property rights in NAFTA's Chapter 17 are virtually identical to those in the WTO's Trade-Related Intellectual Property Rights agreement, the fact that Washington used not NAFTA's but the WTO's dispute settlement body, as its legal venue for pressing Canada to make more concessions to U.S. branded drug companies, suggests that weak continental judicial governance has been trumped in this case by the stronger traditional governance established at the global level. The EU's pharmaceutical firms then used the WTO's dispute settlement process to force Canada to provide longer protection than it had been willing to concede. So in this case, global governance has displaced continental governance as TNCs have used both regimes to get the peripheral governments in North America to conform to their demands.

### Financial services

A central pillar of the financial services, banking, offers a confused picture because North America is not a natural zone for transnational banking. Some Canadian banks have operated for decades throughout the hemisphere and to a lesser extent globally, while all of them already had branches in the U.S. market well before trade liberalization. For their part, U.S. banks had also set up shop in Canada long before free trade. With a much less robust set of banks, which were nationalized in 1982 following one of the country's periodic currency crises, Mexico has found itself at the receiving end of transnationalized banking. NAFTA had required it to open specified portions of its re-privatized banks to foreign ownership, but the peso crisis of 1995 forced it to go all the way. After a flurry of foreign banks merging and associating themselves with domestic partners, Mexicans found all but one of their banks had fallen under foreign ownership. Although some harmonization of the three banking sectors' regulations has occurred within North

America, this is not due to any continental governance created by NAFTA, but rather to the three central banks' participating in the global governance centred in the Bank of International Settlements in Basel and, in turn, applying these multilaterally negotiated norms at home.

### **With the War on Terror, Government Trumps Governance**

The paradigm shift in Washington provoked by the terrorist disaster of 2001 instantly redrew the boundary between governance and government in North America. The economic integration fostered by NAFTA had been reducing the government-made economic barriers along the United States' two territorial borders in order to allow the marketplace freer rein to enhance human and economic flows across the continent. Throughout the late 1990s, the growth in cross-border trade had generated increased attention to border governance issues as business coalitions, concerned about the efficiency of their continent-wide production systems, lobbied their governments to invest in the transportation infrastructure and security technology needed to create a near-borderless continent.

Washington's shift to a security paradigm was dramatized for North America on September 11 by its immediate blockade of its two land borders. This unilateral action demonstrated that once Washington declared its national security at stake, the U.S. government would simply reassert its control over the policy space it had previously vacated. The subsequent demands that Canada and Mexico do what Washington felt was necessary to make their exports safe for the United States showed how much governance in North America was driven by the government of the United States. In the post-September-11<sup>th</sup> handling of domestic security issues, traditional binational relations prevailed, giving Ottawa firstly, and Mexico City secondly, a strong role in working out detailed agreements with Washington to tighten their policies. These intergovernmental negotiations were supplemented by unusually active business-coalition involvement in the design of new security systems. As Erick Lachapelle explains in his paper for this panel, a new intensity of governance impinge on the traditional bilateralism. Overall, as each periphery dealt with Uncle Sam on its own, little trilateral governance was evident.

An equivalent absence of Canadian-Mexican dialogue characterized the initial phase of each country's response to the Pentagon's re-organization of its command structure for North America. The Chrétien government did not resolve how to respond to the United States' pressure to support its National Missile Defence program whose technological integrity was suspect and whose strategic rationale violated Canada's well-established stance against the weaponization of space. In the end, partisan political calculations forced Prime Minister Paul Martin to refuse Canada's endorsement for NMD. In responding to Northern Command, Ottawa in effect had to decide how far it would follow the NORAD model of actually integrating its air forces while retaining nominal autonomy. All this was standard-issue intergovernmental relations, with the governance aspects of the U.S. military-industrial complex and its Canadian subsidiary kept well away from public view.

Most security discourse in Canada presumed that, since the country remained sovereign, its military commitments did not jeopardize its foreign-policy decisions. Canada's responses to the U.S. war on terror both support and invalidate this position. It is true that the Chrétien government made its own decision to send 750 troops to Afghanistan. However, since this



action contradicted an important tenet of Canadian foreign policy, which saw the country's preferred military role as post-war reconstruction, and since the troops were actually integrated under U.S. command, it seems to have been motivated politically by the Chrétien government to ingratiate itself with Washington. Sovereignty in theory did not in this case lead to autonomy in action.

The events of 2003 showed that there were limits to Ottawa's deference. The Bush administration's determination to attack Iraq caused Ottawa enormous heartache. Canada was divided, but given their close and in some cases branch-plant relationship to the U.S., the military-industrial interests lobbied for an extension of the Afghan-type collaboration which was already in place at sea with Canadian naval units operating within the American fleet in the Persian Gulf. Astonishingly, Jean Chrétien developed an oppositional axis with Vicente Fox.

Mexican business and government have been less intimately engaged with Washington on border issues than their Canadian counterparts, who had taken the initiative in working out a smart-border plan. Further, Mexicans had not felt the same solidarity with New Yorkers as had Canadians, and, consequently, Mexico declined to offer even symbolic support for the U.S. war against the Taliban. However less anxious to please Uncle Sam Mexico may have been compared to Ottawa, Mexico City realized it needed to satisfy Washington and would do whatever was needed to create a continental security zone, if not a U.S.-dominated global order.

With Mexican opinion against a pre-emptive U.S. war even higher than it was in Quebec, Vicente Fox appreciated the diplomatic effort that Canada had made to find some war-postponing compromise acceptable at the United Nations' Security Council. Jean Chrétien's flash visit to Mexico City, where he huddled with Fox and phoned President Ricardo Lagos of Chile, established a temporary axis of those in the western hemisphere unwilling to endorse a U.S. unilateralism deemed both invalid in its rationale and dangerous in its consequences. Clearly, North America was far from developing what the EU calls a common foreign and security policy. Foreign policy making remained the preserve of governments, which in a crisis considered vital by all parties involved, retained striking autonomy. In this case, transnational governance pressures were negligible. Overall, whatever NAFTA's role in furthering continental harmonization may have been, the three governments of North America clearly failed to generate a coherent foreign policy position on the issue of greatest importance to the George W. Bush administration.

The value of distinguishing between government and governance is not to indulge in the fine art of splitting hairs. Our goal is to achieve greater clarity in analyzing a range of dauntingly complex dossiers. Furthermore, for each of our probes, the distinction between government and governance allows us to look at the role and influence of various stakeholders in the process of public policy-making at the continental level. Thus, each of our probes, we hope, will contribute to understanding a deceptively obvious but deeply enigmatic entity, North America.