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Challenges to Governance in North America and the European Union
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Stephen Clarkson
University of Toronto

Mixed Blessing: Is the European Union more Help or Hindrance in Studying Continental Governance in North America?

When sociologists of knowledge come to analyze the pathologies of political science at the turn of the twentieth century, they may well identify “governance” alongside “globalization” as the most malleable of this era’s concepts. Less precise than “government” or “state,” governance provides our discipline with a handy, one-label-fits-all moniker that we can attach to the most disparate of phenomena as we try to impose some kind of intellectual on our unruly world.

Looking back, for instance, at the *old*, pre-free-trade North America – defined by Mexicans, Americans, and Canadians alike as the two non-Hispanic countries north of the Rio Grande – we would now talk about its governance as essentially based on informal norms and behaviour patterns that managed a disparate dyad within the ad hoc approach famously dubbed “quiet diplomacy.”¹ When the preference for handling the Canadian-American relationship without formalized rules was abandoned on January 1, 1989 in favour of the Canada-United States Free Trade Agreement (CUFTA), old North America entered its last, brief phase. CUFTA, which President Ronald Reagan called at

¹ Stephen Clarkson, "Continentalism: the Conceptual Challenge for Canadian Social Science," *The John Porter Memorial Lectures: 1984-1987* (Toronto: Canadian Sociology and Anthropology Association, 1988), 23-43.

the time an “economic constitution for North America,” reflected the negotiators’ efforts to retain the two unequal partners’ autonomy by not creating permanent political institutions for managing the more integrated, but still recognizably binational, and predominantly Anglo-Saxon, economic space.

Five years later to the day, the *new* North America was born when Mexico signed on to a broadened North American Free Trade Agreement (NAFTA). NAFTA’s rule book was thicker but its institutions were only slightly less insubstantial than those of its predecessor. Nevertheless, something happened at NAFTA’s birthing that put the question of North America’s governance into a markedly different social science category. CUFTA had been a watershed political event for both its domestic proponents and opponents who declared it historically transformative. But internationally it had been a non-event, a ho-hum rearrangement of what was already considered an established dependency.

To the international academic community NAFTA seemed something else entirely. Its launch on January 1, 1994 established a continent-wide economic region roughly equivalent in economic and demographic size to the European Union (EU).[fn] It had only three members compared to the EU’s fifteen at the time, but Mexico’s patently non-Anglo-Saxon identity and its evidently Third-World level of economic development gave the trilateral entity a cultural, economic, and therefore political heterogeneity that called out for explanation. However hard its negotiators had tried *not* to avoid any supranational institutionalization, it was immediately seen **as a variant -- perhaps less developed, perhaps less structured – of Europe’s more mature, more sophisticated system of transnational governance** on the other side of the Atlantic Ocean.

Having argued elsewhere that there is rich scholarly potential in comparing these two

systems,² I now would like to explore how Europe's towering stature as the mother of all continent-wide regimes conditions our understanding of a fledgling North American governance – for better and for worse. I am not asking, as does Robert Pastor, whether some policy *lessons* can be learned from the EU's practices that could usefully be applied to those of NAFTA.³ The major premise of this essay is that there is enough in common between the systems on each side of the Atlantic Ocean for the **study of the junior regime to be strongly influenced by our knowledge of the senior one**. As a scholar poised to devote several years of his life to studying North American governance, I want to assess the extent to which the EU sets the conceptual *template* through which we construct our understanding of continental governance in North America. I have a double hypothesis. European governance **may help our understanding of the parallel North American phenomenon. But its towering presence both as an empirical and a normative model, may also be a hindrance**, diverting scholarly attention from issues which, while secondary in Europe, are more significant in North America and causing us to misunderstand the problem we are trying to investigate.

My question, “What is North American governance?” is as easy to ask as it is difficult to answer. Recognizing that North America has no representative institutions, with the taxing authorities and bureaucracies that characterize the modern state, the notions of “state” or “government” cannot be employed to frame an analysis of how decisions are made and conflicts resolved for the three-nation entity to which NAFTA gave an “economic constitution” or to explain what kind of identity it may have or what values it may embrace. As a looser concept, the notion of governance encourages us to look at the institutions, the norms, the conflict resolution, and the decision-making of the entity. I

² Stephen Clarkson, *Apples and Oranges: Comparing the EU and NAFTA as Continental Systems* Working Paper 2000/15 (Florence: European University Institute, 2000), 70 pages.

³ Robert Pastor, “What, if anything, Should NAFTA Learn from the EU?” this conference. If there is some validity to the second part of my hypothesis, it may have implications for the question of what we “learn” from Europe. If the EU misleads us analytically, it may also cause us to draw the wrong lessons?

will proceed to examine these four facets of governance in North America, asking to what extent the European Union as template is help or hindrance in the undertaking.

1. Institutions

The EU's institutions are highly articulated, possibly overloaded, with their elaborate mechanisms for consulting societal interests about policy development, for making decisions, and for legislating directives. In this aspect of governance, Europe's intellectual value is to point out how light are North America's institutions. NAFTA's two institutions that seemed most substantial on paper were created as a reluctant afterthought by the three negotiating governments. Little wonder, then that the North American Commission for Labour Cooperation amounts to a mere shell designed to give the impression that pressure can be exerted on Mexican governments to enforce their labour legislation. Even the North American Commission for Environmental Cooperation (CEC), which was endowed with some autonomy and considerable expectations for citizen involvement in continent-wide environmental issues, has proven disappointing. Apart from these two show-and-tell side institutions, NAFTA's formal authority, the North American Free Trade Commission, consists merely of annual meetings of the three signatories' trade ministers and is serviced by a small secretariat.

The treaties establishing the European Union created a norm-making capacity lodged mainly in the European Commission, the European Parliament, and the Council of Ministers.. NAFTA was also established by treaty, but without a formal institutional capacity beyond the trade commission. Very rarely are continental norms made by the quasi-judicial dispute panels whose main work consists of adjudicating domestic actions. Continental institutions may also **be found in several dozen specialized working groups** which were mandated by CUFTA and NAFTA to achieve harmonization of the three participants' standards in highly specific issues such as the risk assessment of

pesticides.

Comparative analysis is as valid when identifying differences as it is in signaling similarities. The immediate help that the EU offers in looking at the institutional features of North American governance lies in providing a yardstick, or rather a metrestick, against which we compare the North American sibling and find it wanting. By noting that members' voting power in the European Commission is biased in favour of the smaller states to the disadvantage of the larger we are presented with a hypothesis to guide our research. Do NAFTA's carefully **disempowered institutions prevent its two peripheral members from achieving any way to exercise greater influence over the continental hegemon than they had previously enjoyed through their diplomatic representation? Does the institutional vacuum facilitate the consolidation of US hegemony** over its partners rather than mitigating the United States's dominance over them? Already CUFTA was judged to have given the US effective control of Canadian decision-making affecting American corporate interests.⁴ Did NAFTA extend this direct US policy influence to Mexico City?

Empirically, the contrast between the EU and NAFTA tells us a good deal about what North American governance is not. Normatively, a more subtle intellectual game is at play. Having noted the *poverty* of NAM institutions, we imply that they *should* be strengthened. Noting the gradual, four-decades long evolution of the European Union's mighty supranational superstructure from its humble origins in the European Coal and Steel Community, we think – and sometimes say – that these are early days for continental governance in the New World. We note, for instance, that in areas of its own jurisdiction, the EU's judicial personality allows it to negotiate international treaties, such as the WTO, on behalf of its members. While noting that there is little possibility that

⁴ Bruce W. Wilkinson, "Regional Trading Blocs: Fortress Europe versus Fortress America", in Daniel Drache and Meric Gertler (eds.) *The New Era of Global Competition: State Policy and Market Power* (Montreal:McGill-Queen's University Press, 1991), 51-82.

NAFTA will gain the supranational heft and juridical personality necessary for it to become a plenipotentiary in its own right, negotiating new treaty obligations on behalf of its members, we may write our analyses as if this is the way it should be developing. John Kirton, for instance, has pointedly shown that the CEC has attempted to develop a common North American negotiating position on certain environmental issues.⁵ To the extent that knowledge of the EU model causes scholars to project onto the NAFTA fantasies of supranational solidarity, it may be a first mixed blessing, causing us to look for and sometimes even see something which is not there.

The EU lays another trap for scholars of North America in popularizing the notion of “democratic deficit,” which is a question of *demos* (people), not *kratia* (power). Power has been shifted to supranational and intergovernmental institutions whose processes are so complex and whose accountability links are so inaccessible that the public can neither observe, understand, nor affect what transpires in them.⁶ In North America the democratic deficit has less to do with *demos* than with *kratia*. Institutions have not been erected at the continental level with enough clout to manage the amounts of power that have been shifted out of the hands of territorial governments towards the continent-wide market. NAFTA’s legislative institutions make no gesture towards the principle of representation. Its dispute-settlement processes privatize judicial processes from which citizens, non-government organizations, and even provincial governments are excluded. If NAFTA suffers from a democratic *vacuum*, then importing the notion of “deficit” may mislead us by suggesting that North America is simply at an early stage of a process that can be expected to follow the European route towards a progressive reduction of its representative deficiencies. Such teleological assumptions may blind us to the possibility

⁵ Commission for Environmental Cooperation, *NAFTA’s Institutions: The Environmental Potential and Performance of the NAFTA Free Trade Commission and Related Bodies* (Montreal: CEC, 1997).

⁶ Michael Th. Greven, “Can the European Union Finally Become a Democracy?” in Michael Th. Greven and Louis Pauly (eds.) *Democracy Beyond National Borders* (New York: Rowman and Littlefield, 2000).

that North American governance is evolving *away from* democratic practices. Such would be the conclusion that analysis of its judicial institutions suggests.

2. Conflict resolution

Like the global economic governance instituted by the World Trade Organization (WTO), North America's governance is weak in decision-making institutions but relatively stronger in mechanisms for conflict resolution. The EU's powerful judicial system features the supranational European Court of Justice (ECJ) whose rulings take precedence over national courts and have direct effect in the member states' systems. Although dispute settlement is also a central feature of North American governance, the EU's example underlines how much more modest is the scope of its trilateral dispute settlement system. Every effort was made to minimize the potential of **NAFTA's judicial processes developing a supranational autonomy** that might impinge on US congressional sovereignty.⁷ A permanent continental court with a supranational judiciary was not established. Ad hoc panels would deal with each separate dispute in the three separate types of dispute settlement that NAFTA provided for. Selected from a roster, the panelists would have no continuity in their position in order to prevent them developing a continental juridical culture.

Despite this deliberate resistance to transnational integration, the EU's judicial model begs us to ask whether a **certain degree of continental jurisprudence isn't developing in any case in North America**. Even if there is no permanent supranational judiciary, even if decisions made by NAFTA panels cannot be used as precedents by subsequent panels, are not those experts from the three countries who do serve repeatedly as panelists developing a continental legal culture as they gain experience in applying the

⁷ Armand de Mestral and Jan Winter, "Dispute Settlement under the North American Free Trade Agreement and the Treaty of the European Union", *Revue d'Intégration européenne* 17:2-3 (1994), 235-266.

complexities of anti-dumping or countervail to each other? Certainly, NAFTA caused a continentalization of trade law in the sense that Mexico was required to introduce into its civil law system a complete, common-law based sector of trade law modeled on the American and Canadian notions of anti-dumping and countervailing duties. The danger here is that, in looking for signs of legal continentalization, we may be grasping for straws, exaggerating the importance of what we find..

The supremacy of EU law, the ECJ's judgments' direct effect in member states, and the capacity of individual citizens to defend their human rights against their own governments by seeking justice at the supranational level underline the extent to which the European experiment has disaggregated components of sovereignty along a vertical, state-EU axis. **NAFTA's justice system, in contrast, gives the citizen no place** in it. It even privatizes and de-nationalizes the legal order by making any member-state government liable to law suits from corporations based in either of the other countries, thus giving non-national companies greater property rights than national firms.

Some products of EU scholarship may be more applicable than others. A good part of the continental integration generated by the European Union's treaty-based legal system has taken the form of the ECJ ruling that a member-state's law or regulation is invalid because it violates some EU norm designed to create a single European market. This was the EU's well-documented dynamics of *negative integration* (reducing national barriers to the circulation of goods, services, and capital) which overwhelmed any evidence of positive integration (creating common, continent-wide social, economic or cultural policies).⁸ NAFTA's dispute settlement processes are also invalidating national regulations with a related logic. Rather than generating more systemic integration, the significant jurisprudence under the investor-state **dispute settlement created by**

⁸ Fritz Scharpf, "A New Social Contract? Negative and Positive Integration in the Political Economy of European Welfare States". Robert Schuman Centre, European University Institute, Working Paper 96/26.

Chapter 11 is furthering continentalization through liberating the individual corporation from national legislation aimed to curb environmental degradation. Ethyl Corporation won the right to keep producing its octane enhancing, if neurotoxic, additive, MMT. Metalclad won the right to develop its landfill waste site, however dangerous the local Mexican community felt it might be. S.D. Myers won the right to transport PCBs across the Canadian-American border. If the EU's negative integration is oriented towards establishing system-wide norms often via ECJ judgements, NAFTA's negative integration acts on individual member states' legislation.

3. Norms

The European Union's normative system evolved from a process of struggle among its constituent members over what rules they should embrace in order to generate a common market. With the largest state suffering from a collective guilt over its conduct in the last war, the EU's rules do not disproportionately reflect Germany's interests. Whether contained in the various treaties that have been signed over the decades or whether contained in the jurisprudence of the ECJ, these norms and rulings form the heart of the European Union's supranational constitution. The EU's constitutional characteristics may hinder as much as help us in understanding NAFTA's constitutional significance. They help by giving their greater state-constraining (constitutional) significance to what were described by free trade's apologists merely as economic rules. They hinder by misdirecting our attention from the national to the continental level.

As any student of federalism knows, a system containing more than one level of jurisdiction creates conflicts between the cohabiting authorities. The development of a hierarchically superior European order of governance has been recognized as valid by member-states. When France's *Conseil constitutionnel* finally accepted the direct effect of the European Commission's directives, it signalled the superiority of Europe's

continental constitution to that of its member states. A general acceptance of a continental hierarchy of norms did not prevent the German *Verfassungsgericht* from objecting that the European Court of Justice had exceeded its authority.

The notion of **an external constitution grafted onto the existing constitutions** can help elucidate the way that continental governance in North America has superimposed a new level of constitutionality affecting national sovereignty. From the point of view of its two peripheral states, NAFTA can be understood as a hegemon-imposed conditioning framework similarly binding as the strictures imposed by the Maastricht Treaty on all the member states planning to join the European Monetary Union, but not accepted as binding by the United States.⁹

NAFTA represented a supraconstitutional “locking in” of neoconservative norms in the United States’ neighbours that permanently changed the balance of political forces within these two countries.¹⁰ This can be seen most clearly in Mexico whose constitution was actually amended by the PRI (*Partido Revolucionario Institucional*) government to allow the alienation from communal ownership of rural *ejido* lands to allow surviving farmers to borrow against mortgaged titles and to permit the move towards large-scale, corporate agriculture. The Mexican Supreme Court ruled in 2000 that the country’s constitution was superior to international treaties. The fact that treaties properly negotiated and signed by the Mexican government made them automatically “the supreme law of the land” and so hierarchically **superior to federal and local law did not mean they could trump the constitution’s own supralegislative norms**.¹¹ Although NAFTA has not been given recognition by its member-states’ constitutional courts as a continental

9 Ricardo Grinspun and Robert Kreklewich, “Consolidating Neoliberal Reforms: ‘Free Trade’ as a Conditioning Framework”, *Studies in Political Economy* 43 (Spring, 1994), 33-61.

10 Stephen Gill, “Globalisation, Market Civilisation, and Disciplinary Neoliberalism”, *Millennium: Journal of International Studies* (Tokyo: United Nations University, 1994), 399-423.

11 *Amparo en revisión 1475/98: Sindicato nacional de controladores de transito aereo*, 76: “international treaties are situated on a second level immediately *below* the Fundamental Law [the constitution] but above federal and local law.” (Author’s translation and emphasis).

constitution similar to that acknowledged for the EU's various treaties, it did **create supraconstitutional norms as in its chapter on telecommunications**, which required Mexico to make changes in its legislation, its institutions, and even its judicial processes.

Far to the north, the Progressive Conservative government led by Brian Mulroney tried to harmonize the Constitution Act (1982) with NAFTA's neoconservative logic in two formal attempts at constitutional amendment. Although unsuccessful in changing the country's constitution *de jure* with the Meech Lake and Charlottetown accords, the Mulroney Conservatives' implementation of CUFTA and their negotiation of NAFTA entailed *de facto* changes in Canada's policy matrix. These were accepted as irreversible by the opposition Liberal Party which, when elected to power in 1993, proceeded to implement NAFTA's provisions it had previously denounced. In some respects such as patent law, it was necessary to change Canadian legislation. In other respects **NAFTA established supraconstitutional norms** such as the protection of foreign TNCs' rights against expropriation, which could be given effect when a dispute settlement process was triggered requiring arbitrators to interpret provisions in the continental rule book. No case has been brought to Canada's Supreme Court that would test whether a ruling by a continental dispute panel necessarily has precedence over a Canadian norm. Continuing clashes between these external and internal constitutional orders must be expected.

"Free trade" was the slogan by which Canada's and Mexico's statist frameworks were brought into line with the emancipatory needs of North America's transnational corporations as they faced growing competitive pressures in a globalizing context and found the constraints of import substitution policies threatening their chances for survival. The imposition of the significant rules from the United States's neoconservative normative system on its two peripheral states permitted these TNCs to eliminate the excess capacity represented by their branch plants' nationally restricted mandates and so restructure their generally downsized operations to service a single

continental market. Translating this political economy formulation into more institutional terms, **NAFTA acted as an *economic constitution* of primary importance to North American enterprises** as they rationalized their operations. It provided rights (national treatment) that gave corporate capital pan-continental security and so greater flexibility and mobility. It created judicial procedures for handling trade conflicts between its member-states. It also established special forums reserved for corporate lawyers and government representatives for settling disputes between TNCs and the governments. At the same time, the three governments' common but competitive desire to attract foreign investment made it more difficult for them to cramp firms' entrepreneurial style with obligations, taxes, or regulations that might increase their costs of operation or decrease their autonomy in deciding in which state to locate, how to operate, and whom to hire – or fire. As a transnational mode of regulation that corresponded to the continental system's regime of capital accumulation, NAFTA can helpfully be understood as a variant of the European model.

Much was made of CUFTA and NAFTA norms such as “national treatment” which forbade member states from discriminating against each other's corporations on the grounds of nationality. In this respect it seemed to be an economic union similar in principle to that of the EU whose members were forbidden to discriminate against partners' corporations. But the resulting view that “free trade” has created a single North American market is seriously misleading. **A real continental economic union would have had to eliminate its members' profoundly protectionist trade remedy regimes.** An ever-nationalist US Congress's mercantilist trade policies built round anti-dumping and countervailing duties made a mockery of within-system trade liberalization, as the continuing saga of softwood lumber constantly reminds us.

Within another similarity lurks significant differences which can mislead those who rely on their knowledge of European integration to understand North America. For instance,

NAFTA's **protectionist rules of origin**, particularly for textiles and automobiles, which discriminate against extra-continental suppliers, create a preferential trade regime. In some ways this is the same, general phenomenon as the **EU's common external tariff which diverts trade** from outside to inside the continent and that injures extra-system producers. Related to protectionism, the EU's Common Agricultural Policy is commonly seen across the Atlantic as an unfair subsidy which is the prime bulwark of "fortress Europe." But care must be taken not to equate the EU's practice to the role of subsidies in North America's continental governance. The CAP is an instrument of continental solidarity and social cohesion because it redistributes income from consumers to support farmers in all states in an effort to preserve Europe's distinctive national communities. In **North America subsidies play a different, continentally destructive role**. The elimination of national trade barriers within North America combined with the maintenance of high subsidies for American commercial farmers has swamped Mexico's market with artificially cheapened US exports, devastating its rural economy and forcing it to shift to agribusiness production for export while its people move to urban slums.

The paradox of trade liberalization is that it requires massive sets of rules. However impressive may be NAFTA's thousand-odd pages of clauses, they do not hold a candle to the tens of thousands of pages of the EU's *acquis communautaire*. But again we need extreme caution in interpreting this difference. Is it simply one of degree in which the young NAFTA will be presumed to grow so that, in due course, it, too, will have tens of thousands of rules? Or are we misleading ourselves to put the question in this vein? Rather than being a "lite" version of continentalism, NAFTA's system of governance may be the **inverse of what the EU represents. NAFTA has very few rules designed to generate common North American behaviour such as policy-making**. Most of the rules prescribe how the three signatory states are to behave individually in specific circumstances. Apart from the behaviour of the Trade Commission and the two side agreements on labour and the environment, they do not determine how these

governments are to behave collectively. Even the dispute procedures de-collectivize the Agreement's judicial needs by providing for ad hoc panels (Ch. 19 and 20) or arbitral tribunals (Ch. 11) to tackle conflicts.

In Europe regional governments are not just affected by the EU, they are supported by it through a number of transnational associations, most notably the Committee of the Regions, which formally institutionalize their presence as legitimate players in the EU's complex policy process.¹² Development at the sub-central level is not supported through NAFTA. Canadian provinces, along with US and Mexican states, are admonished by the national treatment strictures of the agreement to desist from the same range of home-industry enhancing practices as are their federal governments. Investigating the differential capacity of regional and municipal governments to seek solutions to their problems by networking (as opposed to competing) with other sub-national governments promises revealing insights into how **different continentalisms affect the globalization of the local and the localization of the global.**

We should not conclude from its lack of visible government that North America is bereft of governance. It would be a stimulating hypothesis to explore that **the lower number of rules reflects a higher level of pre-existing socio-cultural-economic integration in North America** and the lesser need for rules to create a common political economy. This hypothesis would be easier to verify in North America's CanAm dimension, reflecting the pre-NAFTA reality of an extensive social, cultural, economic integration not requiring any formalized rules. Even in the MexAm reality, high levels of social, cultural, and economic integration had evolved with few explicit rules. If this automatic-pilot quality of governance alongside NAFTA comes close to the essence of North America's mode of regulation, then the EU's hierarchical and dogma-based legalism is a

¹² Peter Karl Kresl, "Sub-national Governments and Regional Trade: Liberalization in Europe and North America", *Revue d'Intégration européenne* 17:2-3 (1994), 309-335.

hindrance to clarity in our quest.

Environmental policy is a field where the European template helps us understand the peculiar nature of North America. The EU is not alone in formally committing itself to achieving high levels of environmental protection. NAFTA's negotiators prided themselves on drafting the first trade agreement that gave three international environmental agreements normative precedence over its trade rules and established a special Commission on Environmental Cooperation (CEC). In practice, the European Commission generated powerful continental environmental standards designed to raise laggard states' performance to the leading states' level. Bereft of norm-making legislative capacity, the CEC has been able to generate little more than its knuckle-rapping reports that show Texas and Ontario to be the worst polluters north of the Rio Grande. And given the extraordinary power that NAFTA Chapter 11's investor-state dispute process gives TNCs, **corporations are able to reduce the member states' legislative capacity to regulate pollution.** Most dramatically, the arbitration triggered by S.D. Myers under Chapter 11 invalidated the Canadian legislation preventing the shipment of PCBs across the Canadian-American border, even in the face of the Basel convention which required member states to treat their own toxic wastes domestically and which the disputed Canadian legislation was implementing.

The European Community took many years before it became environmentally responsible. NAFTA was born at a moment of high environmental consciousness in which problems associated with Mexico's border region were of particular concerns to American environmentalists. The **environmental improvements that did take place in Mexico occurred primarily because its access to the US market was contingent upon them.** Thanks to the influence of American environmental organizations, not only did the US pressure Mexico into adopting stricter enforcement standards for its environmental laws, but it increased its long_term influence over Mexican environmental

policies. The pressure on Mexico to maintain tougher environmental standards is also related to its participation in NAFTA's Commission for Environmental Cooperation which puts its environmental practices under constant scrutiny.

However complex may be the EU's rule-making, rule-applying, and rule-judging, these political processes' impact on government policy can in principle be determined by social science research. More difficulty faces the researcher in search of NAFTA's effects if a prime consequence of such disputes as the S.D. Myers or Ethyl or Metalclad case is to cause a **policy chill which paralyzes decision-makers** who become reluctant to pass a measure if it is likely to cause financial hardship to a NAFTA TNC. Non-decision making is just as hard to observe in the wake of Chapter 11 cases as it is in the shadow of trade harassment actions. Because "free trade" did not exempt Canada and Mexico from the grasp of American trade remedy legislation, Canadian and Mexican policy actors have to design their programs to minimize the risk of potential countervailing duties, anti-dumping or Super 301 actions emanating from Washington. Many may pursue risk minimizing strategies by harmonizing their policies to the US standard. This adjustment process is very hard for analysts to observe. Only in exceptional cases such as the 2001 softwood lumber dispute can outside observers see Canadian policy-makers adjusting their system to avoid future harassment. In this case British Columbia took the lead in proposing to change its pricing system for tree cutting from a government-set stumpage fee to an auction principle. Again, continental governance in which the most powerful state forces the weaker members to adopt its policies is a reality for which the European model does not prepare us.

For rules to have significance, compliance with them has to be monitored. The European Commission's role in ensuring its rules are followed has no institutional equivalent in North America, where each state is merely committed to inform its partners of legislation or statutes or measures that may affect the rights they obtained with NAFTA.

Surveillance of its member-states' behaviour is left up to each partner. For Canada and

Mexico, it is the government's embassy in Washington that has the job of following what the many branches of the US government may be doing that affect the country's NAFTA-based rights. The United States, in contrast, has developed a separate institution, the **US Trade Representative's Office (USTR), which is mandated by Congress to carry out thorough monitoring** of all its trade partners' behaviour. Here North America is so different from the EU that, apart from the comparative exercise involved in raising the *question* of compliance, we are more likely to be misled than enlightened by the effort to find an answer. The USTR's unchallenged surveillance role suggests that the application of NAFTA's rules becomes an exercise more of American power over its periphery than of its neighbours over the US. If this is continental community building, it is through forced compliance with the hegemon's preferences rather than through the mutual development of community norms.

4. Decision-making

In our itinerary through North America's institutions, conflict-resolution, and norms we have been resolutely looking at the continent's governance through the lens of the European Union, looking for points of similarity and difference. By proceeding along this path, we may have walked into a trap of our own making by accepting the premise that, *mutatis mutandis*, North America can be understood in terms defined by Europe's more advanced system of continental governance. But if we ask a cruder question – where is power located and how are decisions made that affect the continent as such – we may find ourselves facing a different, and older reality.

Take the political responses to the American catastrophe of September 11, 2001. Even though the United States's immediate reaction was to close down its borders in panic – and so bring continental trade to a standstill, no special meeting of the NAFTA Trade Commission was convened. Even though Washington's second response was to

reorganize “homeland defense” – with substantial implications for the management of Mexico’s and Canada’s airports, seaports, and borders from and across which potential terrorists might move into the US, the heads of government of the three North American states did not call a special trilateral summit.

Business associations with an interest in the unhindered flow of goods, services, investment, and specialized personnel across North American borders met and called desperately on the three governments to achieve free, if more secure, flows across the two national boundaries. While the national leaders in both peripheral states made appropriate gestures of support, there was no question that they might participate in crafting the responses to the crisis. These were one hundred percent made-in-USA. Washington decided what counted as security. Canada and Mexico then decided how to conform to Washington’s concerns and criteria.

When clarified by crisis, the new label of “continental governance” turned out to describe something surprisingly like the old pre-free-trade system. This, then, is the European Union’s mixed blessing. The EU template of an overarching superstate becomes a distinct disservice if it induces us to look for a continental political reality that is significantly different from the continuing double dyad of US-Mexico and US-Canada relations, each of which being driven proactively by the hegemon and in each of which the peripheral state strives responsively to promote its interests and limit its losses.

Of course, power can and must be analyzed in many other issues, most of which are not characterized by a crisis of urgent national security.

- The single European market, with its mobility of goods, capital, and labour, leads to “free trade” acquiring the connotation that political barriers within the continental community have fallen to permit unhindered economic mobility within the area. But

under NAFTA, most labour remains immobile across political borders. Under conditions of accelerated continental economic integration, Canada and the United States have built higher, more impermeable barriers to immigration. This disjuncture presents a sharp contrast to Schengen Europe's borderless mobility even in exceptional circumstances such as the mad cow disease epidemic. Whereas transborder regionalism in **Europe further reduces the importance of national frontiers, the US tries to make its Mexican frontier more impermeable** despite transborder economic regions having developed.

- The parallel trajectories taken by neoconservative elites both to the north and to the south of the United States point out another comparison by opposites. **The process of continental construction** in Europe was born of a common sense of crisis that engulfed all its candidate members. The crisis brought about by wartime devastation and the crises of the Berlin wall – both its construction and its destruction – suggest that the threat of political rather than economic catastrophe has driven Europe forward. Negotiations were slow, difficult, but inclusive and had the effect of rebalancing the continent's power relationships. NAFTA was born of separate and successive crises in each peripheral state. The fiscal trauma of Canadian governments unable to levy enough taxes to pay for their social programs and so avoid chronic deficit financing signalled the failure of Keynesian social democracy to embed egalitarian values deeply enough to withstand the disciplining power of global capital markets.¹³ The repeated convulsions of Mexico's political economy resulted in the PRI elites making an even more radical turn away from state dominance to embrace a free market philosophy. In each case an economic agreement with the United States was seen as a solution. In each case the demandeur state had to agree to make major concessions demanded by Washington's negotiators,

13 Hideo Mimoto and P. Cross – “The Growth of the Federal Debt”, *Canadian Economic Observer* (June 1991), 3.8-3.9 – show that in Canada “from the mid-1970s, social programs and other spending have had a flat trend relative to GDP... [while] higher debt charges accounted for the bulk (70%) of the increase in spending relative to GDP”.

who gave up little in return. Where the EU's institutional mechanisms mitigated asymmetries between its largest and the smallest members, NAFTA accentuated the asymmetry in North America's power structure.

- If we take the currency system, then North America is clearly not following the European model towards a North American Monetary Union. While the EU may preserve some national distinctiveness in social cohesion, its European Monetary Union decisively removes exchange-rate policy from member-states' capitals whose degrees of fiscal policy freedom it consequently constrains. Projecting this reality westwards suggests that continental currency harmonization is the trend in North America, too, and that a North American Monetary Union (NAMU) is just around the corner. The power of the Federal Reserve Board may make it the de facto equivalent for North America of the European Central Bank. The US dollar may be the continent's dominant currency with informal "dollarization" practised by major corporations operating in the peripheral states. It nevertheless remains true that the Banks of Canada and Mexico still give their governments an instrument with which they can respond autonomously to disruptive economic shocks. Neither peripheral state wants to give up the shock absorber of a flexible exchange rate managed by a government-controlled bank. The continuing role of secondary currencies, which has been in question as a result of the exchange-rate crises of the 1990s, may depend on the strategic calculations of the United States. The United States would not easily concede participation by voting representatives of the Mexican and Canadian governments on the Federal Reserve Board. As long as Washington remains satisfied that its interests are not jeopardized by the separate currency systems on its borders and as long as global financial institutions remain able to stabilize threatening fluctuations, it will remain important not to look to **European continentalism as a guide to understanding its North American counterpart.**

- In social policy the power centres are diffuse. In Europe the connection between

continental economic integration and regional or social inequality is direct since the EU's structural policies have actively supported the development of the poorest regions and encouraged the enrichment of their social policies. While NAFTA cannot be blamed for the growing income inequality within the US economy, **free trade appears causally related to the various factors increasing economic disparities** within Canada and Mexico. The dismantling of social support programs, the continuing shift of the tax burden from corporations to individuals, the persistently high (Canada) and rocketing (Mexico) levels of unemployment, the further impoverishment of the poorest provinces and states have been woven into an ideational fabric as components of neoconservative politics and its concomitant continentalism and globalization. But if neoconservative norms reject social solidarity within states, they are even less supportive of redistributive policies within the continental system.

- In issue after issue, the EU's model forces comparisons with NAFTA that are generally unfavourable from a social-democratic perspective but favourable when viewed through a neoconservative optic. Europe's social norms have been protected by social partners pressing on a political superstructure which has shown itself responsive to political representation. In contrast with this effort to bolster social cohesion in the EU, we can see in North America declining levels of well-being apart from the ranks of the super-rich within each society. If the consequent dedication to competition, glorification of consumption, commodification of culture, denigration of community, and blurring of national identities are given freer rein in the new North America than on other continents as the transnational corporation becomes the lead force defining public values, the North American model will distinguish itself as giving the **greatest leeway for the market to produce social norms and discipline governments**. Here comparison does yield deeper understandings.

Given the differential impact of NAFTA on its constituent members – negligible on the

United States, considerable on Canada and (as an integral part of a decade's worth of neoconservative transformations) traumatic on Mexico; given the increased asymmetry between the hegemon and its peripheral partners resulting from the unequal balance in the trade agreements' negotiating processes and their outcomes; and given the extent to which NAFTA's chapters express the reigning American public philosophy that maximizes market rules and minimizes state roles, a **tripartite North American policy model appears to be emerging in sync with the hegemon's ideological standard**. Its members' models may have started farther apart, but the new continental constitution and the impact of neoconservatism on the peripheral states' internal transformations have brought them into greater conformity within considerably less than two decades. Whether this process has been faster and the resulting homogenization of the dominated to the standards of the dominant has been greater than in the European case is an empirical question requiring very careful analysis. We can already say that in this dimension as well comparison between the two regimes does yield better understanding.

Conclusion

Unlike its institutionally integrated prototype in Europe, **North America is still difficult to describe as having an overarching system of governance**. Despite NAFTA's extensive rule set, the two hegemon-periphery dyads -- CanAm and MexAm -- remain the continent's dominant intergovernmental realities. North America's heterogeneity in history, geography and national or cultural characteristics may be less than Europe's greater diversity, but its institutional tools for fostering continental cohesion are weaker. Clear differences still distinguish the United States from its two peripheral states. With Mexico's per capita income being but one eighth of US and Canadian levels it is even less valid to talk of "North America" as if it were an undifferentiated whole than it is to talk of its three member states as if they were themselves homogeneous entities. NAFTA may act as a supplementary constitution governing some aspects of its three members'

political and economic relations, but the gaps between their social, economic, and cultural realities dictates that their trilateral fraternity remains fragile.

Even when united with its eastern Länder, Germany's predominance in size and prosperity does not come close to outright dominance in the EU, whose institutions counter-asymmetric features have mitigated Berlin's hegemonic potential. By contrast, many of **NAFTA's provisions enhanced the hegemon's superiority**. Increasing disparities, political instability, vulnerability to the new dispute settlement mechanism, and continued tensions with the US characterize both Mexico's and Canada's positions within a NAFTA, which seems to have benefited the US the most through the spread of its legal norms and business practices.

European integration was inspired from the start by politicians. North America has never had an all-encompassing political mission. Until fifteen years ago, it rejected the very notion of formal continental integration. **NAFTA answered an economic imperative**, both in the sense that liberalizing North American trade and investment flows was the top priority of business and in the sense that TNCs energetically pushed government negotiators to meet their specific corporate requirements.¹⁴ . Once started, the process was fast but secretive, controversial, and divisive, privileging business interests and excluding the remaining social partners.

The European Union now boasts a flag, a common format for member-state passports, and many other symbols of its collective existence such as the ECJ and the European Parliament. North America may have a longer history of intergovernmental peace, a more integrated business community, and a more homogenized consumerism, yet the conflicted process of **NAFTA-building has done little to foster a specifically continental identity outside the TNCs' marketplace**. A corporate driven continent-

14 Alan M. Rugman, *Multinationals and Canada-United States Free Trade* (University of South Carolina Press, 1990) Chapter 7.

building process has created little sense of continental identity.

The EU has evolved an initial sense of a shared European citizenship, however deep may be its members' continuing linguistic and national differences. Paradoxically, while American corporations are creating a common North American capitalist culture, **US economic nationalism continually rekindles continentally disintegrative responses from its neighbours**. The Helms-Burton Act, California's discriminatory action against Mexican immigrants, Washington's violation of NAFTA's rule allowing Mexican trucks to operate in the US, and frequent AD or CVD trade actions against successful Canadian exports keep attesting to US protectionism's divisive nature.¹⁵

With its top heavy structure, its normative activism, and its supranational judiciary, the EU is constantly at centre stage of European politics, often providing a scapegoat for popular anger. The Maastricht referenda confirmed how polarizing continental issues can be within its member-states' polities. North American governance, by contrast, is distinguished by its absence. By negotiating NAFTA, the Canadian and United States governments generated an intense intellectual as well as political crisis in their systems that produced a passionate scholarly debate about the implications of free trade. In Mexico, where the PRI kept party democracy under strict control, the negotiation of NAFTA was presented as an uncontroversial panacea for the economy. Now that the 71-year era of PRI rule has ended and democratic norms have penetrated the political system, NAFTA is increasingly becoming the subject of dissent by politicians who are voicing their unhappiness with what their recent technocrat leaders have wrought. In

15 John D. Wirth, "Advancing the North American Community", *American Review of Canadian Studies* 26:2 (Summer 1996), 261-73. I am grateful to Robert O'Brien for pointing out that more interesting in contrast to Europe is the development of sector identities along class, gender and aboriginal lines: R. Alexander and P. Gilmore, "The Emergence of Cross-Border Labor Solidarity", *NACLA Report on the Americas* XXVII:1 (1994), 42-48 and C. Gabriel and L. Macdonald, "NAFTA, Women and Organizing in Canada and Mexico: Forging a Feminist Internationality", *Millennium* 23:3 (1994), 535-62.

Canada, where there had been the most widespread and sustained opposition to free trade, NAFTA has virtually no more political salience. On the whole it remains true that there is **no continental politics because there are no visible continental institutions wielding tangible political power.**

The absence of visible continental politics doesn't preclude a different kind of continental governance. Polarizing new (neoconservative) norms may spark a reaffirmation of countervailing old (social-democratic) values. The shocking processes and regressive rulings of investor-state dispute settlement have roused environmentalists to unprecedented levels of continental and even hemispheric solidarity. Free trade as a symbol has shown real potential for igniting passions around normative issues. Tear-gassed demonstrators protesting against the Free Trade Area of the Americas (FTAA) in the streets of Quebec City in April, 2001 showed clearly that consciousness of the results of free trade and the prospect of further trade liberalization can mobilize mass protests that support transnational citizens movements, a phenomenon referred to as **“continentalism from below” in contrast to TNC-generated and government-negotiated “continentalism from above.”**

Specific examples of such continental governance in civil society can be found in both old and new social movements. In finding the North American Agreement on Labour Cooperation to be of minimal value, trade unions have also learned to deal with and help each other across the two sets of national boundaries. In a similar way environmental organizations, which have been disappointed with the CEC, have developed new transnational solidarities. These examples of continent-wide interactions below the level of formal institutions may be as important as the mainly symbolic manifestations of continental governance spawned by NAFTA. But even they cause us to reflect that the European Union is something of a mixed blessing when it comes to understanding North America. Where the EU helped social partners develop transnational ties, social

movements in the northern part of the Western Hemisphere are generating solidarity in opposition to trade liberalization.

Comparativists of the world beware! Observing North America through EU lenses may produce as much distortion as focus.