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Stephen Clarkson

The Globalization of Governance:  
Canada's Experience with NAFTA and the WTO

The two biggest success stories in business-government relations in the past decade are spelled N-A-F-T-A and W-T-O. These two new trade regimes, the continental North American Free Trade Agreement and the global World Trade Organization, represent the triumph of sophisticated business strategizing and lobbying both nationally and internationally to put into place the kinds of legal regimes needed for transnational corporate investment, production, and distribution under conditions of globalized markets. Why, then, is today's discourse about globalization so centred on failure, on blockage, on frustration of free trade efforts, whether fast track for the Free Trade of the Americas Agreement or the bleak prospects that Congress might vote to approve "permanent normal trade relations" with China? Why has "Seattle" become a synonym for the revolt against the very idea of trade liberalization that has so recently been considered the latest and surest formula for achieving life, liberty and the pursuit of happiness? Why do we hear the slogan "Fix it or nix it!" attached to the WTO and the two other principal international financial institutions, the International Monetary Fund and the World Bank?

This paper proposes to answer this group of questions by

- I - taking a broad look at the past history of trade governance,
- II - examining NAFTA and the WTO as the two newest examples of trade

governance,

III - analyzing the impact of these two institutions of globalization on government in Canada, and

IV - reflecting on how the governance of globalization might respond to the impasse in which it now finds itself.

## **I History: The Symbiotic Relationship of Markets and States**

Let us start with two reciprocal axioms. Markets need states. States need markets.

These simple statements are not riddles. They express two truths of political economy.

- First, no business and no "market" made up of commercial exchanges can operate without a judicial and coercive system that makes contracts enforceable. Nor can markets prosper outside conditions of social stability and cultural cohesion.

- But if markets need states to perform these essential political functions, states need markets just as much to generate the wealth on which their tax base depends.

Once having stated them, it is clear that these axioms conceal as much they reveal. They do not tell us anything about the nature of the market or dimensions of the state. A century ago, for instance, when free trade was globalizing the market for capital and disrupting the lives of labouring people, it was the nation state that responded to the threat. After half century of sometimes revolutionary strife including two world wars, the capitalist industrial countries had worked out a brilliant, dual solution to the apparently unresolvable tension between labour and capital within a globally functioning economy.

- On the home front a "Fordist" compromise between management and labour unions allowed wages to share in productivity gains, thus providing the work force with enough revenue to buy the products it was producing en masse.

While markets were generally allowed to let capitalists compete with each other

freely, states provided indirect management of their economy through Keynesian macro-economic fine-tuning and made sure that there was adequate aggregate demand to keep the economy humming even in bad times by providing social security programs to insure the public against ill health, old age, and the insecurity of unemployment.

- As for the external domain, the international financial institutions set up following the Bretton Woods agreement, along with the rules that complemented them, gave the industrial states control over capital flows in and out of their markets and had them fix their exchange rates. Speculation in currency was frowned on. The purpose of capital was to serve the national interest.

This Keynesian welfare state was extraordinarily successful, demonstrating in the 1950s and 1960s an admirable social stability and delivering a steadily rising prosperity. The reasons for its demise were too complex to discuss here but coincided with and helped create the factors that led to its own decline. Capital increasingly escaped national control and developed a global market. At the same time industrial production systems became transnationalized as companies established manufacturing subsidiaries in low-wage economies. As the cost of the research required to develop new technology escalated, national markets no longer sufficed to pay back the necessary investment which required that distribution markets also transcend national frontiers. As the nation state lost control over capital flows and currency rates and as its tools for directing the national economy failed to resolve such new problems as stagnation, the identity between state power and national territory was broken.

The nation states challenged by this three-headed globalization made three kinds of response to this disturbing crisis. Instinctively they defended their existing systems as best they could by raising taxes, cutting spending, reducing their deficits, shrinking their public sectors, all the while claiming to be treading a 'third way' between the now repudiated Keynesian welfare state and the generally unpopular severity of the neo-conservative remedy. When states

realized there were functional issues beyond their direct control, their second response was to regroup in continental collections such as the European Union (1993) and NAFTA (1994) in order to achieve greater efficiencies for their markets and greater effectiveness in their governance. Knowing that the best solutions for many issues were universal, their third reaction was to redesign the institutions and rules of the world's international financial institutions, most dramatically by transforming the anodyne General Agreement on Tariffs and Trade into the innovative World Trade Organization (1995) whose extraordinarily intrusive new rules were endowed with exceptional judicial capacities with which to enforce them.

States belonging to the international system are bound by hundreds of treaties thanks to the very act of joining the legion international organizations that perform functions ranging from the very general (United Nations Organization) to the very specific (ozone layer depletion). Depending on their legal system, signatory states are automatically bound by the rules of the conventions they have signed (Mexico), modify their existing laws to bring them into conformity with the international agreement (Canada), or have a mixed system embracing both automaticity and legislative amendment (United States). In that sense there is nothing new about NAFTA or the WTO.

What is new is the extent to which these trade regimes penetrate deep into the legal and policy systems of their members, which they do in three ways.

- First, NAFTA's and the WTO's rules are so comprehensive that, in adopting implementation legislation, their members have to change myriad existing laws.
- Not only is the extent of these changes unprecedentedly broad. These changes are different from the normal legislative amendments made by legislatures, which can always further amend or revoke their acts in response to changing domestic considerations. In the case of amendments incorporating international trade laws, they can only be amended if the external regime changes its rules by international agreement.
- Third, these trade regimes also have rules that are not incorporated in the

members' legal orders but that serve as codes of behaviour or standards to which the members are expected to conform. If another country considers its interests to have been damaged by a state's nonconforming action, it can "take it to court" as it were. If proven guilty, the misbehaving state has to mend its ways or suffer commercial retaliation.

- Fourth, the EU or the WTO may create new rules to which not all their members agree but which bind them nonetheless.

In this sense, the principles and evolving practices embodied in NAFTA and the WTO act as their members' *external constitution* to which they are subject on an ongoing basis with often unpredictable results. To give concrete meaning to these general statements I will examine these agreements from the point of view of one country, Canada. I take this case because Canada's uniqueness is not extraordinary. For over a century it has been the world's seventh or eighth, now ninth largest economy, a happy condition that it owes neither to military nor imperial prowess but to natural endowments. It is not a once-autarchic economy now recently liberalized. From its earliest days it has been a trading state, so has long experience with commercial interdependence. In recent decades it has been an active participant in multilateral organizations playing a significant role as one of the largest non-great powers in all the world's international life. (It is the United States's largest single trading partner, accounting for more American exports and imports than do Mexico and Japan -- the second and third -- combined.) So, to examine the impact of the new trade regimes on its governmental life is not to take a case that is particularly unusual.

## II The New Trade Governance: NAFTA and the WTO CUFTA/NAFTA

It can hardly be denied that the original free trade deal in North America, the Canada-United States Free Trade Agreement (CUFTA, 1989) and NAFTA are serious legal documents having been toughly negotiated, ceremoniously signed, passionately debated, solemnly ratified, and formally implemented in the legislation of the three negotiating parties. The economic geography of the area

covered by NAFTA comprises three sovereign states with a combined population in 1995 of 384 million and a combined national product of some US\$8.5 trillion (compared to the European Union's fifteen member economy with a population in 1996 of 373 million and a gross product of \$8.6 trillion.) Given this substantial weight and given the global role of the United States, an economic agreement among the North American states would automatically be a significant phenomenon. Still, size does not necessarily make an international economic agreement a document with constitutional implications.

To understand to what extent and in what senses CUFTA and NAFTA constitute an innovative trade regime, we must recall the historical conjuncture out of which each agreement emerged. Although the United States had long applied a strategy towards Canada (to maintain it as a complementary economy but prevent it becoming a competitive one<sup>1</sup>), it had never officially formulated a comprehensive set of demands concerning how the federal and provincial governments to the north should - or, more importantly, how they should not -- make their policies. Apart from signing agreements concerning bilateral trade in the military, farm equipment, and automobile sectors and apart from addressing such issues unique to the Canadian-American boundary as joint management of water straddling and crossing the border under the aegis of the International Joint Commission, the Columbia River treaty and the St. Lawrence Seaway authority, Canada had carefully avoided formalizing its most important bilateral relationship, preferring as much as possible to treat with its overwhelming neighbor in multilateral fora where it could form alliances on an *ad hoc* basis with other countries on dealings it had with Washington.

CUFTA was the product of a double set of crises. Following the devastating defeat of Prime Minister John Turner in the 1984 federal election<sup>1</sup>. Canada was in the process of rejecting the Liberals' social-democratic legacy

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1G. Stewart, "A Special Contiguous Country Economic Regime': America's Canadian Policy," *Diplomatic History* (Fall, 1982) pp.339-57.

which was thought to have failed. In its place the massive and decisively influential report of the Macdonald Royal Commission proposed continental free trade as a defence against a newly aggressive American trade protectionism would blight Canada's prospects for growth via exports.

For its part, the United States in the mid-1980s was afraid that gridlock in the GATT's eighth, "Uruguay" round of negotiations would stymie Washington's urgent attempts to expand the scope of global trade rules. At a time when US hegemony was being threatened by rival states in Asia and Europe using their governments to create competitive advantages for their national champions, Washington felt it needed rules on bio-tech agriculture, foreign investment, traded services, and intellectual property that would let American TNCs exploit their comparative advantage in information and knowledge-based enterprise. Bilateral negotiations with an obligingly docile partner could be a useful tactical move to achieve the broader strategic goal. Thus CUFTA represented a break with both capitals' traditional way of dealing with the other.

The second phase of North America's rapid crystallization as a trade bloc represented a simultaneous broadening and deepening of the bilateral system established by CUFTA in 1989. The broadening was made possible by another crisis, in this case, the dire economic straits experienced by Mexico in the early 1980s. In the wake of what they considered to be the incontrovertible failure of the post-war decades' attempt to raise the Mexican economy by its own bootstraps through import substitution industrialization, the ruling PRI's (Partido Revolucionario Institucional) younger elites turned to the American economic model whose nostrums they had absorbed in graduate school at MIT and Chicago. They decided unilaterally to take radical measures to open up and liberalize Mexico's political economy by cutting tariffs, privatizing parastatal entities, reducing controls on foreign direct investment, freeing communally held peasant (*ejido*) lands for private acquisition, and joining GATT and the OECD. Having taken such bold steps, Mexico was deemed by Washington to be ripe for an arrangement that would "lock in" this welcome neo-liberal counter-revolution

by tying anti-interventionist norms to what Mexico wanted most -- guaranteed access to the American market. The resulting NAFTA (1994) deepened CUFTA as well as broadening it, because it expanded the disciplines and obligations contained in the 1989 document

What was striking about the institutional structure created by the first bilateral agreement was its almost complete absence. No policy-making institutions with their own power structure were established beyond a Canada-United States Trade Commission which was set up on paper but not in practice. With neither supranational secretariat nor permanent address, it consisted merely of periodic meetings of the two countries' trade ministers who had advisory powers concerning a limited number of issues.

NAFTA tells a slightly different story, that of cautious, still informal institutional deepening. It created a North American Trade Commission, although the establishment in Mexico City of this small secretariat was an agonizingly slow process with a largely inconsequential result. Deepening can also be seen in the two organizations which were established following side agreements insisted on by the newly elected Clinton administration and which were given narrowly focused mandates. The North American Agreement on Labor Cooperation created a trilateral Commission for Labor Cooperation headquartered in Dallas (now Washington) to encourage compliance with the signatories' respective labour laws -- a euphemism for American labour union concerns about the export of jobs because of Mexico's lax enforcement of its legislation on workers' rights to organize.<sup>2</sup>

The second body, a trilateral Commission for Environmental Cooperation was set up in Montreal by NAFTA's other side deal, the North American Agreement on Environmental Cooperation. This tripartite organization, whose professional secretariat was given supranational standing (even if its budget

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2 "Is the North American Agreement on Labor Cooperation Working for Workers'

Rights?" *California International Law Journal* 25 (1995), pp. 425-58.

came directly from the three governments), constituted the potentially most important institutional strengthening in NAFTA -- a direct testimony to the power of the US environmental movement to extract concessions from Governor Bill Clinton's presidential aspirations in 1992.<sup>3</sup>

Apart from these two organizations whose substance remains very much to be proven, NAFTA created no state-like political entity with the power to regulate the

- Is the North American Agreement on Labor Cooperation Working for Workers' Rights?" *California International Law Journal* 25 (1995), pp. 425-58.

- John Kirton, "The Commission for Environmental Cooperation and Canada-U.S. Environmental Governance in the NAFTA Era," *American Review of Canadian Studies* 27:3 (Autumn 1997), pp. 459-86.

newly liberalized continental market it had established or with the authority to challenge any of its member-states' sovereignty. Far from creating the equivalent of the European Union's "democratic deficit" in which substantial new supra-national power centres were established but were unaccountable and inaccessible to popular participation or control, North America's free trade area had no central, market-regulating institutions where power was exercised. Rather than democracy suffering at the continental level from a deficit, it was in a complete vacuum. The negotiation of NAFTA had been far from transparent, its negotiators unaccountable to more than their own trade policy professionals and the business community. What did make CUFTA/NAFTA significant as a trade regime was the agreements' hundreds of pages of rules.

At first glance these rules seemed to be little more than a repetition of those

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3 John Kirton, 'The Commission for Environmental Cooperation and Canada-U.S.

Environmental Governance in the NAFTA Era,' *American Review of Canadian Studies* 27:3 (Autumn 1997), pp. 459-86.

written into the General Agreement on Tariffs and Trade. "National treatment," for instance, already required Canada to treat foreign goods the same way it treated nationally produced goods once they had crossed the border. CUFTA and NAFTA extended the national treatment principle to foreign investments, which made the new North American system more of an economic integration regime than a free trade regime. Corporations controlled in the other two states were given the right, by the principle of national treatment, to get the same help from a NAFTA member government that it offered to firms owned and controlled by its own nationals. Besides national treatment, the right of establishment (that is, the right to carry on business in a country *without* having to establish a corporate presence there) made it easier for firms from another member-state to do business in that member's economy. The right to bid on government procurement contracts above certain established ceilings granted corporations based in one North American country access to some important new markets in the public sectors of the other two countries.

Another rule which was pregnant with import for the Canadian political economy was the one requiring state "monopolies" to operate on commercial bases. Uncontroversial though this sounded, it could have major implications for the crown corporations' in the Canadian economy that had social objectives such as reinforcing national unity or correcting inequalities among regions. The two trade agreements enhanced the rights of corporations controlled by nationals of one of the other two member states and their employees who needed to travel to the other country for business purposes. The most significant extension of corporate rights lay in CUFTA's extending trade rules to include services rather than just goods. This brought financial services under the principle of national treatment and potentially exposed Canada's publicly provided services of education and medical care to American corporate participation. One of NAFTA's most significant innovations was incorporating a chapter on intellectual property rights, a major objective of the US information-based sectors such as pharmaceuticals, entertainment, and software.

Entrenching neo-conservatism at home by accepting Washington's desire to constrain its interventionist potential was only a secondary objective for the Canadian government whose main negotiating aim was to limit the damage that the American government could impose on Canadian exporters. What it had in mind was achieving a rule for North American trade that gave Canada an exemption from the application of American trade remedy sanctions such as anti-dumping and countervailing duties. The hoped for means to this end were to have Washington renounce anti-dumping action within the free trade area and to adopt a comprehensive code specifying what kind of Canadian subsidies were not acceptable to the Americans (legitimizing US countervail actions against exports incorporating their benefits) and what were acceptable (providing security against US harassment of exporters whose products had received such approved types of government assistance).

Canada's complete failure in this objective in both agreements meant that they imposed negligible limits on what damage the US government could do to block Canadian exports that were succeeding in the American market. Indeed, CUFTA acknowledged Congress's right to pass new trade measures that could supersede the trade agreement, an action Congress proceeded to take with its Omnibus trade act. To declare Congress's unimpeded sovereignty loud and clear, Article 103 of the US implementing legislation for CUFTA specified that, should there be a conflict between the bilateral agreement and American law, the latter would prevail.<sup>4</sup> As this example suggests, CUFTA/NAFTA actually imposed different and lesser constraints on the hegemon than the limits accepted by the peripheral members.

Although the language of these trade agreements expresses a studied symmetry in which each "party" has rights and obligations, it betrays in practice a noticeable imbalance that was the understandable outcome of three incompatible

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<sup>4</sup>Daniel Drache, "Dreaming Trade or Trading Dreams: The Limits of Trade Blocs," in Wilfrid W. Bratton et al., eds. *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States* (Oxford: Clarendon Press, 1996).

negotiating agendas. De facto asymmetry, for example, characterizes NAFTA's clause defining how any party can abrogate the agreement given six months' notice. The threat of abrogation has a very different weight in the hands of Washington than in those of Ottawa or Mexico City. American interests would be affected - but not radically so--if the US defected from NAFTA. The opposite would be the case for either of the peripheral states. Following their virtually complete integration in the continental economy, Mexico and Canada would be forced to their knees if Washington threatened to abrogate. The case of Hawaii at the end of the last century illustrates how a free trade agreement led to the peripheral territory's integration in the US economy, making it so vulnerable to Washington's threat to abrogate that it was forced to accept political annexation in the form of statehood.

Unless the three parties agree informally to alter practices established by NAFTA, it would take formal negotiations and legislative implementation to amend the agreement. Mexican and American resistance to the Canadian government's request to renegotiate the meaning of the expropriation clause in Chapter II confirms that this is a high hurdle to jump and strengthens the document "constitutional" appearance.

It would be misleading to infer from CUFTA/NAFTA's institutional weakness that this continental economic agreement exercises little clout on its members' individual legal orders. Without creating a supranational judiciary, CUFTA and NAFTA established some precarious dispute settlement mechanisms for the resolution of bilateral trade conflicts.

The most frequently used has been a binational panel process to review protectionist trade remedy determinations considered unfair by the exporting partner. This dispute mechanism (Chapter 19 in both agreements), over which much ink has been spilled,<sup>5</sup> enables complaining parties to request *ad hoc* panels

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<sup>5</sup>William J. Davey, *Pine & Swine: Canada-United States Trade Dispute Settlement, The FTA Experience*

(whose personnel are drawn from rosters of experts proposed by the concerned governments) to declare whether a trade determination made by the administrative process in either country properly applied that country's trade law. If the panel finds that the law has not been properly applied it suggests to the trade commission that the decision be remanded for review.

In Canada's experience, both anti-dumping and countervailing duty determinations have been investigated by Chapter 19 panels with only minor consequences. Some of the government's practices in making trade determinations have been amended and some effects of judgment have been corrected, but the sovereign application of Canadian law (which is remarkably similar to US law in this matter) has not been challenged. As far as Canadian security from US protectionism was concerned, CUFTA offered no significant improvement. To get relief from the strategically coordinated anti-dumping actions against their exports, Canada's major steel companies have located their new plants in the United States.

That nationals of another country could take part in passing judgment on the application of American law has been considered by some US legislators to be an unacceptable infringement of congressional sovereignty. When some of these panels remanded US trade determinations as improperly made they became the source of further political outrage in Washington. Accordingly, when it came time to negotiate NAFTA, Congress demanded its pound of flesh. NAFTA's dispute settlement mechanism was duly made weaker than CUFTA'S. The roster for panels, which had been dominated by trade experts who tended to criticize the lax reasoning and arbitrary methodology in US trade remedy determinations, was to be weighted towards retired judges who could be expected to be more understanding of American interests in the crunch. In case this failed to shift the process adequately in favor of the US, the grounds

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*and NAFTA Prospects.* Ottawa: Centre for Trade Policy and Law, 1996 and Leycegui, Beatriz, William B.P. Robson, Dahlia Stein, eds. *Trading Punches: Trade Remedy Law and Disputes Under NAFTA.* Mexico City: ITAM; Toronto: C.D. Howe; Washington, D.C.: NPA, 1995.

for making an appeal against panel rulings were made much broader.<sup>6</sup> Dispute settlement under Chapter 19 was less a case of establishing a continental judicial process than of inserting participation by panellists from partner states in the review of member-states' internal trade protection practices.

Dispute settlement procedures are also provided by CUFTA's Chapter 18 and NAFTA's Chapter 20 to deal with conflicts arising out of one "party" deeming another party to have violated some provision in the continental agreement. The insertion of this judicial institution into the continental legal order is of debatable moment. The few cases that have been brought to a conclusion have been settled less by a judicial weighing of the free trade texts than by intergovernmental negotiation of a pre-free-trade type. Rather than NAFTA working as a confederal system in which continental norms are applied to the member-states, it appears still to be operating on the basis that the hegemon insists that its needs trump those of its partners, at least when it has substantial economic interests at stake.

Trade rules are only as effective as their enforcement mechanisms. Since the rulings of chapter 20 dispute panels are actually recommendations to the NAFTA trade commission, which is a trilateral political body, it is clear that NAFTA's rules will only be enforced by voluntary compliance or by the United States's insistence that its neighbors conform to the new order.

When Ronald Reagan hailed CUFTA as North America's new "economic constitution," he was not showing signs of premature senility. Even if it didn't define new institutions for North America, CUFTA did constrain the role of governments (if those of Canada more than of the United States). It did define rights for citizens (albeit those of transnational corporations rather than individuals). It was ratified in the form of each government duly passing the requisite implementing legislation. It did allow for amendment and termination.

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<sup>6</sup>Robert Howse, "Settling Trade Remedy Disputes: When the WTO Forum Is Better than the NAFTA," *CD. Howe Institute Commentary 111* (June 1998).

And it did establish a judicial process (if only an appeal system accessible by the federal government and corporations but not provinces or citizens).

Much the same could be said of NAFTA, though with both more sense and less. "North America" now took on its true geographic identity by including Mexico. But the notion of "constitution" clearly could only be applied very partially to the new, three-state economic bloc. With the absence of a supra-national institutional structure beyond the weak dispute-settlement mechanism, the United States's constitutional reality is barely affected. For the two peripheral member-states, CUFTA and NAFTA have indeed entered their constitutional makeup as *external* components. In other words, CUFTA and NAFTA have *re-constitutionalized and* extended the previous, informally operating dominance of American norms in their political economies. The notion of an external constitution has taken on an even greater substance with the entry into force of a global economic agreement of unprecedented strength, the celebrated World Trade Organization.

#### **The World Trade Organization**

What was far more important for Washington when negotiating CUFTA and NAFTA than its specific agenda for the US-Canada and the US-Mexico relationships was the message it wanted to send to its interlocutors in the Uruguay Round: "if a multilateral treaty is not negotiated to our satisfaction, then we will continue to negotiate bilateral deals, proceeding with our most compliant trade partners, until the most obdurate amongst you are completely isolated." In addition, Washington hoped to establish important precedents for the ongoing GATT talks. For the first time in a trade agreement, CUFTA included services as well as provisions on financial services.

The US tactic was successful. When NAFTA showed the EU how far the US was able to go single-handedly in pushing forward its international trade agenda on agriculture, services, and intellectual property rights, Brussels realized it was time to break the Uruguay Round's log jam.

By 1994 the astonishingly impressive Uruguay Round had achieved a global trade organization whose ambitious constitution had only been dreamed about since the US Congress had repudiated the International Trade Organization that American trade diplomats had themselves negotiated in 1947 in Havana. Because the WTO extended the process begun under the GATT in the Tokyo Round and accelerated with NAFTA of going behind border maintenance questions of tariffs and quotas to raise a wide range of other trade-related policy questions, its deep-integration effects had implications for Canada's legal order beyond those already noted for NAFTA.

As a result of six long years of extremely complex negotiations among perhaps one thousand trade officials and political leaders, a consensus developed across more than a hundred states supporting the creation of the World Trade Organization as a single undertaking. Its thousands of pages of rules were drafted in the heat of a more symmetrical struggle than had characterized North American trade negotiation. GATT's replacement by a substantial global trading regime led those states that did not originally join to seek admission to the WTO.

Compared to the relentlessly neo-liberal principles entrenched in NAFTA, the WTO appears relatively compassionate. Whereas NAFTA has no provisions that could allow the redistribution of wealth from free trade's winning corporations or regions to its losers, the WTO does at least acknowledge the existence of the grossest disparities between the rich and the poor nations and biases some of its rules in favour of the latter. That said, neoclassical orthodoxy remains the guiding principle behind the WTO's *Weltanschauung*.

Citizens are even more absent from the WTO than from NAFTA in whose environmental commission they have some right of access. Corporations are another story. The WTO entrenches a notable extension of international corporate rights, particularly through the General Agreement on Trade in Services. Some of the rights in GATS such as Trade Related Intellectual Property Rights are essentially the same provisions already written into NAFTA's

chapter 17, but they now benefit firms from all member-states, not just those based in North America. This means that their disciplinary effect is greater (as Canada found out when the European Union used TRIPs to support United States pressure on Canada to extend patent protection for brand-name pharmaceuticals<sup>7</sup>).

In the area of trade-related investment measures, the WTO's rights for TNCs are less expansive than those granted in NAFTA's chapter 11, but supplementary agreements in financial services and telecommunications further expanded the rights of corporations to buy into previously sheltered national sectors and state monopolies.

The WTO is a member-based organization boasting both strong and weak elements.

- *Its legislative* capacity is notoriously faulty. Consisting of a ministerial council made up of its 130 members which meets biennially and functions by consensus, it is patently unable to make difficult decisions, as the 1999 debacle in Seattle demonstrated.

- *Its executive* capacity is almost as precarious, the Director General having to work between ministerial councils with an unwieldy General Council and with the ambassadors resident in Geneva.

- Despite these handicaps, the WTO does have a surprisingly effective *administrative* capacity in the shape of a secretariat equipped with a relatively small staff of legal experts who constitute the institution's historical memory and manage the organization's main activities. Apart from dispute settlement, these consist principally of monitoring the trade policy compliance of the member states

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7 Christopher Kent, "The Uruguay Round GATT TRIPS Agreement & Chapter 17 of the NAFTA: A New Era in International Patent Protection," *Canadian Intellectual Property Review* (1994), 711-33.

under the aegis of a Trade Policy Review Board.<sup>8</sup> While this institutional structure can be criticized for being too elaborate for its small budget to support -- a Mercedes Benz with no gas as one expert observer put it<sup>9</sup> -- it is greatly superior to its predecessor, GATT, and has potential for reform as it matures.

As with NAFTA, the WTO's rules operate on two levels. Some require that the legislation of the member-states be amended so that the rules take direct effect in each participating constitutional system. Others, which remain part of the global constitutional order, are norms by which members are judged in cases of conflict. Such, for example, is the WTO's subsidy code, which defines what industrial subsidies are acceptable (green light), what are unacceptable (red light), and what are contestable (orange light) measures. Since Washington had refused to consider incorporating a subsidy code in either CUFTA or NAFTA, the WTO's subsidy text represents another limitation on Canada's policy freedom that actually enhances its power since it constitutes a potential discipline on Washington taking unilateral trade actions against it.

While some WTO provisions, such as those governing anti-dumping, represent no great improvement on previously existing GATT norms, others such as the sanitary and phyto-sanitary measures and rules governing agricultural protection constitute an enormous expansion in the scope of the global trade order that discipline both Canada and its trading partners.

Since the trade-policy agenda is virtually endless, the process of inter-governmental negotiations continued after the basic text was adopted in 1994. Two further agreements were achieved on telecommunications and financial services. A built-in agenda of unfinished business formed the preface for the so-called millennium round of negotiations whose launch was frustrated in Seattle.

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<sup>8</sup>Gilbert R. Winham "International Trade Policy in a Globalizing Economy," *International Journal* 51:4 (Autumn, 1996), 638-650.

<sup>9</sup>Sylvia Ostry, *the Post-Cold War Trading System: Who's on First?* (Chicago: University of Chicago Press, 1997).

If new negotiations do not produce additions to this global trade constitution, this does not mean that the WTO's constitution will not evolve. Existing rules have to be

interpreted in practice. The General Council has already developed the custom of issuing "interpretations" to specify the meaning of WTO rules that were (often deliberately) ambiguous.

As with the evolution of a national constitution through the judicial process, the ongoing process of dispute settlement will constitute the principal process which will reveal the significance of the WTO's constitutional content. More important still, the Dispute Settlement Body established by the WTO is superior to the dispute settlement mechanism established in CUFTA and NAFTA. Panellists will be nationals not party to the dispute in question. They will be making their judgements on the basis of international norms, not those of the countries in conflict. The strict time limits and appeal procedures promise prompt and less politicized justice. All these factors predicted that the adjudicating capacity of the WTO would be stronger than that of CUFTA or NAFTA.<sup>10</sup> The cheers and jeers provoked by the DSB's decisions have borne out this prediction.

### **III The Globalization of Canada's Government**

A political scientist visiting Ottawa or a provincial capital would be hard put to find traces of NAFTA's and the WTO's direct impact on Canadian government, Representatives are elected in periodic elections. The winning party still forms a government. Under its aegis Parliament still passes laws. The Supreme Court still issues judgments concerning the constitutionality of disputed laws and regulations. The police still maintain law and order. Civil servants still staff the governments departments.

Had the political scientist been in Canada and read the Toronto *Globe and Mail* on Monday July 12, 1999 she would have learned from a single front-page story, that Canada was poised to lose four major economic disputes at the WTO.

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<sup>10</sup>Howse, *op. cit*

At one fell swoop these adverse judgments would likely jeopardize federal policies that maintained:

- the dairy industry's supply management system,
- the economic base of firms producing cheaper, generic drugs,
- a number of high technology, export-oriented products,
- and even the Ontario economy's principal crutch, the Auto pact.

..... Whether Canadian farmers should be protected, whether Canada's public health care system should pay a king's ransom for brand-name drugs, whether there are better ways to support high-tech production, whether the Auto Pact matters any more: each of these issues raised specific policy questions which could be debated, each on its own merits. But they dramatized what globalization of governance now meant for the member-state.

Government policies are the state's response to general problems in the context of a specific conjuncture of class, regional, ethnic, and ideological struggle. For better or worse they represent the wisdom of the public's democratically elected representatives as they seek to resolve problems of economic, social and cultural development. When the WTO's dispute settlement body declared these Canadian laws and government practices to be violations of the new global trade rules, it was also delegitimizing the Canadian political system by showing it to be incapable of exercising its own power.

Bending to the principle of national treatment required Canada to abstain from practising the kind of import substitution industrialization policies based on favouring nationally-controlled over foreign-controlled corporations that it had used with considerable success since World War II.

One can object that the monopolies clause has had little effect, since it was not incorporated into Canadian law through implementation legislation. One can also agree that the privatization and commercialization of many crown corporations since 1989 cannot necessarily be attributed to the new principles of free trade. *Post hoc ergo propter hoc*: there were other reasons for this downsizing by the government such as the need to cut its deficit and the belief among neo-

liberal policy makers that state enterprises were no longer justified in their own terms. Nevertheless, if policy-makers know that another NAFTA state can attack the practices of a crown corporation or even the public education system on the grounds that it is not acting on commercial principles, they are naturally going to shift the operation of that public entity towards commercialization.

If the commercialization of publicly provided services is the product of Canada's globalization, Canadian society may lose its cohesion. An efficient, publicly funded health system has become a defining characteristic of the Canadian identity. Should the impact of continental and global free trade norms cause the accelerated privatization of health care with the consequent increases in inequality of treatment between the rich and the poor, a central element of Canadian political culture would be jeopardized. There is considerable fear in thoughtful circles that, instead of developing its social and community cohesion, Canada is increasingly dividing into a society of those who can succeed in the globalized system and a society of those left behind.

It will take time before the full significance of our new, two-level external constitution can be known, because the way it is applied will depend on a number of factors.

- The aggressiveness and ingenuity of the member states, whether their governments or their corporations, will be critical in applying the rules through launching disputes that set precedents.
- The responses of the major members to adverse rulings will largely determine the legitimacy of the WTO. Resistance by the European Union to the beef hormone ruling could make the Sanitary and Phyto-Sanitary agreement a dead letter.
- It will further depend on the judicial interpretations of the text in the many disputes that are brought to Geneva.
- It will also depend on the ideological and programmatic positions of Canada's federal and provincial governors who may wish to accelerate the state's neo-liberalization or may want to resist this trend.

New additions to a constitution take some time to have an impact. It took several years for the Charter of Rights and Freedoms to be applied in the form of legal disputes requiring the Supreme Court to rule whether a particular law or regulation was constitutional. The same is true of NAFTA and the WTO when they are conceptualized as two external additions to the Canadian constitution. Some provisions that were originally dismissed as non-issues have proven extremely significant. For instance, NAFTA's chapter II broadened the definition of investment and extended investors' rights to include the capacity of a firm from a partner state to sue a member government for jeopardizing its profitability through regulations unjustified by scientific evidence. This "Chapter II" right to sue foreign governments for actions "tantamount to expropriation" has proven in Canada to be the most controversial of NAFTA's new corporate rights because its application has challenged environmental measures taken or proposed in each of the three states. Canadians discovered to their dismay that NAFTA's stronger investment chapter means that a US TNC such as Ethyl Corporation of Virginia had more rights vis-à-vis their government than would a Canadian company. The federal government was constrained from banning MMT, a chemical additive to gasoline that is suspected as a neurotoxin of causing health risks such as Alzheimer's disease. Ethyl, the company exporting the substance to Canada, successfully threatened to sue the Canadian government on the grounds that its commercial rights had been "expropriated" by Ottawa's regulatory action. Beyond the policy constraint, Chapter II also represents constitutional change. The reconstitutionalizing nature of this provision can be better appreciated once it is recognized that the Canada Constitution Act 1982 does not contain property rights. As some analysts see it, NAFTA's chapter II imports the US constitution's fifth amendment through the back door.<sup>11</sup>

The WTO's impact on Canadian values is a product both of the rules that

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<sup>11</sup>David Schneideman, "NAFTA's Takings Rule: American Constitutionalism comes to Canada," *University of Toronto Law Journal* (1996), 499-537.

have been internalized through Canada's implementation legislation and of the individual dispute rulings that can alter the domestic situation. When *Sports Illustrated's split* run edition was ruled a "like product" to such national magazines as *Maclean's*, the WTO initiated a process that will make it even more difficult than it was previously for Canadians to communicate their own values with each other rather than having American values thrust on them through their own cultural market.

In agreeing to accept limits to government powers derived from the principles of free trade, the Progressive Conservative government led by Brian Mulroney lost what for ideological reasons it did not want to keep, namely a capacity to intervene in the economy to promote Canadian-owned corporations in the hope of creating competitive advantage for its economic champions. The Mulroney government was reacting against what it saw as the failure of the Keynesian, interventionist state to generate economic growth. If CUFTA tied the government's hands, this was a plus, not a minus, a deliberate use of an international agreement to "constitutionalize" an ideological position. The point was to let market forces do the economic job and prevent future politicians of a different persuasion from messing things up ever again.

The use of international economic treaties to achieve partisan political objectives gave the question of the democratic deficit a different -- because deferred -- twist. The self-imposed constraints could not be seen as undemocratic in the present because a duly elected government had agreed to be bound by the agreements' interdictions. The problem has been described as a "pre-commitment strategy" in which the present generation disables future generations from pursuing certain legislative goals should a government be elected that is committed to an interventionist strategy.<sup>12</sup> At that point the public's mandate would have been frustrated by the previously signed agreement which had created a built-in

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<sup>12</sup>Schneiderman, "NAFTA's Takings Rule," 514.

democratic deficit in perpetuity.

By signing CUFTA the Canadian government committed itself and its successors to abstaining from the kinds of industrial and cultural development policies that had formed the core of much of federal and provincial policy activity for thirty years. Free trade constrained governmental action in a host of areas too numerous to detail. Most salient were:

the Auto Pact,- which was altered to prevent future Japanese transplants from using Canada as a base for their North American assembly operations;

- energy policy, which required Canadian governments to export existing liquid petroleum supplies at constant volumes and at prices below those needed to replacement costs;

foreign investment policy, which limited the screening of foreign takeovers to the very largest Canadian companies;

- a cultural interdiction which gave the United States the right to retaliate for losses that the American entertainment industry might claim because of future federal or provincial policies enacted to protect Canadian culture.

This retaliation clause in CUFTA's much debated "cultural exemption" illustrates the dual nature of its constitutionalizing thrust. No amendment had to be legislated in any Canadian cultural policy when CUFTA came into effect, so in one sense this provision had no impact. However its presence in the new North American legal order meant that it could be invoked and applied when the United States deemed that the Canadian government had taken an action that injured an American entertainment company. This occurred when a country and western broadcaster was replaced with a Canadian country and western outlet on a TV channel by the Canadian RadioTelevision and Telecommunications Commission. Although Canada's internal legal order had not been changed *per se*, the new continental norm made it impossible for a federal agency to apply its previously defined policy for promoting Canadian cultural expression among in the Canadian media.

*The Sports Illustrated* case also shows how the global and continental trade orders constitute interacting normative realms. On behalf of Time Warner, the United States successfully prosecuted Canada's magazine promotion policies at the WTO which deemed Ottawa's longstanding tax regime and postal subsidies for Canadian-owned magazines "illegal". Then when Ottawa reformulated its magazine laws in response to the WTO's ruling, Washington invoked NAFTA's cultural clause to threaten massive retaliation against Canadian steel exports to force Ottawa to capitulate to Time Warner -and any other US split-run magazine aiming at the Canadian advertising market.

Beyond inhibiting federal and provincial governments in their policy actions, CUFTA, NAFTA and the WTO may also have altered the balance of power between the two levels of government. By making the federal government responsible for ensuring the provinces' conformity to its provisions, CUFTA restored to the Canadian constitution a federal power of disallowance that had fallen into disuse. In this way it may have altered -- to a potentially dramatic degree --the country's delicate constitutional balance.<sup>13</sup> This statement remains hypothetical, as it has still not been tested either in political action or in a court case.

Should the federal government in the current WTO negotiations agree to let education and healthcare be brought under the trade miles, it would have taken a step that affected the provincial constitutional order (which has jurisdiction over education and health) more than the federal. This action might also be of dubious constitutional validity since it would lead to a change in the norms governing the provinces without the appropriate amendment having been made in the Canadian constitution.

#### **IV The Governance of Globalization**

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<sup>13</sup>Mark Gold and David Leyton-Brown, eds. *Trade-Offs on Free Trade* (Toronto: Carswell, 1988).

Many of the Canadian protesters who convened in Seattle for the privilege of being tear gassed by the local police were driven to this drastic step because they had some understanding of the issues sketched above. They know that the rules incorporated in NAFTA and the WTO were written by trade officials who held the pen for the major transnational corporations. They knew that, at least in the Canadian case, trade unions, environmentalists, cultural organizations, native peoples, pensioners, poor people's associations and other groupings from civil society, who look to their state for protection and support, were excluded from the negotiation process - in clear and telling contrast to business organizations who were invited to advise the government of their corporate needs. While they may agree that it is better in principle for Canada to operate in a rules-based rather than a power-based international system, they feel that the actual rules put in place by NAFTA and the WTO were written by and in the interests of the most powerful - the US, the EU and their globally competitive corporations.

If the impact of the trade liberalization entrenched in NAFTA and the WTO is systematically to privilege trade over environmental, social, or cultural considerations, these new institutions will understandably suffer from a significant legitimacy problem.

If the price of business's success in having NAFTA and the WTO weighted to serve its own interests is for these innovative moves towards global governance to experience an overwhelming popular backlash, then we will need to consider how to rebalance these organizations so that they serve and are seen to serve the interests of all stakeholders in society.

The "Fix it or nix it" slogan suggests that it is possible to take either of these approaches. This may be less easy than it seems. Nixing could not be achieved simply by the United States denouncing the WTO. The global trade institution would continue to operate, albeit in a crippled condition as did UNESCO following the United States's and the United Kingdom's withdrawal. Nixing the WTO would require a large number of member-states to withdraw from the institution - a prospect that would be historically unusual, given the

proclivity of states to enter and not to exit international organizations, particularly ones that provide concrete benefits.

Fixing the WTO is less problematic in principle, though no more difficult a proposal in practice. In principle, the WTO is in a continuous process of change. First there is the built-in agenda of issues such as agriculture not successfully or definitively dealt with in the Uruguay Round and tabled for future attention. Next there are the interpretations issued by the Council. Third, the rulings of the Dispute Settlement Board are building up a global trade law jurisprudence which deepens the trade regime as it clarifies particular stipulations in the Agreement. Then there are the many items proposed by member-states for negotiation that the Seattle ministerial failed to put on the new agenda: the EUs agricultural subsidies, investment measures, and so on.

The prospects for some change happening are much more promising for some of these issues than for others. But, whatever is achieved along these lines is unlikely to count as the "fixing" that the Seattle protesters had in mind. One kind of change demanded by labour leaders is the incorporation of labour market standards in the trade rules so that member states could discriminate against products produced by child or prison labour. Ecologists want stipulations that would give environmental criteria equal - or superior weight alongside trade rules. Given the determined opposition of most third world governments to what they see as the attempt by a rich states' club to foist its own values on them and at their economic expense, the chances of these changes being made are low.

There is a third alternative between Fix and Nix which we might call Sticks. If the present architecture of the WTO *sticks* because there is no consensus for change in the direction of either further neo-liberal broadening of the trade rules' scope or in that of the "green-red" coalition's program, it will still evolve. There is a possibility that this evolution could be in the direction desired by the Seattle protesters if the panellists and the Appellate Body in the Dispute Settlement Body decide to give more weight to the environmental and labour norms that are already entrenched in the FLO's conventions and existing international

environmental agreements. As any student of the U.S. Supreme Court during the New Deal knows perfectly well, the same judges interpreting the same constitutional text can give radically different judgments from one year to the next if their political mindscapes shift. It is quite conceivable that the epistemic community of international trade experts could decide that the way to save their system from imploding from a legitimacy deficit is for its decisions to be made more friendly to civil society's concerns for environmental sustainability, social justice, and cultural diversity.