

**Law Commission of Canada  
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**GOVERNING BEYOND BORDERS:  
LAW FOR CANADIANS IN AN ERA OF GLOBALIZATION**

**Background Paper**

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**LAW COMMISSION OF CANADA  
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## INTRODUCTION

Consider the following scenarios:

- An American company restructures its Canadian operations, relocating an assembly plant to Mexico and many management functions to its US headquarters;
- A Canadian mining company is implicated in environmental and human rights abuses in an African country;
- Cheap international travel and instant global communications allow growing numbers of Canadians to forge multiple identities and social bonds that challenge homogeneous notions of national citizenship;
- Respiratory disease in China spreads rapidly via airline passengers, straining public health systems and disrupting Toronto's lucrative tourism economy for months;
- Victims of torture find their way to Canada and eventually launch lawsuits in Canadian courts against the foreign government officials who allegedly tortured them;
- Canadian labour and human rights groups collaborate with civil society organizations around the world to eliminate sweatshops and promote fair trade;
- Canadian corporations entrust resolution of their disputes to international arbitrators whose decisions are giving rise to an autonomous, stateless *lex mercatoria*;
- The amorphous threat of global terrorism prompts the Canadian government to restrict certain civil liberties and tighten controls on immigration and refugees.

All of these seemingly disparate developments are manifestations of, or reactions to, a vast and bewildering array of phenomena that has come to be referred to by the generic term globalization.

Globalization is one of the most fascinating yet confusing concepts being debated in Canada and around the world. Two decades after the term joined the public's vocabulary, its meaning remains as fundamentally contested as are the many proposals that have been advanced for how to steer, resist or redefine – in short, how to manage – the forces that engender it and the effects that it has.

Efforts to manage globalization are as diverse and contested as globalization itself and often constitute forms of globalization in their own right. Novel forms of governance are proliferating outside the conventional bounds of government and law in many areas (for example, international commercial arbitration), even while this state power is being reasserted in others (for example, the "War on Terrorism"). Complex systems of multi-actor, multi-level governance are emerging in which states and official law, while still occupying prominent roles, are being dislodged from exclusive pre-eminence.

This Background Paper examines the challenge of managing globalization in a Canadian context. Its main purpose is to provide a background sketch of historical patterns, contemporary developments and normative principles to inform a broader conversation, initiated by the Law Commission of Canada, about the role of law and legal systems in addressing the impact of global forces on Canada and the conduct of Canadians as actors on the global stage.

### **Governing Beyond Borders**

Globalization brings into question a whole range of familiar political, social, cultural, and economic boundaries: not just the borders one sees on maps, but also conceptual and institutional borders like those associated with the state, law, public policy, sovereignty, and personal identity. In some cases, globalization may erase these borders, in others it may shift or redefine them; and in yet others it may bring them into sharper relief.

The nation-state is a prime example. Throughout most of the 20<sup>th</sup> century, the state was recognized as the primary, even exclusive, institution for governing national societies. Its territorial borders were seen as coextensive with those of society, so that state and society formed an organic unity. The state was understood as having an exclusive monopoly over law- and policy-making and the legitimate use of force, a proposition captured in the notion of sovereignty. It was also seen by many as possessing a unique capacity and responsibility to promote collective prosperity, health and welfare by intervening directly in markets and society, a vision embodied in the Keynesian welfare state. Numerous developments have

combined to loosen the state's apparent monopoly in governing and break down the geopolitical and conceptual borders on which it depended. In an era of instantaneous worldwide communication, porous and shifting societies, apparently seamless global production networks, and liberalized international trade, many Canadians feel they are living in a borderless world.

In some cases national borders appear to be disappearing, as states devolve some of their functions to multilateral structures such as the UN or the World Trade Organization (WTO). Other governmental functions are being assumed by an array of informal, flexible, private global institutions including markets, transnational corporations (TNCs), and civil society organizations (CSOs). Whether they feel victimized by global economic forces they cannot control, enjoy the cosmopolitan pleasures of international tourism, pursue professional occupations that span national borders or identify with tsunami victims half a world away, many Canadians experience borders as decreasingly relevant and governance as an increasingly transnational phenomenon.

In other respects, however, it appears that borders are simply shifting, from the national level to the regional, provincial or local. Effective economic and political boundaries, for certain actors at least, are shifting upward to the continental level with such arrangements as the North American Free Trade Agreement (NAFTA). Some governmental functions are shifting downwards to local communities or sideways to the market or civil society. Citizen groups mobilize to clean up local parks. Cities raise standards for pesticide use and water pollution. Changing combinations of NGOs, business, and provincial/state governments interact with their national capitals to work out transborder arrangements, for instance, to clean up the Great Lakes. Politics, whether formal or informal, becomes confusingly messy as no one seems in ultimate control.

Finally, in some cases globalization seems to reinforce familiar borders or throw up new ones, as federal and provincial governments battle over jurisdictional boundaries or Ottawa tightens border barriers in reaction to perceived threats such as terrorism or disease. New psychic borders are being erected, for instance when minority groups seek to protect their customs, values or identity, when the Earth's billion or so slum dwellers are effectively expelled from the global economy or when the millions who have no access to telephones or the Internet are excluded from the new virtual communities made possible by the information technology revolution.

Such reconfigurations of the borders within which we live and govern are not entirely new. Throughout Canada's history, political and other borders have continually been erected, dismantled, and reconstructed, shifting along a continuum from porous to solid. From the beginning, the identity between state and society has been somewhat strained in Canada, with Quebec's "distinct society," aboriginal nations, and countless ethnic minorities existing alongside a dominant Anglophone society. Scholars debate whether the current wave of globalization is different from what has existed in the past, but it is increasingly clear that contemporary developments put into question in a fundamental way our received understandings of how we govern and are governed.

Drawing a sharp line between domestic and international law neither reflects contemporary realities nor addresses the needs of both Canadian and global society. A coherent response to globalization must look beyond the conventional borders of the state to reflect the realities of how globalization is experienced.

## **Overview of the Paper**

Due to the broad scope of this paper, we do not explore specific fields of law or policy in any detail or make specific "law reform" recommendations for such specific issue areas as immigration, national security, trade liberalization, international commercial arbitration, recognition of foreign judgments, or international criminal law. Volumes have already been written on each of these issues, including a number of excellent papers written for the Law Commission, and we refer the reader to those sources for analyses and recommendations specific to particular fields. Rather, we tackle the issue of "governing beyond borders" at a broader level, sketching the broad contours of historical and contemporary developments relevant to Canada's legal and political engagement with globalization and suggesting some general issues and considerations to inform a more concrete law reform exercise.

Having explained our use of the term, Part I of the paper argues that, for Canada, globalization has been inseparable from its experience of empire, first in the form of French, then British rule and more recently in the form of American military and economic hegemony.

In Part II our analysis of the legal implications of globalization focuses on rethinking four key terms of our political order: government, law, sovereignty, and legitimacy. Our normative evaluation of globalization and its attendant transformations in law and governance takes as its starting point the question of legitimacy, understood not just procedurally but in terms of whether particular forms of law and governance hinder or advance projects for social emancipation. Central to our analysis is the assumption that Canada and Canadians are not just passive objects but also active agents of globalized governance.

Rather than attempt to apply all of these considerations comprehensively to the entire range of governance beyond borders, an exercise which would require volumes, we single out three general arenas of governance. In Part III we examine the intergovernmental arena and argue that, in the economic realm at least, a global “supraconstitution” has emerged that constrains the ability of Canadian governments to govern their economy and society according to domestically determined priorities. In Part IV we examine various dimensions of the “globalization” of the Canadian state including its relation to governance “beyond the state”. Finally, in Part V we outlined the prospects for governance by civil society. These three broad illustrations – the international “supraconstitution”, the “globalized state” and civil society – represent different positions on a continuum from elite-driven “globalization-from-above” to grassroots “globalization-from-below”. Each arena presents its own mix of legitimacy issues and emancipatory possibilities. We find that the global supraconstitution – the primary form of globalized governance from above – has the greatest legitimacy deficit and the least emancipatory potential. The contemporary transformations of the state are ambivalent on these fronts, while the burgeoning forms of civil society governance present the most hopeful developments, though they also tend to be the most marginalized from established legal and political power structures.

## I. Globalization: Old and New

At the most general level, the notion of globalization refers to the increasing breadth, intensity and speed of worldwide interconnectedness in all aspects of social life and their consequences for human conduct. In the contracted space and time of the “global village,” decisions or actions in one place have increasingly profound impacts on the health, prosperity, and prospects of individuals, communities, or ecosystems half way around the world.

Six further characteristics demonstrate the complexity of the phenomenon. First, globalization is **pervasive**, affecting government, the private sector, civil society, and individuals. It comprises a vast array of phenomena affecting all domains of human affairs, including:

- *Psychic globalization*: a growing collective consciousness of humanity, the planet earth and its ecosystems as a single community with a shared fate;
- *Political globalization*: the rise of transnational political regimes in which corporations, civil society organizations, and governments establish new norms for global trade, environment, and human rights;
- *Economic globalization*: the global spread of free trade rules and ideology, a spectacular increase in transnational investment, and a dramatic expansion of world trade in goods and services;
- *Societal globalization*: massive movements of peoples, transnational networks of activists and a huge proliferation of personal interaction in cyberspace;

...globalization is in danger of becoming, if it has not already become, the cliché of our times: the big idea which encompasses everything from global financial markets to the Internet but which delivers little substantive insight into the contemporary human condition.

Clichés, nevertheless, often capture elements of the lived experience of an epoch. In this respect, globalization reflects a widespread perception that the world is rapidly being moulded into a shared social space by economic and technological forces and that developments in one region of the world can have profound consequences for the life chances of individuals or communities on the other side of the globe. (Held *et al.*, 1999: 1).

- *Technological globalization*: the instantaneous, worldwide connectivity now provided by information technology, particularly in the industrialized world;
- *Legal globalization*: harmonization of national laws, proliferation of international laws, the increasing use of model contracts and international arbitration by commercial actors, the spread of foreign and international law in domestic courts, and the worldwide transmission of American legal norms by US-based law firms as they serve the needs of large multinational corporations;
- *Globalization of health and disease*: societies' increasing vulnerability to epidemics like HIV/AIDS, SARS or influenza whose devastation respects no borders;
- *Cultural globalization*: the increasing domination of American (and to a lesser extent European) entertainment industries and cultural products;
- *Ecological globalization*: the emergence and rapid intensification of environmental change, from ozone depletion to climate change to biodiversity loss;
- *Criminal globalization*: the growth of networks of sex trade, drug trafficking, and terrorism, as well as the rise of white-collar corporate crime employing sophisticated tools and having transnational effects; and
- *Military globalization*: the rise of "humanitarian intervention," the War on Terror, the Iraq invasion, a burgeoning global arms trade, and the presence of Canadian troops in Kabul remind us that no defence issue is local any more.

Second, globalization is **heterogeneous**, taking many different forms, involving a multiplicity of actors pursuing disparate goals and having a wide range of effects, both adverse and beneficial, creative and destructive, intended and unexpected. It involves tendencies both toward *integration* (e.g. regional trade blocs; globally integrated production and distribution networks; transnational social movements; universal human rights norms) and *fragmentation* (e.g. separatist movements; weakening of established social bonds; disintegration of established states; increasing gulfs between rich and poor or between advanced and marginalized sectors). It involves both universalization (global transmission of particular local ideas and practices), and localization (the variable, localized impacts of such globalized ideas and practices). The benefits and damage caused by globalization are not evenly distributed. Some people and places bear the brunt of its negative impacts while others enjoy many of its gains.

Third, globalization is **dynamic**. It is characterized by rapid, intense, and seemingly constant change in almost all domains of human affairs. Seemingly beyond the control of any single actor or class of actors, it appears to have a life of its own, reinforcing certain relations of power and privileging certain models of social, political and economic organization while destabilizing or marginalizing others. As a result, any approach to managing globalization must be adaptive to change and ready to challenge new or continuing patterns of injustice.

Fourth, phenomena do not have to be global in scale to be considered part of globalization. We consider globalization to include the intensification of transnational interactions at **any geographic scale**, whether relatively localized (the adoption of Sharia law in Ontario's Moslem communities) or encompassing the entire globe (ozone layer depletion).

Fifth, we understand globalization to include **internationalization**, that is the spread of intergovernmental agreements, organizations, and regimes. One of the biggest developments of the post-World-War-II period has been the proliferation of international law and organizations. This has occurred multilaterally, regionally and bilaterally. While some argue that internationalization should not be considered a part of globalization, because it reinforces rather than challenges the state-based character of the existing world system, we believe its impact is likely to be more ambiguous, in some ways reinforcing the dominant position of states, in other ways undermining it. Besides, we want to appraise the complete picture that Canada faces in the world. Moreover, defining globalization in terms of phenomena that undermine the existing state-based system predetermines a question we prefer to leave open by focusing on aspects of internationalization that have emerged or acquired new significance in the last couple of decades.

Finally, globalization's meaning, effects, and desirability are fundamentally **contested** in Canadian society as elsewhere. Any approach to managing it must be sensitive to its deeply contestable character.

In sum, globalization refers to a pervasive, heterogeneous, dynamic, interactive, multi-centred, and contested intensification of interconnectedness in all aspects of human affairs, at all geographic scales. It is a social phenomenon in which Canadians are both agents and objects.

### Lessons from History

In trying to understand what, if anything, is new in contemporary globalization, Canadians can draw two linked lessons from their history. First, since Champlain sailed up the Gulf of the St. Lawrence, Canada's destiny has been largely determined by external forces, from the original cod fishery and fur trade to recent massive waves of immigration. Second, Canada's experience of globalization has always been mediated by its relationship with a single dominant power, first as an outpost of the French, later British empires, and, more recently, as an extension of American hegemony.

Since the arrival of the first Europeans, both Canada's indigenous and settler populations have been influenced by distant forces and actions. It was Europeans' search for increased supplies of less perishable protein that pushed their fishermen to discovering the Grand Banks. The subsequent demand for furs in France and England, along with the two great powers' search for a route to the Orient motivated their establishing colonies in New France and the Maritimes.

The need and the efforts to deal with the problems posed by its insertion into the global economy are nothing new for the Canadian state. Indeed, there is a sense in which the political history of Canada consists of little else. (McBride, 2001: 35).

From prehistoric migrations across the Bering land bridge to the influx of European settlers to contemporary diasporas from around the globe, Canadian history is a story of ceaseless human movement. Modern Canada is a nation of immigrants, many of whom preserved strong ties to their home cultures, languages and communities even as they cobbled together a Canadian identity. Intolerance, prejudice and discrimination in many forms were, as we know, central to this history. They were directed toward people of aboriginal, Métis, Irish, French, Chinese, Japanese, Southern European, Eastern European, Jewish and other heritages. They were embodied in racist immigration policies that could be described at best as a "calculated kindness" (Folson, 2004). They were also directed at women and religious minorities. Outside the largest cities which received the bulk of our immigrants, the population remains predominantly French in Québec and Anglo-Saxon in the rest of Canada. Notwithstanding these facts, Canadian society is remarkably diverse and has built a global reputation for multiculturalism, tolerance, and respect for civil rights. Canadian society, especially its urban population, is a microcosm of global cultural diversity, a global diaspora. The history of Canadian demography is, then, a history of globalization as we would understand the term today.

Similar stories could be told in the realms of economy, technology, and politics. The Canadian economy has long been export oriented, responding to the amount for natural resources and raw materials in European, American, and increasingly Asian markets, dependent on imports of many manufactured and finished goods, and highly sensitive to fluctuations in international commodity prices and changes in the economic fortunes of its major trading partners.

In terms of scientific developments, Canadian economic and social history was determined by the same technological transformations that wrote the story of globalization: from sail to steam, from telephone to television, from the car to the computer, from electricity to e-mail.

Canadian politics have always been heavily influenced by, and oriented toward, external powers and events, from Paris to Whitehall to Washington. Ever since Canada emerged from the blood-soaked battlefields of the two world wars as a separate actor in international affairs, its foreign policy has been cosmopolitan and internationalist. In the post-World War II period it built for itself a reputation as an honest broker in great power politics, exercising an influence seemingly beyond its material size and capabilities. It was a staunch supporter of multilateralism and international law and played a key role in the negotiation of universal human rights instruments. It was a vocal proponent of decolonization and "Third World" development. It has been an avid participant in multilateral fora, joining every international

club for which it was eligible, from the Commonwealth to the Francophonie. One reason for Canada's avid multilateralism is that solidarity with other middle-sized powers helps Canada to offset its relative weakness in relation to its overwhelmingly stronger neighbour, the United States, by generating political space in which Canada can manoeuvre outside Washington's direct influence.

Canadians have at times felt themselves the hapless pawns of imperial conflicts going on elsewhere. By the end of the 18<sup>th</sup> century, the struggle among the European empires for global dominance left the territory to the north of the new United States in the hands of the British whose need for timber and wheat caused their staple-producing colonies to burgeon. Some residents of these colonies did not fare so well in these imperial geopolitics. First Nations were steadily marginalized, despite the 1763 Royal Proclamation pledging to protect their lands and interests. The Acadiens were brutally deported to Louisiana, while the Canadiens of New France became second-class citizens within British North America.

Dependence is never entirely a one-way street. The wealth, health, and security of the imperial powers required Canada as supplier of furs, fish, and timber. While this interdependence may always have been *mutual*, it has also been *asymmetrical*, with the weak colonial periphery depending more on the powerful imperial centre than the centre depended on the periphery. Furthermore, the colonial periphery was inherently *vulnerable* to interruptions in the supply of technology and capital from the metropolis and to fluctuations in its demand for the colonies' staples. From its first European settlers' days, Canada has related to its global context as a receiver, relying on investment and know-how coming from a more powerful and advanced economy and then depending on that economy's market for selling the resulting raw materials or manufactures.

This vulnerability generated a desire for autonomy from Britain in the 19<sup>th</sup> century, but fear of being swallowed up by the US tempered this desire. Canada's independence from British control evolved gradually over almost one hundred years from the 1860s until the mid-twentieth century. After World War I its locus of economic dependence shifted steadily from the declining British empire to the rising colossus to its south as American investors elbowed aside their English rivals to become the Dominion's main source of capital. In this process, the US also displaced the UK as Canada's major foreign market and its principal supplier of technology.

Former US Secretary of State Henry Kissinger famously quipped that globalization is just a euphemism for Americanization (Kissinger, 1999, p. 3). The prime indicators of globalization – development of communication technologies, the spread of TNCs, the emergence of a global capital market, the negotiation of new economic rules for global capitalism – were indeed the product of the United States' political economy. For Canada perhaps more than any other country, globalization *is* experienced as Americanization. Since Canada felt the social, cultural, and economic effects of post-World-War-II US power more fully than any other country, discussion of Canadian experiences of globalization must start with its experience under American hegemony.

No one could have foreseen in 1776 or 1783 that the new, independent English-speaking United States would grow so rapidly as to overshadow quickly the imperial remnant to the north and create by these geopolitical facts the permanent crisis in Canadian life; namely, its development beside an immense neighbour who would outstrip Canada in everything, perhaps, but the determination to achieve an integrity of its own. It is no surprise, therefore, that the long-term Canadian international experience *par excellence*, and the concomitant political-legal preoccupation, should have been the form and substance for managing Canadian relations with the United States; and this remains true to the present day. (Cohen, 1974: 4).

During the standoff between the socialist and capitalist blocs from the late 1940s to the late 1980s, Washington established its dominance over the non-socialist world through a system of strong institutions with norms and rules which provided the leadership on the basis of a supportive consensus of its weaker partners. It was during this Cold War period that the US attained its predominance as the most dynamic economy, ideological leader, and military superpower. Its decisive role in setting up, financing, and staffing the institutions that redefined the capitalist order after World War II and its partners' acceptance of this international order made it the unquestioned hegemon.

Well before the word "globalization" was invented, Canada's autonomy was already limited by the fact that a substantial part of its economy, including whole sectors such as petroleum, chemical, automobile and electrical machinery, were owned by American TNCs and so controlled from south of the border, where the best management jobs and most important research and development facilities were located. With almost half the country's Gross National Product flowing to the US through intra-firm transfers, Canadian governments' capacity to make their own decisions has been chronically limited.

This branch-plant economy's pervasive dependence on the US did not prevent considerable autonomous political evolution. Notably, in the first decades following World War II, Canada, along with its fellow nation states in the industrialized world, developed a sophisticated management capacity and social infrastructure. What we now call the Keynesian welfare state had three main tasks. It managed the economy's overall health by adjusting interest rates and setting taxation levels. Next, it implemented micro-economic policies for specific economic sectors aimed to increase exports, reduce imports, and expand domestic production for the home market. This import-substitution strategy was complemented by programs designed to provide a basic social wage (through pensions, unemployment insurance and workers' compensation) along with healthcare and education for all citizens. Through these measures, the Canadian state achieved considerable legitimacy as the manager of a marketplace and society which were largely coterminous with its political boundaries.

In response to a nationalist surge critical of the country's deepening integration in and dependence on a bellicose America fighting an imperial war in Vietnam, the Trudeau government sought to reduce Canada's dependence on the US economy and vulnerability to US policy, by forging a more independent foreign and a more nationally-focused domestic economy. Trudeau established PetroCanada, tried to limit foreign (read: American) investment in crucial sectors, launched the controversial National Energy Policy and pursued a foreign policy that was at times openly critical of US international stances. To little avail. The Canada we knew then was very much a product of globally experienced pressures. To think that this Canada was an autonomous state pursuing its own priorities domestically and internationally would be naïve. Canada's tenuous, ambiguous, and complicated sovereignty is intricately tied to its asymmetrical and vulnerable dependence on the hegemon next door.

### **What's New?**

What makes Canada's contemporary experience of globalization different from its historical antecedents is not the nature of North American integration but deeper economic and technological transformations in global capitalism (Cox, 1996; McBride, 2001: 16). What changed was the terms of the post-World War II bargain between industrialized states and capital that had enabled the emergence of Keynesian welfare states.

The equation of states' political boundaries with their economic space started to break down in the 1970s for a number of reasons both internal and external. Domestically, the success of the Keynesian welfare state generated a crisis as an ever-enriched social wage and escalating labour demands for higher pay put inflationary pressures on governments, which were unwilling to tax their citizens enough to finance their generous programs. Internationally, the world economy was shaken by the OPEC oil shocks and the collapse of the Bretton Woods system of international currency controls. Computer technology and the intermediation of financial markets made capital markets increasingly volatile and integrated across borders, helping to free TNCs from government control and weaken national governments' control over their economies.

By the late 1970s these problems proved more than the old formula of Keynesian welfarism could resolve. With inflation and unemployment at record levels, economists and business advocates made the case for a radical policy shift that would restrain the state in order to liberate and reinvigorate the market. With the election of Margaret Thatcher in 1979 and Ronald Reagan in 1980, neoconservatism took hold as the dominant policy paradigm in the capitalist West. As Canada, along with other states, lost more control over its markets and found it was competing with other countries to lure foreign investors, it came under pressure to cut back the social wage and restrict such regulations as those aiming for environmental sustainability.

Finding it more difficult to resolve problems on their own, governments started cooperating more extensively with their neighbours. With the European Community in the lead, regional groupings of states emerged as common markets or free trade areas, permitting their corporations to cut their costs (from lowered tariffs) and achieve greater competitive efficiency (from economies of scale). The trade-off was straightforward: less protection for domestic firms from foreign competition in return for increased access for them to other markets.

By the late 1970s, the Canadian business community had abandoned its historic pursuit of an import-substitution industrialization that kept the home market to itself. With tariff protection falling as a result of the continual negotiating rounds at the General Agreement on Tariffs and Trade (GATT), Canada was losing its share of what was in any case a relatively small market. Unable to survive by producing for the domestic market, Canadian entrepreneurs decided their best hope lay in selling to and investing in the huge market next door. At the same time, American business was lobbying for Washington to break down other countries' economic development programs which fostered domestic corporations. Claiming they faced unfair discrimination abroad, American TNCs promoted an ambitious agenda centred on the ability to operate freely in all economies. Giant firms in the entertainment, biotechnology, and computer sectors wanted their intellectual property rights protected around the world. Corporations in the energy, courier, and health sectors argued that other countries' public-sector provision of these services should be deregulated and privatized to allow foreign investment.

Incorporating these demands in a sophisticated, dual strategy, the US government pressed its global counterparts for major changes in the rules governing the GATT. Finding multilateral resistance to this vision from major industrialized players such as the European Community and Japan as well as from rising Third-World powers such as Brazil and India, Washington also pursued a bilateral approach, twisting the arms of its more compliant trade partners to make concessions which could be used as precedents in the ongoing multilateral negotiations. It had its first major success with the 1987 CUFTA. 1993 saw the signing of the North American Free Trade Agreement (NAFTA), which expanded the bilateral deal to Mexico and provided corporate investors with unprecedented rights and powers against the governments of the three member states. 1994 in turn saw the conclusion of the GATT's Uruguay Round, which launched the World Trade Organization effectively universalizing American-inspired norms of international trade liberalization. Regardless of whether it is thought that these free trade arrangements have been beneficial or harmful, all agree they have fundamentally changed the balance between states and transnational capital.

Throughout this period, then, "an international economy made up of discrete and strongly regulated national economies trading with and investing in each other slowly became eclipsed by a world economy 'in which production and finance were being organized in cross-border networks that could very largely escape national and international regulatory powers'" (Ó Tuathail, Herod & Roberts, 1998: 2-3, quoting Cox, 1996: 22).

While these politico-economic changes are of fundamental importance, what is new about globalization is not limited to the economic sphere and associated changes to the administrative state. The collapse of the Soviet bloc, the end of bipolar geopolitics and the emergence of the US as the only superpower have had profound effects, including newfound instability and uncertainty in the former Third World, a massive ideological boost to agendas for the global spread of capitalism and liberal democracy, and transformation of the nature of global military conflict from relatively stable nuclear stalemate to unstable, pervasive, but localized wars. We are witnessing a global "rights revolution" in which new and old states are emerging from the yoke of totalitarianism and embracing greater democracy, human rights, and personal freedoms (Scheiderman, 2003). We have also seen the rise of Islamist extremism, Christian fundamentalism and other nominally religious transnational movements. The emergence of global environmental change in the last thirty years, from ozone depletion to climate change, shows for the first time that human activity can impair ecological functioning at a planetary scale and intensifies the need for cooperative action to counteract environmental degradation. The Internet and other communications technologies make possible an unprecedented density and velocity of personal connections across borders, instantaneous communication of events around the world and new forms of social solidarity and personal identity, at least for those with access to them. The list could go on. Suffice it to say that while the existence of a global

dialectic is old, some of its manifestations and implications are substantially new in the contemporary period.

## II. Governing Beyond Borders: Key Challenges

Globalization forces us to rethink some of the conceptual and practical foundations of our legal and political order. Among other things, it requires us to reflect upon what we mean by “government,” “law,” “sovereignty,” and “legitimacy”. We single out these four pillars of public order because they are central to what we can hope for and expect from legal and political systems. To be sure, all of these issues were present in earlier eras, but the complex and uncertain conditions of contemporary globalization make them particularly intense today.

### Rethinking Government

First, globalization challenges how we think about governing society, specifically the conventional assumption that our formal, elected governments wield the ultimate governing authority in Canadian society. Other “governance” arrangements, from the North American Free Trade Agreement (NAFTA) to multinational corporations, coexist with formal governments in a complex tapestry of power relations and may substantially constrain Canadian governments’ autonomy to direct Canadian society according to their own priorities. For most of the last two centuries, “governing” was viewed as an activity undertaken by “the government,” i.e. the formal apparatus of the state: legislatures, executive agencies, bureaucracies, courts, and the coercive agencies of police and armed forces. Many observers believe that this way of looking at government is now obsolete. They find, the conventional institutions of the nation state ill equipped to deal with problems that transcend borders or those for which other actors like businesses are better equipped to address. After all, a whole range of institutions play important roles in governing contemporary societies, from private corporations to international organizations, from local social movements to transnational networks of scientists.

More and more people employ the term “governance” to describe this more complex type of decision making. Formerly restricted to a few specialized areas (for example, corporate affairs), the term “governance” has recently spread to almost all domains of human endeavour. We now talk about governance of health care, education, prisons, or pension funds; “good governance” of developing countries; and “global governance” of world affairs through the UN, the WTO, or other international regimes. It is almost impossible now to talk about how to conduct human affairs without talking about “governance”. That said, there is little agreement on what governance means. For many, it presents a normative agenda for reform. In this paper, we use governance as a descriptive category.

We understand governance broadly as any and all calculated efforts to steer or direct human conduct. In this definition, governance includes “government,” understood as the institutional apparatus of the nation state. Governments remain at the centre of efforts to respond to globalization and must be included in any examination of what it means to manage globalization. Beyond their constitutionally prescribed confines, it is also important to recognize the wide range of “non-governmental” actors and institutions involved in globalization, from multinational corporations to non-profit aid organizations.

Despite the proliferation of forms of governance beyond the state, many decision makers and stakeholders continue to think about governance in terms of “the government”, defined in terms of the nation-state, territorial sovereignty and formal law, and to draw a sharp line between domestic and international spheres. Rejecting this approach as outmoded, we adopt a broad definition of governance in order to examine state and non-state governance arrangements alongside each other, taking on board the myriad ways peoples’ lives are actually governed.

All governance arrangements are not created equal. Some have more “muscle” than others. In the past the term “government” was often understood to designate those arrangements that had ultimate governance authority in any given territory. Governments had a monopoly over lawmaking and the legitimate use of force within a defined territory. Their actions and pronouncements were assumed to have a binding authority and efficacy that other actors and institutions could not claim. If this picture was ever fully true, however, globalization has cast grave doubt on it. Today certain non-governmental actors and

institutions may, and in some cases clearly do, have more effective and binding authority than some governments. Giant multinational corporations, international organizations (e.g. the IMF), credit rating agencies, and the rules of the world trading system have such muscle. It would even be consistent to apply the term “government” to these institutions and to acknowledge that they stand alongside (or even superior to) some national governments in terms of power and authority. Regardless of terminology, it is important when exploring the myriad forms of governance in a globalized world to consider the relative muscularity of different governing authorities and institutions and to subject muscular non-state governance arrangements to the same expectations of legitimacy as we apply to governments.

This brings us to a final question about the relationship between globalization and governance: can globalization be governed at all? In practice, globalization is governed in a piecemeal and incoherent manner by a range of forces including the needs and demands of global capital, the geopolitical priorities of the major states, the set of quasi-constitutional rules and institutions underpinning the world economic system, and, to a much lesser extent, the emerging structures of a transnational civil society. Some critics refer to this disconcertingly heterogeneous organizational hodgepodge as global “dysgovernance” (e.g. Latham 1999). Our question for Canadians is whether globalization can be governed in ways that respect and enhance equity, justice, human development, ecological sustainability and democratic legitimacy. After much heated debate everywhere in the world, the answer is not yet clear (eg. Falk, 1999; Bhagwati, 2004). But it is certainly worthwhile, indeed imperative, to map out our own position.

## Rethinking Law

Globalization also invites us to challenge the conventional conception of law as a formal product of the state and consider a range of unofficial, “private,” and transnational forms of normative ordering as part of a larger legal system. The Law Commission’s purpose is to study Canadian law and its effects with a view to providing independent advice to Parliament on reforms that will foster a more just legal system that meets the changing needs of Canadian society as a whole and of the individuals within it.<sup>1</sup> This is not a question simply of keeping the law up to date; it is necessary at times to rethink its meaning and role. With its mandate to develop “new approaches to, and new concepts of law,”<sup>2</sup> The Commission is also committed to focusing on the “living law” (the actual patterns of regularized conduct in society) rather than law “on the books” and has opened the door to a conception of its subject that is not restricted to official statutes but is defined in terms of all the ways people actually experience authority and rule in their own lives. Of course, official legal systems feature prominently in these experiences for most people, but a range of other normative systems work alongside or in place of official law. Contemporary examples might include corporate codes of ethics, “fair trade” labelling schemes, workers’ rights certification programs, the *lex mercatoria* and Shari’ah (where Shari’ah is not the official state law).

Why should we use the term “law” to describe these unofficial rule systems? The simple reason is that, if we are concerned about the legitimacy of governance in a globalized environment (as we argue below we should be), the term “law” carries with it certain expectations of transparency, democratic accountability, fairness, and justice that facilitate an inquiry into legitimacy. These aspirations may not always be realized in practice, but thinking about private, unofficial governance systems in terms of “law” prompts us to apply the same aspirations and expectations to them as we do to “official” law.

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<sup>1</sup> *Law Commission of Canada Act*, S.C. 1996, c. 9, s. 3.(a).

<sup>2</sup> *Ibid.*

...[L]aw is one of our strongest and most compelling metaphors. ... [It] carries connotations of accountability, responsibility, and right. Use of the term law invites an inquiry into the question of justice.... The modern concept of state law may be said by many measures to have failed to live up to expectations, but it has left us with at least one vital legacy, that of its aspirations. Disillusionment with the emancipatory capacities of the state may be widespread, however the aspirations of effective and democratic governance have if anything increased their resonance around the globe. The task of re-imagining what law should mean in a globalizing world should be guided by these aspirations.... (Szablowski, 2004: 14, 20).

Without descending into definitional debates, suffice it to point out that sharp distinctions between state law and other forms of ordering are increasingly problematic. We should strive for consistency when investigating and evaluating all approaches to governing globalization, whether public or private, state or non-state, "legal" or "non-legal".

This broader conception of law also prompts us to be modest about the role of official law-making institutions in legal and social change. While central to conventional conceptions of law, legislatures and courts play only small roles in the day-to-day operation of law as it is lived in this pluralist conception. In this broader view, "law" is made and applied in myriad arenas from union halls to corporate boardrooms, religious councils, community organizations, and internet chat rooms. To appreciate how all these varieties of law work in lived

experience requires us to "turn away from the canonical texts and the privileged sites of legal reason, and turn towards the minor, the mundane, the grey, meticulous and detailed work of regulatory apparatuses, of the control of streets, of the government of transport, of the law of health and hygiene, of the operation of quasi-legal mechanisms for the regulation of relations between men and women, parents and children ... of all the places where ... laws, rules and standards shape our ways of going on, and all the little judges of conduct exercise their petty powers of adjudication and enforcement" (Rose & Valverde 1998: 546).

Similarly, we should recognize that official law reform bodies such as the LCC, and their official law reform projects, play only minor and tangential roles in legal change. In a pluralist understanding of law, law reform occurs in the imperceptible evolution of normative structures through day to day social interaction, in innovative business arrangements invented by imaginative business people and their professional advisers, in grassroots political action and other social institutions and practices. If official law reform is to have any substantial influence on legal and social change it must be acutely sensitive to these social practices.

Another central concept that arises throughout discussions of global governance is sovereignty which, along with the complicated set of social practices that constitute it, lies at the heart of conventional understandings of law and demands acute attention in an era of globalization.

### **Rethinking Sovereignty**

New forms of governance challenge the traditional conception of sovereignty upon which the nation state, its legal order, and the system of international law are based. They throw the continuing meaning and relevance of sovereignty into question, seemingly weakening many states' sovereign authority, casting doubt over the adequacy of a purely territorial model of sovereignty, increasing the kind and numbers of entities claiming some form of sovereignty, and inviting us to reconsider what sovereignty might entail in the contemporary world.

For most of the last century or so, sovereignty was seen exclusively as a property of the nation-state. Toward the end of the twentieth century, however, this definition of sovereignty as a nation-state's territorially bounded and mutually exclusive authority over a specific geographic space came under increasing pressure from many sources at once, including market globalization, transnational interdependence, neoconservative political and economic ideology, global ecological changes, the retreat of the welfare state, and the collapse of eastern European communism. The result of these pressures is that sovereignty is no longer what we once thought it was.

Sovereignty has been at the foundation of the modern world order since the peace of Westphalia in 1648. Traditionally, sovereignty denoted complete, exclusive and independent authority over a defined territory and its permanent human population, along with security from intervention in its internal affairs by other

sovereigns. So understood, sovereignty implies the absence of any higher authority capable of binding a sovereign against its will. Hence all international obligations, whether arising by customary law or treaty, are dependent, in theory, upon the consent of the affected sovereign, freely given on the basis of formal equality. While its meaning and role have always been ambiguous, the level of debate has increased dramatically in the last couple of decades.

For some observers sovereignty is dead, overwhelmed – for better or worse – by the advance of global capitalism, global environmental crises, universal human rights, armed humanitarian intervention or international treaties. For others sovereignty still exists but has been fundamentally transformed so that far from denoting freedom to act as it chooses, it denotes the capacity of a state to participate in the dense web of international regulatory regimes that make up international life and increasingly constrain unilateral action. This brings into focus the old question of whether international agreements detract from state sovereignty. On the one hand, we can view signing international treaties or joining international organizations as limiting Canadian sovereignty because they effectively restrict the authority of national, provincial or local governments to regulate business firms or other actors as they see fit.

Such restrictions are found, to varying degrees, in many policy fields from foreign investment (e.g. NAFTA) to biodiversity protection. Something like one third of the laws adopted by Parliament derive from domestic implementation of international agreements. For these reasons many observers view international treaties and organizations as limitations on Canadian sovereignty.

Traditionally, sovereignty has signified the complete autonomy of the state to act as it chooses, without legal limitation by any superior entity. ... If sovereignty in such terms ever existed outside books on international law and international relations, however, it no longer has any real world meaning. ... [F]or all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life. Chayes & Chayes, 1995: 26-27).

The contrary view maintains that, by negotiating international agreements and joining international organizations, Canada affirms its sovereignty and extends its capacity to act beyond its borders. In this view, treaty making is how Canada exercises its sovereign will on the international level. The Canadian government only enters those arrangements it deems in the national interest and treaties always contain provisions which allow it to exercise its sovereign prerogative to register exceptions to or withdraw from those arrangements that do not meet its needs. Granted, many international treaties restrict Canada's freedom of action but, like a contract between private individuals, such restrictions are (in theory) assumed freely and voluntarily. This is so even when Canada "binds itself to the mast" of an intrusive international regime. In this view, if international arrangements restrict Canadian governments' regulatory authority more than initially anticipated, this is more a failure of informed consent than an invasion of Canadian sovereignty.

Still others believe that contemporary developments challenge our conceptions of sovereignty on an even more fundamental level, requiring recognition that sovereignty lies with people (or peoples), not states. Among other things, this is manifested in the emerging recognition of a right to democratic governance and the assertion of sovereignty claims by national minorities around the globe, sometimes through bloody conflict. Many of these claims are either asserted over territories that are not coterminous with existing sovereign states or are based on factors other than territory. The result is that we may be living more and more in a world of multiple, overlapping, and even deterritorialized sovereignties.

None of this means that sovereignty has become irrelevant. On the contrary, with national governments continuing to assert their sovereignty aggressively in international arenas, many Canadian citizens continue to see certain international agreements as attacks on national sovereignty, international organizations continue to reassure anyone who will listen that they respect state sovereignty, and such national minorities as the Quebecois continue to demand recognition of their own sovereignty. Many First Nations peoples consider Canadian governments to be colonizers and insist that "sovereignty" means their right to make their own decisions and to participate in the international domain on their own.

For many others, state sovereignty is as important now as it has ever been. This is true not only in developing countries where sovereignty is widely seen as an indispensable (albeit in practice often unattainable) defence against “Northern” impositions, but also in powerful countries such as the US where sovereignty is routinely invoked to justify everything from high import duties to rejection of the new International Criminal Court’s jurisdiction.

Sovereignty is one thing; the ability of a national government actually to “do what it wants” is another. The practical ability of a national government to decide and do what it wants in its own territory might be referred to as *autonomy*. A national government’s autonomy may be limited by the influence of powerful external actors such as states, international organizations or multinational firms. It may also be limited internally by powerful domestic actors or by constitutional constraints such as federalism and bills of rights. Major states, such as the US, have more success in exercising their will on the world stage and are scarcely inhibited by the threat of retribution for violating their international obligations. Smaller or less powerful states, such as many developing countries, often find they have little or no autonomy in either domestic or foreign affairs, although they may enhance their autonomy by making common cause with like-minded states. Canada, as a semi-peripheral yet highly advanced industrialized country, finds its autonomy constrained mainly by its relationship to its huge southern neighbour and often seeks to nurture its autonomy by promoting multilateralism and joining international organizations in which it has more freedom of manoeuvre than it often enjoys when dealing one-to-one with the American government.

### **Rethinking Legitimacy**

Finally, globalization complicates and intensifies the age-old problem of legitimacy, ie., the problem of ensuring that decisions affecting people are made by appropriate authorities, in appropriate ways. Systems for legitimation have not kept pace with perceived changes in the operation or location of political authority (Bernstein, 2004). Globalization prompts us to rethink the legitimacy of both “new” and “old” forms of governance. It does so in at least two ways.

#### *Legitimacy and the State*

First, it prompts us to reconsider the tendency to identify legitimate governance authority with the state. Until recently, legitimate political authority was understood, in the liberal democracies at least, to rest primarily with the governmental institutions of the nation state. These institutions’ legitimacy was based on their representation of and ultimate accountability to citizens, as well as the existence and more or less consistent observation of constraints on their authority (in the form of division of powers, civil rights, judicial review, the rule of law, and the like). At the international level, the legitimacy of international governance rested on state sovereignty: international laws got their legitimacy primarily from the consent of sovereign states, freely given on the basis of sovereign equality. While these traditional sources of legitimacy were already under strain at the domestic and international levels (e.g. Habermas, 1975; Chayes & Chayes, 1995), globalization has stretched them sometimes beyond the breaking point. Globalization has shown, if we harboured any doubts before, that governance is not the exclusive domain of nation states.

Wherever there is governance, there is the problem of legitimacy. Every would-be governor, whether state or non-state, is compelled to justify itself in some way: “to govern, one could say, is to be condemned to seek an authority for one’s authority” (Rose, 1999: 27; see also Weber, 1968, vol. 3: 953). Authority is “another name for the willingness and capacity of individuals to submit to the necessities” of collective rule and as such, lies ultimately with, and must be conferred by, those over whom it is exercised (Ruggie, 1998: 61, quoting Barnard, 1938). This leads to the second point.

#### *Legitimacy as an Empirical Phenomenon*

If authority is ultimately conferred by those over whom it is exercised, the legitimacy of authority is not just a question for normative analysis and prescription. It is also a sociological question. Legitimacy is the contingent outcome of social interaction among “rule makers” and “rule takers”. Legitimation is one of the

central strategies used by rule makers, both state and non-state, to establish and maintain their authority.<sup>3</sup> It involves deliberate, strategic efforts by rule makers to establish the appropriateness and authoritativeness of their status and decisions as rule makers. Legitimacy is achieved where the relevant communities accept the rule maker as “appropriately engaged in the task at hand” (Bernstein, 2004: 4). This does not necessarily mean that rule takers agree with the rule maker or its rules, only that they perceive them to be binding and authoritative (Weber, 1947). Different audiences may share different perceptions of legitimacy and these perceptions may vary over time, space, and with the subject matter of the rule maker’s putative authority. Depending on the context, a rule maker’s legitimacy may be grounded in any number of foundations, including appeals to truth, justice, fairness, neutrality, objectivity, expertise, ethnic identity, tradition, consent, the will of the people, and the will of God. Legitimacy may depend on characterizing the rule maker’s authority as public or private, technical or political, religious or secular, and so on.

Legitimation simultaneously disguises and puts limits upon the exercise of power. It masks unequal power relations by cloaking them in the guise of authority, yet in order to be successful at this it must have some demonstrated effectiveness at curbing that power (Szablowski, 2004: 55, citing Thompson, 1975: 265). It is thus no coincidence that all legitimation strategies share one characteristic: “they seek to justify the exercise of power by claiming to set certain constraints upon its exercise” (Szablowski, 2004: 54), for instance when state authorities claim to respect the autonomy of a “private” sphere, or technical experts claim to stay away from “political” questions. For legitimation to function, rule takers must believe that these constraints are, for the most part, actually observed (ibid.: 56). The shape and success of legitimation strategies may also depend upon the relative power of the purported rule takers. Groups of rule takers who are highly organized, attentive to rule making activities, and capable of posing a threat to rule makers’ authority typically receive more attention, and are typically more likely to have their legitimacy expectations taken seriously, than disorganized audiences of rule takers who are less vigilant, more easily demobilized, and less able to threaten rule makers’ authority (Szablowski, 2004: 56). This has particular significance in the context of transnational relations, in which some sets of rule takers are highly fragmented and dispersed, while others are highly organized and easily able to mobilize resources across borders.

As a sociological matter, then, the legitimacy or illegitimacy of a given actor, institution, norm, or decision is the contingent outcome of interacting legitimation and “delegitimation” efforts in a particular social field. The result is that while we can take a principled approach to the question of legitimacy, we must remember that “[l]egitimacy in global governance is not conducive to formulaic lists of requirements ... [but] highly contextual, based on historical understandings of legitimacy and the shared norms of the particular community granting authority” (Bernstein, 2004: 18). When considering both old and new forms of governance in an era of globalization, we should ask not just “Are they legitimate,” but “How are they legitimated or delegitimated?” That said, it is important to be clear about the normative criteria we are using to evaluate the competing authority claims made on behalf of different forms of governance under conditions of globalization.

### *Legitimacy as Emancipatory Potential*

We believe that legitimacy, as a normative matter, ought to be judged ultimately by the extent to which the governance arrangement in question advances or hinders emancipation. By emancipation we mean freedom from the legal, social, and political restraints that keep humans (and by extension nature) in positions of subjugation and oppression. This has been the goal of Western political philosophy since the Enlightenment: to free people everywhere from oppression, injustice, violence, social exclusion, ignorance, poverty, disease, and early death. Although flawed in some respects, the project of emancipation remains both vital to progressive political practice and central to most Canadians’ aspirations.

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<sup>3</sup> The other main strategies are coercion and reward, but research suggests that perceptions of legitimacy typically exert a greater influence over rule takers’ beliefs and behaviour than the other two (e.g. Tyler & Mitchell, 1994; Szablowski, 2004), and it can be argued that even these other strategies depend to some extent on legitimation for their effectiveness (e.g. Rose, 1999; Dean, 1999).

Emancipatory potential refers to the potential of a given governance actor, institution, norm, or decision to advance social inclusion, human rights, human welfare, individual and collective self-realization, and ecological sustainability. The goal of emancipation is not mere survival, but flourishing – of individuals, communities and ecosystems. It is to break the bond between experiences and expectations. For the majority of people on the planet, expectations follow fairly predictably from experiences and experiences conform fairly grimly to expectations, as they have for generations. To strive for emancipation is to strive to increase the discrepancy between experiences and expectations, by confronting and delegitimizing the norms, institutions, and practices that guarantee the stability of expectations (Santos, 2002, p. 2). Stability of expectations is one of the main priorities of those who benefit the most from current forms of globalization: stability not just of business expectations and private property entitlements, but of expectations of continued good health, prosperity, cheap and plentiful food, and security against arbitrary violence. Emancipation aims to destabilize expectations. Admittedly, this instability is dangerous, both for those struggling to break free of oppression and those clinging to received advantages. But it is also hopeful, especially for those with the least to lose and the most to gain from it. Emancipation does not necessarily mean fighting to destabilize existing legal systems, however. In some cases it may involve defending the legal status quo (eg. campaigning for more effective enforcement of laws on the books), in others struggling for deeper social transformation (Santos, 2002, p. 470).

Who, then, are we talking about when we speak of emancipation? We mean primarily those groups that are effectively excluded from the social contract. On a global scale this means the “majority world” – the majority of the human population living in chronic poverty, disease, violence, drought, or pollution. In advanced liberal democracies such as Canada, it means the inhabitants of internal “Third Worlds” such as aboriginal peoples, the rural poor, and the homeless.

Let us now connect emancipation to legitimacy. Legitimacy is usually analyzed in terms of either the processes by which decisions are made (“process legitimacy”) or the outcomes of such decisions (“outcome legitimacy”). Emancipatory potential is a function of both processes and outcomes.

### *Process Legitimacy*

A decision may be legitimate if it was made by an authority and through processes perceived by the relevant audience to be proper in the circumstances (Franck, 1990; Chayes & Chayes, 1995: 127; Szablowski, 2004). While this inquiry encompasses great complexity, it essentially involves two questions: who is the proper authority to make a decision, and do all those subject to or affected by the decision have an appropriate voice in decision making?

**Are the decisions in question made by a proper authority?** This includes inquiry into the source of the purported authority, the distribution of competences between authorities of different kinds and across different zones (ecclesiastical matters should be decided by religious officials, municipal matters should be decided by town councils, etc.), whether the issue in question falls within the scope of the rule maker’s authority (is this really an ecclesiastical matter?), what are the limitations on the rule maker’s authority and have they been observed, and whether the authority has followed any internal rules and procedures that govern its own behaviour (Szablowski, 2004: 62-63). This is typically where questions of accountability arise: is the rule maker’s authority open to challenge and by whom? Can the rule maker be held to account democratically for its actions, and how? This is also where questions of technical expertise arise: is the issue in question properly characterized as a “technical” matter over which specialized experts should have authority? How should technical matters be distinguished from “political” ones? How should expert authorities be held accountable (e.g., is peer review adequate)? (ibid.: 65.) This is also where questions of subsidiarity and centralization arise: should authority be centralized, or should it be located as close as possible to the affected people and places?<sup>4</sup> Finally, this is where questions about “public” and “private” domains arise. In many places, including Canada, perceptions of legitimacy depend partly on whether the matter in question is understood as falling within a “private” or “public” sphere. Within a private sphere, the individuals and groups are widely considered to have the freedom to govern their own affairs as they see fit

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<sup>4</sup> The Supreme Court endorsed the latter proposition, known as the subsidiarity principle, in *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at 249. See also Bernstein, 2004: 8.

within the limits established by civic responsibilities, and public authorities have a duty to protect and foster the autonomy of this private sphere (Szablowski, 2004: 63). This leads to the difficult question of what is “private” and what is not, a question to which there is no *a priori* answer and the resolution of which varies from one audience to another.

**Do all those subject to or affected by a decision have a say in decision-making?** Most perceptions of legitimacy are based on the expectation that there should be congruence between those with decision-making authority and those targeted or affected by the decisions (Conzelmann & Wolf, 2005). The subjects of rules should have an effective voice in the development of the rules to which they are subject; likewise, those who stand to be affected significantly by a decision should have an effective voice in that decision (Szablowski, 2004: 64). In this view, legitimacy requires public participation in and access to transparent decision-making processes that affect them (Bernstein, 2004: 7). Many difficult questions arise here, including who counts as the relevant “public” – neo-Nazis in Germany? Mafiosi in Sicily? – along with what form participation should take, how transparency should be ensured, and to what extent non-state or “expert” authorities should be subject to these requirements.<sup>5</sup> Difficult questions also arise in relation to self-regulation, especially self-regulation of business, with some observers emphasizing the advantages of self-determination while others warn against the dangers of allowing the foxes to guard the henhouse or allowing an actor to be the judge in its own cause (eg. Chayes & Chayes, 1995).

### *Outcome Legitimacy*

Legitimacy is as much a function of ends as means. Conventional analyses of legitimacy tend to identify three potential sources of outcome legitimacy. Perceptions of legitimacy may be based on **outcome favourability** when the outcome of the decision favours the observer’s interests, on **substantive fairness** when the outcome is fair and just according to the observer’s values, or on **effectiveness** when the rule or decision in question achieves its stated goals (Szablowski, 2004: 51; Chayes & Chayes, 1995: 127; Peters, 2003: 86).

Conventional analyses tend to discount the possibility of outcome legitimacy for two reasons. Firstly, outcome favourability is typically discounted as a measure of legitimacy when dealing with large, heterogeneous audiences (such as one finds in many national, transnational and international settings), since outcomes are likely to favour particular interests over others (Szablowski, 2004: 51). In such circumstances, judging legitimacy on the basis of outcome favourability would be to take sides in a contestable value judgment. Similarly, substantive fairness or justice is typically discounted as a measure of legitimacy on the ground that conceptions of what is substantively fair or just are bound to differ (Franck, 1990; Szablowski, 2004: 51). In such circumstances legitimacy can only be determined in terms of the “right” rather than the “good,” which means that most analysts insist on judging legitimacy primarily in Rawlsian terms of “right process”.

We believe outcomes must be brought back into our evaluation of the legitimacy of globalized governance. Indeed, it is meaningless to discuss the legitimacy of governance beyond borders without reference to its outcomes. The content and effects of rules are just as important as where the rules are made or how. In particular, we believe that the dominant rules governing globalization systematically (though not uniformly) favour concentrated economic interests in the global North at the expense of human welfare and ecological sustainability. Many disagree, but this should not prevent anyone from characterizing this as a question of legitimacy. The reason for the intensity of the “global backlash” against the rules governing globalization is that their outcomes are viewed by many millions of people as disproportionately benefiting global capital at the expense of ordinary people, both the relatively well off residents of advanced liberal democracies who are experiencing unaccustomed insecurity and downward mobility, and the global majority whose

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<sup>5</sup> In this connection, legitimacy expectations may differ depending on whether the relevant community comes together voluntarily to address a specific issue, or is a “community of fate” bound together by shared destinies. The legitimacy of the former may depend only on officials explaining and defending their decisions to the direct subjects of the rules, while the legitimacy of the latter may depend on broader democratic participation and deliberation. Unfortunately it is often difficult to distinguish between voluntary, issue-driven institutions and general-purpose jurisdictions (Bernstein, 2004: 9).

longstanding immiseration endures or deepens. This is not something we can ignore in assessing the legitimacy of global governance, and therefore we must reject the tendency in much normative theory to judge legitimacy primarily in terms of “right process”. While there will always be competing conceptions of the just and the good, an outcome-oriented account of legitimacy allows us to acknowledge that the “winners”’ conceptions of what is good and just have major impacts on the health, happiness, and security of the majority of “losers.”

Outcome legitimacy is likely to acquire increasing salience as we move away from governance by democratically elected governments, since few other institutions can boast the universality of representation claimed by modern liberal democratic states. What legitimacy civil society organizations can claim, for example, is bound to rest less on the nature of their membership structures, funding sources, and decision making processes than on their capacity to advocate substantive positions “that are recognizably in the ‘global public interest’, rather than the narrow self interest” of a privileged few, and this is so even if a truly cosmopolitan set of global values remains elusive (Buchanan & Long, 2002: 62). Following Buchanan and Long’s earlier work for the Commission (2002), we argue that legitimacy is based on both substantive and procedural grounds (ibid: 3).

One final caveat about outcome legitimacy. Some analysts argue that “legitimacy is a product of effectiveness, just as it is a product of the procedures by which the political elites are selected” (Peters, 2003: 86). The relationship between legitimacy and effectiveness is complicated, however. Many rules and institutions are effective in achieving their goals without being legitimate (Nazi concentration camps, as one example), and vice versa. As a result effectiveness is not a reliable gauge of legitimacy, although in the long run we can expect that effective authority will need to cloak itself in legitimacy in order to remain effective, and legitimate authority will need to have some effectiveness in order to remain legitimate.

### *Legitimacy and Legality*

Before leaving the question of legitimacy we should reflect briefly on the relation between legitimacy and legality. This problem has long exercised lawyers and philosophers. All we wish to do here is reiterate the well-established proposition that legality does not guarantee legitimacy (eg., Bernstein, 2004: 11). A rule or decision may have the force of law (legality) yet lack legitimacy. Conversely, many rules and decisions recognized as legitimate in social relations lack the status of law. Law must earn its legitimacy just like any other form of authority. In some ways, law has a legitimization advantage, due to its close historical and ideological association with ideals of justice and fairness. In other ways, it is at a disadvantage because of its historical and continuing role as a mask for injustice and domination. Throughout history, the powerful have employed law as an instrument of repression. In short, the legitimacy of law should not be assumed, but should be determined according to the same criteria as other forms of authority.

If this is true, we need to reconsider the relationship between legitimacy and the “rule of law”. The rule of law is a fundamental constitutional principle in the Western liberal democracies. It is typically understood in Canada as having three elements: equality of all before the law (“one law for all”), the existence of a system of positive law (which embodies and preserves the more general principle of normative order), and the need for all government action to be grounded in law (rather than arbitrary) (Hughes, 2004). On the one hand, the existence of the rule of law tends to enhance the legitimacy of laws by providing a principle of constraint on arbitrary or unfairly discriminatory government action. To the extent the rule of law is observed in practice, the process legitimacy of laws and state action are likely to be enhanced. But on the other hand, the rule of law does not itself guarantee legitimacy. From a legitimacy perspective, appeals to the “rule of law” will always beg the questions of “whose law” and in the service of what interests the rule of law is being invoked. In the context of globalization, we need to ask whether efforts to promote the “rule of law” advance a particular Western agenda and conception of law; and whether they advance (unintentionally, perhaps) a neoconservative agenda of economic globalization, property rights protection, free markets and limited government that may be at odds with Canada’s constitutional tradition and with the ultimate goal of justice (Hughes, 2004: Schneiderman, 2004).

Armed with an understanding of the principal ways in which globalization challenges received ways of thinking and acting about public order, we turn now to the question of evaluating the contemporary manifestations of “governance beyond borders”.

## Evaluating Governance Beyond Borders

Canadians are divided over whether globalization and the attendant transformations in law and governance are beneficial or harmful. Some see these developments in a positive light, welcoming freer trade, stronger international laws and institutions, harmonization of different countries' laws, innovative changes to the structure and operation of the welfare state, a burgeoning global civil society, a growing commitment by global business to corporate sustainability and social responsibility, and the spread of Canadian constitutional values and jurisprudence to other countries. Others take a negative view, pointing to the growing power of unaccountable and opaque international bodies, Canadian governments' retreat from their responsibility to protect the public welfare, the increasing power and continuing social and financial abuses of multinational corporations and the questionable motives and accountability of some NGOs.

These disagreements are bound to persist. Globalization is, after all, a fundamentally contested phenomenon. But this does not mean that it is impossible or inappropriate to take sides on the benefits or harms of particular manifestations of globalization or globalized governance. Indeed, normative engagement with new (and old) forms of governance in a globalized world is imperative. We take as the starting point for such a normative engagement the question of legitimacy elaborated in the previous section: What kinds of legitimacy claims are made on behalf of the various forms of governance, how do they hold up in terms of normative criteria for process or outcome legitimacy and, ultimately, do these various instantiations of globalized governance advance or hinder projects of social emancipation?

Rather than attempting a comprehensive normative analysis of all forms of governance in a globalized environment, we focus on three general categories of governance that are among the most significant manifestations of "governance beyond borders" and raise some of the most pressing questions for Canada and Canadians. These are: a global "supraconstitution," the "globalized state" (including the state's relation to governance "beyond the state"), and governance by civil society. While there is ambiguity and room for contestation in all these areas, we will argue that certain forms of globalized governance enjoy a significant degree of legitimacy and have the potential to contribute substantially to emancipatory struggles, while others have severe legitimacy deficits and positively hinder social emancipation. In this connection we follow others in distinguishing between "globalization-from-above" (ie., the constitution of global order by transnational market actors and other privileged elites) and "globalization-from-below" (ie., local and transnational politics of resistance and transformation emerging from society, especially from marginalized and disadvantaged segments thereof) (See Falk, 1999; Likosky, 2002: xxii).<sup>6</sup>

The forms of governance about which we feel most hopeful tend to involve primarily the dynamics of "globalization-from-below," rooted in civil society or in hybrid networks of civil society, business and state actors. It is these governance formations that hold the most promise for combating the negative effects of "hegemonic" globalization and improving the prospects for social emancipation. As we will argue below, the state occupies a central, albeit ambivalent, position in the encounter between hegemonic and counter-hegemonic globalization, in many respects acting as an agent or instrument of globalization-from-above but also having a special, often underestimated capacity to advance social emancipation and restore some balance between market supremacy and human and environmental well-being.

The first category of "governance beyond borders" we examine, the global "supraconstitution", is characterized mainly by forms of "globalization-from-above" that have questionable legitimacy and tend to exacerbate social exclusion and ecological degradation, although it also has some potential to be progressive in certain circumstances. The second category, the globalized state, is more ambivalent, presenting both hegemonic and progressive possibilities. The third category, governance by civil society, is the most promising of the three in terms of emancipatory potential, yet (not surprisingly) the most marginal in terms of its relation to established power structures. It also has its own legitimacy challenges, especially

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<sup>6</sup> What we are referring to here as "globalization from above" and "globalization from below" correspond roughly to what Santos (2002) calls "hegemonic globalization," on one hand, and "counter-hegemonic globalization" or "subaltern cosmopolitanism," on the other.

in terms of the transparency, accountability and elitism of many leading non-governmental organizations and deep disparities between the global “North” and the global “South”.

Our normative evaluation of each of these categories or arenas of governance is accompanied by a small number of recommendations, which are of necessity cast at a very general level. Discussion of specific law reform proposals is beyond the scope of this paper and would, in any event, duplicate a great deal of existing writing on the implications of globalization in specific legal fields, which has been done in much more detail and more comprehensively than we can attempt here.

Before turning to our assessment of contemporary forms of governance beyond borders, it is important to emphasize that the actors involved in governing beyond borders (in particular, Canadian actors) figure as both agents and objects of globalized governance.

### **Canadians as Agents and Objects**

Understanding their history (see part I, above), it is neither surprising that Canadians tend to feel they are *objects* of globalization nor that they are divided into two camps, the one seeing themselves as winners, the other as losers. The happy winners find themselves the beneficiaries of global forces, enjoying an increasingly multicultural Canadian society, the Worldwide Web, cheap international telephone calls, an increased variety of consumer goods and cultural products from all over the world, better job opportunities in some sectors, affordable international travel, almost instant worldwide communication, rapid transmission of ideas across borders and growing understanding of the “outside” world. Others see themselves as victims of globalization, pointing to increasing job insecurity, increasing vulnerability of the Canadian economy to external shocks, increasing social tensions, a loss of national identity, the homogenization (which in many cases means Americanization) of cultural and consumer products, increasing disparities between rich and poor, worsening environmental quality and an increase in criminal activity, disease, and terrorism. They feel themselves bound by decisions made increasingly outside the country by actors and institutions that are neither transparent nor accountable. Either way, Canada and Canadians are portrayed as passive objects of external forces.

This is only part of the picture, however. Canada and Canadians are also *agents*, acting on the world stage and fostering or shaping globalization. Consider this:

- The Canadian government early became adept at parlaying its vulnerable position in the global hierarchy of power into unusual, if limited, influence in global politics, “punching above its weight” diplomatically and earning a reputation as an “honest broker” and a champion of multilateralism and international peace.
- Individual Canadian politicians and diplomats, from Lester Pearson to Maurice Strong and Louise Arbour, have been leading figures in the development and implementation of international law and policy in a wide range of fields, from peacekeeping to environmental protection and international criminal law respectively.
- Federal and provincial governments have been active champions, not just passive objects, of many of the changes associated with economic globalization, from government downsizing and privatization to negotiating trade agreements that deliberately reduced their own powers.
- Some Canadian businesses are active agents of globalization, investing abroad, sometimes bringing jobs, technology, and industrial best practices to host communities, other times bringing social dislocation, human rights abuses, and environmental damage. Industry initiatives developed in Canada have spread globally, such as the chemical industry’s Responsible Care program.
- Canadian civil society organizations are also global players. Greenpeace began as a small group of environmental activists in Vancouver. Canadian activists were instrumental in securing the adoption of a global land mines treaty. Canadian aboriginal groups are influential advocates of indigenous rights and self-government in Australia, Chiapas and the circumpolar region.
- As tourists, Canadian individuals influence other societies and economies through their choice of destinations, activities, accommodations, meals and souvenirs. A Canadian tourist who engages in child-sex tourism has very different impacts on the world, and different implications for legal governance, than one who travels to ski, hike, or visit art museums.

- At home, the choices Canadians make as consumers and investors affect health, prosperity, and life prospects half a world away, sometimes rewarding unsustainable systems of production, sometimes pressuring firms to be more socially and environmentally responsible.
- Finally, like it or not, Canada is often a model for the world. The Canadian health care system, social programs, Charter of Rights and Freedoms, our laws and policies regarding multiculturalism, indigenous rights, women's equality and sexual diversity, and the relatively successful coexistence of Quebec in the Canadian federation are held up for emulation around the world – or, occasionally for derision (usually in the United States).

Canadians are in sum simultaneously objects and agents of globalization. When thinking about globalization we must consider “the world's impact on Canada” and “Canadians' impact on the world” together, because more often than not these “inward” and “outward” dynamics are inseparable sides of the same coin. Canadians experience their engagement with the world as a double movement. Not only do they feel the impact of “external” forces on them, they also have impacts on the world outside Canada's borders. They are concerned about the fate of communities in other countries and want to know what they, as Canadians, can do as cosmopolitan “citizens of the world” to ameliorate that fate.

We now turn to the first general category of governance issues facing Canadians in an era of globalization, namely international governance and the emergence of what might be termed Canada's “external constitution”.

### III. International Organizations and Regimes: Towards a Global Constitution

One of the hallmarks of the last half century is the vast proliferation of international organizations (IOs). These are generally presented *individually* as addressing almost every imaginable policy issue concerning the global public domain such as managing international air traffic or the universal radio wave spectrum or the law of the sea or lending to developing countries. But to understand Canada's position as both subject and object of global governance, we need to reframe them in terms of three facets of their *collective* significance.

First, all “international” phenomena have a domestic incidence. At the same time as they create a transnational sphere of governance, multilateral agreements signed by governments necessarily affect the internal affairs of the signatories, whether this be the pricing of drugs for their HIV/AIDS victims, or the treatment of their aboriginals or the size of their foreign debt and the interest payments they have to make on it.

Second, the steady development of this “intermestic” -- simultaneously international and domestic -- phenomenon has constituted a complex but substantial world order, which we can best conceptualize as an emerging global constitution.

Third, the global constitution at the same time reconstitutes every participating state, although in varying ways and degrees. These propositions need both to be amplified by defining “constitution” and to be qualified by elaborating the complexities raised by this expanding dialectic reality –in which the international has domestic roots and the local has global effects.

A constitution is the set of fundamental principles, rules and institutional practices according to which any organization – whether a small club or a large state – governs itself. It typically sets out the guiding principles by which the community's collective life is to be conducted; the rights of community members vis-à-vis governing authorities; the division of authority among these governing institutions; and the functions, scope, and limitations of governmental authority (see, e.g., Bakan et al., 2003: 3-4; Black's Law Dictionary, 1979). In the realm of politics and public law, constitutions are associated almost exclusively with the nation state (e.g. Hogg, 2004: 1; Monahan, 2002: 3) – an inward-looking understanding that needs to be supplemented by appreciating how international commitments affect the domestic constitutional order. At the same time, as international governance arrangements have become more powerful and pervasive, it has become plausible to talk about them collectively as giving a constitutional character to the global community.

## Global Constitution

Any consideration of the emerging global constitutional order must preemptively recognize its fragmentary, disconnected, imbalanced, heterogeneous, multifarious nature. International organizations range in their territorial scope from bilateral to regional to global and in their size from tiny to huge. Some are relatively autonomous, while others are little more than agents for their member states. Some may be quite insignificant, while others exercise substantial influence over world developments as well as national governments. They vary from relatively informal secretariats to bricks-and-mortar organizations with their own buildings, permanent civil service, insignia, and flags (eg. the UN Development Programme). They include ad hoc arrangements for cooperation in a specific functional area (e.g. international fisheries management regimes) and general-purpose political structures complete with the organs of a would-be world government, such as the United Nations.

The general trend shows that many international institutions enjoy expanding competences in sectors that once were the exclusive domain of states. Beyond enlarging its range thanks to the formal decisions of their member states, the global order has acquired some autonomous capacity to evolve. Although typically established by some kind of intergovernmental agreement, an organization may take on a life of its own with implications for its founders. For instance, new rules binding on member states may be introduced in the course of international bodies carrying out their responsibilities. When international tribunals make judgments to resolve a dispute, they often establish new norms with global impact. Commissions reach decisions about new problems. For instance, food safety issues have become burning questions for the once obscure Codex Alimentarius Commission in Rome. Although highly technical, the questions surrounding the approval of genetically modified produce for human consumption involve the fate of many countries' agricultural economies and some of the world's largest corporations, which have invested billions to develop crops impervious to certain insects or plant diseases. Because of public concerns about the health implications of hormone-treated livestock and genetically modified fruits and vegetables, agribusiness and governments are defending their positions at the Codex in the face of non-government organizations and experts representing the often opposing interests of consumer and producer groups.

In sum, the hugely complex, multi-institutional international order can be analyzed in terms of the four basic components of a constitutional order.

1. Norms and principles range from the vague (the aspiration for peace) to the specific (national treatment for investors).

2. Rules are multitudinous but more specific, forbidding, for example, states from exporting hazardous chemicals. A great many of these economic rules reflect American norms. When the members of the WTO reached an agreement in 1997 on the liberalization of their telecommunications sectors, the US trade Representative Marlene Barshefsky exulted that the United States had just universalized its Telecommunications Act of 1994. (New York Times, February 1997) But since these rules are negotiated in a power-based system, they also reflect the interests of the other dominant powers at the centre of the world system. The WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement supported the interests not just of American but also of European and Japanese big Pharma, entertainment, and information-technology industries.

3. Rights are expressed along a continuum passing from the general (the right to justice or education or shelter) to the specific (rights of foreign investors not to have their property expropriated).

4. Institutions can be found that are powerful, well-financed and sophisticated as in the partly supranational, partly intergovernmental structure created by the various treaties that built the European Union. Some international institutions are quite flimsy. Whether strong or weak, they can be analyzed as a collectivity or individually in terms of their five principal functions.

a) *Legislature*. Decision-making which results in the promulgation of laws or regulations takes place within most institutions. The European Commission has a substantial legislative capacity, which manifests itself in the form of hundreds of directives that its member states have to implement. In contrast, NAFTA has no autonomous rule-making capacity so is unable to adapt its many rules, which were negotiated in the early

1990s, to changing conditions. In between these extremes, the World Trade Organization has a forum for making rules in its biennial meeting of its members' trade ministers, but the requirement that decisions be made by consensus makes it extremely difficult to reach any decision acceptable to all – currently 147 -- member states. As a result, new rules for the WTO are made following years-long negotiating "rounds" between the member-governments, as in the current Doha Round, named for the site of the last ministerial meeting which launched it. Taken in its totality, the body of world institutions has a spotty and uneven legislative capacity.

b) *Executive*. Institutions mostly have an executive group mandated to manage day to day operations as well as to make monumental decisions such as whether the UN Security Council should endorse a pre-emptive war against Iraq. Putting all international organizations together, their second weakest constitutional function after the legislative is the executive – largely because nation states have been reluctant to allow institutions much decision-making autonomy.

c) *Administration*. If it is to operate, any organization needs a staff to implement decisions and deliver the action for which it is mandated. The Organization for Economic Cooperation and Development (OECD), UNESCO, the WTO, and, of course, the United Nations have staffs totalling in the thousands. Aggregating them all would show a considerable – but heterogeneous and disconnected – international civil service, many elements of which are supranational in the sense that their civil servants' careers are independent of their member governments' control.

d) *Judiciary*. Norms and rules are subject to diverse interpretations; administrative actions cause compliance complaints. No organization can operate for long without having to resolve conflicts generated by its own mandate and mechanisms. Dispute settlement varies from the highly structured European Court of Justice whose rulings have direct effect in each member state of the EU to the deliberately ineffectual arbitration processes established in the North American Agreement on Environmental Cooperation.

e) *Enforcement*. The North Atlantic Treaty Organization has the capacity to enforce its decisions through a command structure that can mobilize the armed forces of its members in order to fight a hostile regime or intervene militarily to keep the peace in a failed state. By contrast, the rulings of the International Labour Organization (ILO) are unenforceable except by moral suasion. Compliance with the WTO's dispute settlement rulings tends to be high, in part because its rules permit economic retaliation against states that do not comply with its judgments. WTO rulings are also effective in part because a member considers it in its interests to comply with an adverse judgment, since its counterparts tend to comply when it wins a ruling against their trade protectionism. The enforcement capacities of the global constitution can also be rated in terms of the local impact of international institutions' decisions. When in the winter of 2003, a few officials in the World Health Organization issued an advisory about travel to Toronto where a small outbreak of SARS had occurred, Ontario's tourist economy was shot down – suggesting that the global constitution may be more muscular than the sum of its individual components.

This is not the space to develop a more extended analysis of the global constitution in all its kaleidoscopic components and uneven functioning. The point of this section is to emphasize that, taken as a totality, existing international organizations create a global governance system which Canada has to take seriously, and for two reasons. First, as an agent in globalization, Ottawa participates in efforts to reform existing elements of the world order and develop new components as needs arise. Canada may have lost relative position in the global hierarchy of states over the last few decades, declining from seventh largest economy to battling with Brazil for ninth place, but it remains a player in the upper middle range of semi-peripheral states that can make a difference in the shadow of the more powerful states that bestride the centre of the world's power system. During the Uruguay Round of negotiations to reform the GATT, for instance, Ottawa made the original proposal that led to the new WTO receiving a powerful judicial capacity.

We will return to what Canada should do as agent of globalization after demonstrating that the second reason why Canadians should take the global constitution seriously is that it has a substantial effect on their own political system by superimposing on it what we will call a supraconstitution – an issue to which we will now turn.

## Canada's supraconstitution<sup>7</sup>

Because of international organizations' intermestic nature, the global constitution necessarily impinges on the constitutional order of every member state but to a degree at that depends on its inherent power.

The main thrust of all of these economically-focused regimes is the liberalization of international trade. Through these agreements, governments commit themselves to dismantling barriers to the movement of goods, services and capital (but generally not labour) across borders, revoking policies that favour domestic over foreign producers, goods or services, and eliminating all forms of government intervention that distort market competition, in order to reap the benefits of comparative advantage, more efficient production, lower prices and greater choice of goods and services. Although presented at the time as a commercial agreement, CUFTA (which came in force into 1989) was historically significant as a step towards a new global investment regime with fundamental implications for the structure of corporate-state relations and the effective constitutionalization of international corporate "personhood" complete with powerful individual rights.

CUFTA also became a polarizing moment in Canadian politics. On the one side was the business community, which saw the agreement as necessary to its survival in a world characterized by declining tariff protection and increasing challenges from competitors exploiting economies of scale to achieve lower production costs. On the other side was a broad coalition of civil-society organizations led by the labour unions and the women's movement, which saw CUFTA as a death warrant to the activist state on whose public services and programs they felt their future well-being would depend.

NAFTA, which was signed in 1993 and came into force in 1994, in effect continentalized CUFTA's bilateral regime by incorporating Mexico into its then toughened set of rules. Driven by Washington's demands that its two neighbours open up their economies by cutting back their governments' controls, NAFTA strengthened CUFTA's investment provisions, extended its rules on services, and added powerful intellectual property rights which were of particular importance to US brand-name pharmaceutical TNCs. NAFTA formalized the two peripheral economies' hitherto informal integration as territorial extensions of the American marketplace. It is worth noting that NAFTA became almost as divisive in American politics as CUFTA had been in Canada. Fearing the loss of jobs to Mexico because of that country's low wages and weak enforcement of environmental and labour standards, American environmental organizations and trade unions launched a similarly losing campaign against the business-led agenda for continental economic integration.

A year after NAFTA established a continental economic régime, the Uruguay Round of the GATT negotiations came to an end with the establishment of a new global economic order known as the World Trade Organization. The WTO transformed global governance by projecting to the global level the trade and investment rules wanted for their TNCs by the core capitalist countries. Taken together, the WTO and NAFTA added to Canada's already existing internal legal order an external constitution which can itself be analyzed in terms of its norms, rules, rights, and institutions.

### **Norms**

Many norms in the WTO and NAFTA establish principles such as *national treatment* that are not necessarily incorporated into domestic legislation. National treatment is a supraconstitutional norm in the sense that it controls government behaviour because it has been incorporated as a superior legal order, holus bolus and in general terms, but not as legislation applying to specific public policies. There is no Canadian law saying that the federal government must treat foreign-owned furniture companies at least as well as it treats Canadian-owned furniture firms. But since the trade agreements extended the national treatment principle from goods to investments and even to services, if any federal or provincial or municipal government discriminates in favour of a nationally - or provincially - owned firm, the government

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<sup>7</sup> Much of this analysis is adapted from Clarkson, 2004.

of Canada is liable to legal attack by another government belonging to NAFTA or the WTO that deems one of its companies in Canada to have suffered from unequal or discriminatory treatment in Ottawa, a province, or even a Canadian municipality. In other words, although not implemented in specific statutory changes, it remains a prescription to which NAFTA partners may appeal if they feel that Canada is not fulfilling its obligations.

Along with national treatment, the *most favoured nation* (MFN) norm in GATT's Article 1 rules out discriminating among trading partners even for reasons of social or environmental policy. Now that they are part of the WTO's normative structure, this along with other basic trade principles have become supraconstitutional because they are mandatory for its members, unlike international commitments that Canada has made by signing, for instance, the many conventions on labour rights sponsored by the ILO. As well, the interpretation of the WTO's norms is far more expansive than that of identical norms under the GATT. Even when government measures are formally neutral vis-à-vis nationality, the WTO may strike them down if in practice they are deemed to bias the competitive conditions in favour of domestic service providers (national treatment) or of particular foreign providers (most favoured nation). (Sinclair 2000, 44)

NAFTA's and the WTO's trade principles are thus supraconstitutional because they give legal grounds to foreign corporations -- which, for instance, might consider demands on investors in the Arctic to be too onerous or the subsidization of only Canadian firms unfair. If they do, they can press their home government to launch a suit against Canada through NAFTA's dispute settlement panels or the WTO's dispute settlement board. When Canada persisted in showering public largesse on its champion aircraft builder, Bombardier, to boost its exports and when Brazil lodged a complaint at the WTO on behalf of its own regional airplane builder, Embraer, the dispute panel in Geneva found Canada to have acted illegally. Ottawa was obliged to mend its ways.

The imposition of authoritative new norms into the Canadian political order raises legitimacy issues both in terms of process and outcome. The acceptance of major constraints on the governing capacity not just of the federal but also of provincial and municipal governments as a result of a negotiating process characterized by secrecy and non-transparency took place with a minimum of informed public debate. This absence of a deliberative democratic context for a major shift in the parameters of the political order contrasts with the extensive engagement not just by the political parties, the media, and interest groups -- the normal actors in a political process -- but also of the highest court of the land from 1980 to 1982 when Prime Minister Pierre Trudeau led a campaign to patriate the domestic Canadian constitution into which he proposed to introduce a Charter of Rights and Freedoms.

In terms of outcome legitimacy, normative additions to the Canadian legal order from NAFTA and the WTO had direct legislative consequences. National treatment for investment spelled the end to a whole generation of industrial development policies centred round the targeting of subsidies to domestic corporations or sectors to improve their competitive performance in order to boost their exports. It also called into question the capacity of the Canadian state to continue to bolster its cultural industries through favouring domestic entities in the private sector. In this way, supraconstitutional norms have had direct impacts on the domestic legislative and administrative order without most of the public -- and even much of the government apparatus -- understanding this had happened.

## **Rules**

When we speak of Canada's "external constitution," we refer to those rules at the international level that can be said to form part of the ensemble of fundamental practices by which Canadian society is governed and from which "ordinary" Canadian laws and policies may not -- in principle -- derogate. Identifying all such rules is bound to be a monumental task, given the hundreds of international commitments Ottawa has signed, but certain institutions and rules of economic globalization are clear candidates for this status. We focus here on three: CUFTA, NAFTA, and the WTO.

Continental economic integration was paid for by the weaker partners with diminished political autonomy. While CUFTA and NAFTA did achieve somewhat reduced American tariffs for Canadian exporters, the price Ottawa had to pay for a partial opening of the US market was to accept constraints on the Canadian state's regulatory capacity. The federal government was no longer allowed to manage a two-price system

that supplied petroleum products for domestic industry and consumers at lower prices than their export price to American importers. No new cultural policies could negatively affect the commercial interests in Canada of American entertainment corporations.

CUFTA introduced rules reducing the Canadian governments' capacity to regulate investment, whether foreign- or domestically-owned. Another innovation incorporated in CUFTA was to have trade rules go far beyond the rules for buying and selling physical goods by including services, which cover an enormous range of activities, from those traditionally in the private sector (e.g., banking, advertising, engineering and tourism) to those traditionally provided by governments as public goods (e.g. education, health care, and public utilities). Even if they were not provided directly by governments, many of these services are closely regulated by governments (including environmental, labour, health and safety and consumer protection regulation) and may fall under international rules for services if they have any commercial characteristics which make them competitive with potential private sector providers of the same service.

By the very act of signing CUFTA, NAFTA, and the WTO, Canada undertook to make immediate changes in a wide range of legislation and regulations. CUFTA's investment chapter raised the exemption for a review of a foreign takeover from \$5 to \$150 million (CUFTA 1988). This required Canadian implementation legislation to make the appropriate amendment to the Investment Canada Act. While controversial, the process legitimacy of CUFTA was considerable. Although secret, the negotiation process was the subject of intense media and public interest. Once the agreement was published, fierce debate over its various provisions continued for months, reaching their climax in the 1988 federal election campaign whose results – a majority of seats (if only a minority of votes) for Prime Minister Brian Mulroney's Progressive Conservative government – gave the accord an ultimate parliamentary legitimacy. CUFTA's practical outcome – the loss of hundreds of thousands of industrial jobs in the Canadian economy's manufacturing centres – left it highly unpopular among the labour unions and a number of popular grassroots movements, which continue to deem "free trade" illegitimate. .

In the WTO's agreement on agriculture, member states committed themselves to transform such quantitative restrictions as import quotas into tariffs, which were then to be reduced. Canada duly proceeded to "tariffify" its protective regulations for farmers in central Canada. The WTO's and NAFTA's rules are so comprehensive that, in their implementation legislation, their members had to change hundreds of existing laws. Benefiting from much less public debate and information, the process legitimacy of the WTO's and NAFTA's rules remains dubious. Their outcome legitimacy is difficult to assess, since the effects of these rules may take years to become evident.

Under their domestic constitution, changes in laws and regulations are made by governments within the institutional and legal framework established by their internal constitutions and in response to demands from below by the electorate or specific functional constituencies. What makes NAFTA supraconstitutional is the signatory governments having to change their laws and regulations in a context which makes them irreversible. Unlike normal amendments to statutes made by sovereign legislatures, which can further amend or revoke their acts in response to changing domestic considerations, statutory amendments incorporating international trade norms can be validly amended only if the external regime changes its rules by international agreement. What would otherwise be democratically legitimate government actions will subject that government to sanctions or penalties if they are deemed by the appropriate arbitration procedures to violate the international agreement in question.

In this respect, not only has the *political* order been changed by the amendments, but the *legal* order has been altered by accepting legal and regulatory changes over which parliament no longer exercises sovereignty. This is what defenders of free trade allude to when they described NAFTA as "locking in" neoconservatism – despite the fact that the neoconservatism model is no closer to being accepted as a sustainable societal contract in Canada than it is elsewhere (Clark 1997). Even if more activist political parties were to win power, they would find their hands tied by these internationally negotiated and domestically implemented political limits to which their predecessors had committed them.

Another type of rule whose enforcement is contingent on foreign complaints is the prohibition of governments from imposing requirements on foreign investors, for instance, to make export commitments, to find local sources for their manufacturing needs, to transfer technology to domestic partners, or to

guarantee set levels of employment (Chang 1998). To be precise, these standards do not actually *prevent* governments from imposing performance requirements on foreign investors or subsidizing domestic firms. But any federal or provincial government that violates these NAFTA or WTO norms is vulnerable to a partner state initiating a legal action that could result in economic sanctions to restore the damage from which its corporations claim they have suffered. Economic outcomes are likely to be lowered benefits to the local economy from much sought after foreign direct investment.

The global constitution's rule book is never finalized. A chronic state of flux results from the intergovernmental processes of continually negotiating new global rules. At the WTO's current Doha Round, for instance, Canada was pressed by countries trying to obtain better access to the Canadian market for their agricultural products. As a result, Ottawa's negotiators have agreed ultimately to abandon both the marketing boards (which guarantee protection from foreign competitors for chicken, dairy, and egg farmers in central Canada) and the Canadian Wheat Board (which gets western grain farmers the best price on the world market for their wheat by marketing it collectively). Canada is also under severe pressure from the United States to allow, through enriching its commitments to the General Agreement on Trade in Services, the entry of transnational capital into its public health and education systems. This context of being constantly beleaguered to make further concessions creates an instability that necessarily puts the external constitution's legitimacy in continuing jeopardy. If central Canadian farmers realize that their government cannot protect the marketing boards on which their entrepreneurial calculations depend, their cultural security vanishes.

## **Rights**

The corollary of a limit on government may be a right for the citizenry. In contrast with the EU which does create direct rights for citizens in member states – for instance to sue their own governments before the European Court of Justice, the only 'citizens' whose rights in Canada were expanded under NAFTA were corporations based in the US or Mexico. Under the TRIMs – Trade Related Investment Measures -- agreement, rights were also created for all corporations based in states belonging to the WTO, not to their citizens. National treatment and the right of establishment made it easier for firms owned in one country to do business throughout the continent. What makes NAFTA supraconstitutional in this regard is its creation of a right that gives non-Canadian NAFTA corporations the power to overturn such regulations as those designed to secure the health and safety of the citizenry by taking member governments to international commercial arbitration in alleged cases of expropriation (Levin and Marin 1996, 90).

CUFTA's Article 1605 provided that no government may "directly or indirectly expropriate or nationalize", or take "a measure tantamount to expropriation or nationalization" except for a "public purpose," on a "non-discriminatory basis," in accordance with "due process of law and minimum standards of treatment" and on "payment of compensation" (CUFTA 1988). NAFTA's Chapter 11 contained an identical provision. In the face of Canada's Charter of Rights and Freedoms that deliberately excluded property rights (on the grounds that they would excessively enhance corporate power which was adequately protected by the common law), this provision created a property right for foreign corporations understood neither (apparently) by the government nor (certainly) by the public.

Unlike rights in their internal constitution, this right was not available for Canadian corporations in Canada, where it can only be exploited by American and Mexican companies. The more citizens' groups understood that foreign corporations had been given invasive rights to nullify domestic legislation that were not just beyond recourse in domestic courts but were unavailable to Canadian enterprise, the more NAFTA's Chapter 11 became delegitimized. Also contrasting with a national constitution, the new justiciable empowerment accorded by trade agreements to transnational corporations subjects them to no balancing obligations by continental-level institutions with the clout to regulate, tax, or monitor the newly created continental market that has proceeded to emerge (Blank and Krajewski 1995). NAFTA's Chapter 11 expanded the scope of investment rights without requiring TNCs to promote the public interest by protecting the environment or public health.<sup>1</sup>

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2. Steven Shrybman (2002) notes that the powerful private enforcement machinery of international investment treaties has now been invoked by several transnational corporations to assail water protection

One minor exception to NAFTA's non-provision of rights to citizens is the process established under the North American Agreement on Environmental Cooperation for citizens to submit complaints challenging any member government's "persistent failure" to enforce its environmental laws. However, the mechanism established to investigate these complaints and the possibilities of enforcing any finding on a delinquent government are so weak as to be almost meaningless beyond the value of the publicity and the potential shaming effect that the citizen submission process and ultimate factual findings might have on a government. Similarly, the North American Agreement on Labour Cooperation established elaborate mechanisms formally dedicated to facilitating citizens' challenging a member government for failing to apply its labour laws. In practice, trade unions in the three countries have concluded that the scant results achieved by pursuing the complicated process have not been worth the expensive efforts needed to pursue a complaint.

Many of the WTO's agreements also contained rights for international corporations but none for citizens, other than investors. Its agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) required that all member states amend their intellectual property legislation and change their judicial procedures in conformity with the stipulated norms (Kent 1994). The external and constitutional quality of these rights can be seen in their giving transatlantic pharmaceutical firms the legal justification to have the EU successfully take a case to the WTO against Ottawa because its drug legislation did not give European big Pharma the full patent benefits that they claimed were now their due (WTO 2000).

### **Institutions**

With the major exception of the European Union, whose various institutions' decisions can directly affect the behaviour of individuals and corporations in its member states, global governance acts indirectly through influencing the behaviour of the nation states that have constructed its various organizations by treaty. It would be surprising if, in Canada's case, the WTO and NAFTA would not have some indirect effects on its political institutions as well as their relationship with civil society.

Beyond inhibiting federal and provincial governments in their policy actions, NAFTA and the WTO may also have altered Canadian federalism's distribution of powers between the two levels of government. By making Ottawa responsible for ensuring the provinces' conformity to its provisions, NAFTA arguably restored to the Canadian constitution a federal power of disallowance that had fallen into disuse. In this way it may possibly alter -- to a potentially dramatic degree -- the country's delicate constitutional balance (Petter 1988, 141-7). For example, in the Doha round of WTO negotiations, should the federal government agree to let education and health care be brought under the GATS rules on services, it would have taken a step that affected the provincial constitutional order 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. Even before further global limits on government are negotiated, provincial government powers are deeply affected by NAFTA and the WTO. For instance, only the federal government may launch a trade dispute and appear in its hearings, even when a provincial grievance or measure is the issue.

NAFTA norms also create constitutional abnormalities at the level of interprovincial relations. The application of national treatment and investor-state conflict resolution to subcentral governments creates the anomaly that provinces, territories, and municipalities have to give NAFTA investors non-discriminatory treatment, whereas they may still discriminate against Canadian investors from other provinces.

Global and continental rules have differing impacts on various parts of Canadian society. Take the country's two geographically determined types of agriculture. To the extent that the prairie provinces are exporters of grains and livestock, their farmers can expect to benefit from the WTO's agreement on

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laws, water export controls, and decisions to re-establish public sector water services when privatization deals have gone sour.

Sanitary and Phyto-Sanitary (SPS) standards whose supraconstitutional norms limit *other* member states' capacity to use health regulations to impede imports. As illustrated by the North American dispute with the European Union over its refusal to allow the import of beef raised with a growth hormone, the SPS norms, if successfully applied, should make it easier for Canadian cattle ranchers to find export markets. In contrast, farmers in central Canada, who supply a protected market of national consumers thanks to the quotas established by government-enforced marketing boards for eggs, milk, and poultry, can be expected to suffer under the WTO rules, as their quantitative barriers are turned into tariffs, which are subsequently cut to allow more competition from abroad in the Canadian market.

An efficient, publicly funded health system has become a defining characteristic of Canadians' sense of national identity. If the privatization of publicly provided services is the product of the services provisions in NAFTA and the WTO's General Agreement on Trade in Services (GATS), Canadian society may risk losing a prime social institution that has played a major role in defining its identity and so sustaining its cohesion.<sup>8</sup> Should the impact of continental and global free trade norms cause the accelerated commercialization of health care with consequent increases in inequality of treatment between the rich and the poor, a central element of Canadian political culture will have been jeopardized.

Instead of developing its social and community cohesion, Canada appears to be polarizing into a society of those who can succeed in the globalized system and a society of those left behind. If this perception is linked to the norms and practices of the global economic governance regimes, serious repercussions may be felt in the legitimacy of the country's own representative system (McBride and Shields 1997). If global institutions have 'hollowed out' the Canadian state to the point that it risks being seen as incapable of defending its citizens' interests (Arthurs 2000), the Canadian political system will lose credibility at the same time as neoconservative globalization loses legitimacy. Much hangs on the capacity and effects of judicial rulings concerning the conformity of domestic regulations with the supraconstitution

### **Adjudication**

For a foreign government to take a case against Ottawa presumes that global governance boasts adequate judicial capacity. This ability on the part of one state to accuse another of violating some supraconstitutional norm varies widely depending on the IO's own constitution. Global *environmental* governance is notably bereft of adjudicatory muscle. The strength of global *economic* norms, rules, and rights is due to the muscularity of the WTO's dispute settlement mechanisms. Whereas the WTO was endowed with an impressive apparatus for adjudicating intergovernmental disputes, NAFTA was created without a supranational judiciary. Instead, North American governance is distinguished by some precarious dispute settlement processes whose supraconstitutional impacts vary from minor (for general disputes between member states) to negligible (for trade disputes between exporting and importing states) to substantial (for disputes between transnational corporations and host states).

### **NAFTA**

#### **General Disputes**

Continental dispute settlement was meant to depoliticize conflicts between the three governments by having their differences resolved by neutral arbitrators applying common rules. In this spirit, NAFTA's Chapter 20 provides for binational panels to be struck when the member-states have been unable to resolve their differences related to issues generated by the agreement. Although "Chapter 20" dispute settlement was considered expeditious at first, (Davey 1996, 65) later decisions have proven unable to settle conflicts without resort to power politics (Loungrathand Stehly 2000, 43). For example, when it lost a panel decision to Canada in a wheat case (CDA-92-1807-01), Washington responded by threatening to launch an investigation into Canadian wheat exports. Closure was only achieved when U.S. pressure caused the Canadian government to give way by agreeing to limit wheat exports during 1994/95 to 1.5 million tons (Davey 1996, 56). If such Chapter 20 rulings are unable to constrain the continental hegemon so that it becomes futile to submit general issues to NAFTA arbitration, continental

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<sup>8</sup> Arup (2000, 96) writes that "the main thrust of the GATS is deregulatory: it attacks non-conforming national government measures."

governance appears judicially unable to deliver for its weaker members the rights for which they “paid” when negotiating the original compact. In this respect, the judicial function of NAFTA is faulty as a constitution for North America by failing to have supraconstitutional effect in the US legal order.

### Trade disputes

Had NAFTA created a true free trade area, its members would have abandoned their right to impose anti-dumping (AD) or countervailing duties (CVD) on imports coming from their partners' economies and dealt with problems of predatory corporate behaviour by establishing continental-wide anti-trust and competition policies. The United States refused such a real leveling of national trade barriers which would have created a single continental market. It simply agreed to cede appeals of its protectionist rulings to binational panels which were restricted to investigating whether the administration's AD or CVD determinations properly applied *domestic* trade law (Trakman 1997, 277).

Generalized to its two peripheral partners in NAFTA's chapter 19, this putatively binding judicial expedient turned out to be almost as disappointing as its critics had predicted. When the United States's CVD against Canadian softwood lumber exports was remanded for incorrectly applying the notion of subsidy as defined in U.S. law, Congress simply changed its definition of subsidy to suit the Canadian situation. Beyond softwood lumber's long-lasting evidence (Howse 1998, 15), Canada has not had a satisfactory experience in using Chapter 19 to appeal other American trade determinations. In 1993, for instance, there were multiple remands in five cases, which led the panels to surpass their deadlines significantly. Furthermore, problems have arisen over the lack of consistency in Chapter 19 panel decisions, which have shown differing degrees of deference to agency decisions (Trebilcock and Howse 1999, 83).

Although AD and CVD jurisprudence may have been ineffective in helping the peripheral states constrain their hegemon, the opposite is not necessarily true. Canadian trade agencies have had to become more attentive to American interpretations of the standards they apply in AD or CVD determinations out of a concern for what the binational panels, which necessarily include American jurists, may later decide on appeal.

Thus Chapter 19 confirms the experience of Chapter 20, that NAFTA's judicial function is asymmetrical in its impact. On the one hand, it does not have supraconstitutional clout over the hegemon's behaviour. On the other, it is used to enforce NAFTA rules in the periphery where it has some effect on Canadian administrative justice. When these processes don't satisfy Washington, it can still exercise its raw power to achieve its objectives.

### Investor-state disputes

With Chapter 11 of NAFTA, Canada constricted the authority of its national courts by accepting the jurisdiction of private international arbitration when American and Mexican corporations claim that action (or inaction) by a federal, provincial, or municipal government has an effect “tantamount to expropriation” of their property. By the same token, of course, Chapter 11 also gives Canadian companies the right to sue US or Mexican governments. Although barely noticed when NAFTA was debated in the public domain before its ratification, an obscure dispute mechanism buried deep in Chapter 11 has established a powerful new zone of adjudication to enforce Article 1110's corporate rights. Under these investor-state tribunals, an American or Mexican corporation with interests in Canada can initiate arbitration proceedings on the grounds of expropriation against a municipal, provincial, or federal policy that harms their interests. These “investor-state” disputes are taken for arbitration before an international panel operating by rules established under the aegis of the World Bank's International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL) for settling international disputes between corporations (Horlick and DeBusk 1993, 52). Since these forums operate according to the norms of international commercial law,

Chapter 11 disputes actually transfer the adjudication of disputes over government policies from the realm of public law to commercial law (Dunberry 2001).<sup>2</sup>

Made by trade law specialists in closed hearings with little opportunity for public input, Chapter 11 panel decisions, have taken a fairly broad view of what is “tantamount to expropriation” and what counts as “property,” going well beyond what is considered an impermissible taking in Canadian law and effectively restricting governments’ ability to regulate TNCs’ activities in what they see as the public interest. Since Chapter 11 allows these TNCs to take legal action directly without having to wait for their government to initiate arbitration proceedings, these firms gain the ability to short-circuit what may be lengthy diplomatic negotiations when they consider themselves to have been subject to abuse in the neighbouring jurisdiction as well as avoid having to make their case in tribunals where the pleadings would be more transparent and the rulings subject to appeal before superior courts. The threat of an adverse Chapter 11 ruling is sometimes enough to prompt Canadian governments to repeal offending laws without waiting for a decision (as was the case with the Canadian government’s ban on the suspected neurotoxin, the gasoline additive MMT). The result of the various cases that have been decided is the delegitimizing public awareness that TNCs from the US or Mexico have greater rights vis-à-vis the Canadian government than do domestic Canadian corporations or citizens.

Chapter 11 arbitrations both shrink the scope of the Canadian judicial system and overlay it with a supraconstitutional process that conflicts with many of its historic values. *Transparency* is the first victim in this secret world of commercial arbitration: even the existence of a case may be kept secret, and the public may never learn what has happened or why. *Neutrality* is the second legal value that falls by the wayside. Since the plaintiff investor has the right to appoint one of the three arbitrators, the defending government already faces a bench that is substantially weighted in favour of corporate rather than public values. *Judicial sovereignty* is a third victim of this extraordinary addition to the Canadian legal order. As the corporate plaintiff and the defendant state choose the panel’s chair by consensus, it is likely that there will be just one Canadian in tribunals adjudicating suits launched against Canadian governments. This suggests that, when a norm of international corporate law comes into conflict with a Canadian legal standard, the latter is likely to be overridden by the former to the profit of transnational corporate autonomy and to the loss of the legitimacy among the public of global economic governance.

## The WTO

In contrast with NAFTA’s judicial processes, which are weak at the governmental level and strong at the corporate level, the WTO’s dispute settlement body excludes corporations from directly using its services and gives governments a powerful tool with which to enforce the global regime’s economic rules even against the most powerful non-compliant state. Indeed, the key to the WTO’s unprecedented importance lies in the power and neutrality of its dispute-settlement mechanisms. Unlike NAFTA’s Chapter 19 and 20 panels, WTO panellists are chosen from countries other than those involved in a particular dispute. Their rulings are not based on the contenders’ own laws, as they are in NAFTA’s AD and CVD cases but on the WTO’s international rules. They make their judgements quickly on the basis of the WTO’s norms that they interpret in the light of the international public law developed by prior GATT jurisprudence.

The sociology of its dispute panels enhances the WTO’s legalistic rigidity (Weiler 2001, 194). Panellists adjudicating WTO disputes are either trade lawyers and professors of international law who tend to stick very close to the black letter of the WTO’s texts they are interpreting, or they are middle-level diplomats who take their cues from the Secretariat’s legal staff. In either case, they know full well that their judgment will be appealed by the losing side and that the judges on the Appellate Body will be responding to highly refined legal reasoning (Bhala 1999, 847; Palmetier and Mavroidis 1998, 405).<sup>3</sup> Under these conditions,

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4. For example in the Metalclad case, the tribunal ruled that the local municipality had exceeded its constitutional authority – a judgment that hitherto only the judges of the Supreme Court of Mexico had the power to make.

5. Joseph Weiler, paper, University of Toronto Faculty of Law; and Robert Howse, personal communication to Clarkson. It might also be said that while formally speaking, Appellate Body rulings are

“soft” arguments defending cultural autonomy or environmental sustainability hold little weight against the “hard” logic of the WTO’s rules.

With its intrusive judicial institutions, this dynamic international economic regime creates new levels of uncertainty for domestic governments whose elected officials cannot be sure how measures they propose to implement might be judged in some trade tribunal. Many critics of the new external constitution have talked about a “regulatory chill” particularly in the light of NAFTA Chapter 11 rulings that have given complaining businesses the benefit of the doubt and shown little deference to democratically-sanctioned government regulations.

While the WTO’s rules create new supraconstitutional norms for member states to accept, their meaning cannot be anticipated with any certainty. In referring to one contentious concept in trade law, the WTO’s Appellate Body memorably compared the notion of “likeness” to “an accordion, which may be stretched wide or squeezed tight as the case requires.” This judicial flexibility did not guarantee cultural sensitivity, as Canadians discovered when the WTO ruled that *Sports Illustrated Canada* was “like” *Maclean’s* magazine (WTO 1997). This finding meant that several key policy instruments, which had successfully promoted a Canadian magazine industry for several decades, were declared invalid (Schwanen 1998). The permanent threat of a court challenge of their regulations at the WTO means that national policy makers can only be sure that they will never know what this supreme court of commercial law will decide until a trade dispute concerning this policy is heard (Howse and Regan 2000, 268).

Whether the WTO rulings’ supraconstitutional superiority over their own constitutional norms will be accepted by Canadian courts remains to be seen. As any student of federalism knows, a system containing more than one order of jurisdiction creates conflicts between the cohabiting authorities. No case has yet been brought to Canada’s Supreme Court to test whether a ruling by a global or continental dispute panel takes precedence over a Canadian norm.<sup>4</sup> The introduction of a supraconstitution with judicial muscle suggests that continuing clashes between the external and internal constitutional orders must be expected. Conflict can also be anticipated between the global and continental orders. The United States, for instance, challenged in a NAFTA panel Canada’s tariffication of its agricultural quotas as a violation of its NAFTA obligations (Trebilcock and Howse 1999, 267). The panel ruled that the WTO’s tariffication imperative prevailed (CDA-95-2008-01). Other conflicts between the two regimes’ norms are bound to occur, complicating their constitutionalizing impact on their members.

The WTO’s dispute-settlement system may be superior to NAFTA’s in many respects, but multilateralism does not necessarily present Canada with a real escape from US pressure. Indeed much of the constraint that the WTO has imposed on the Canadian state in the first few years of its existence has been an application of US-driven demands that Canada comply with US-inspired WTO rules on behalf of US-based pharmaceutical and entertainment oligopolies.

The judicialization of trade rules has affected international cooperation on regulation in other areas, such as the environment. Consider this example. Before 1990 many governments, including Canada’s, considered trade sanctions a legitimate tool for enforcement of multilateral environmental agreements and pushed for

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not precedent setting, it is generally recognized that the logic of one panel’s decision can be carried over from case to case as the situation dictates. Palmetier and Mavroidis (1998, 405) also note that the Appellate Body “operates on a ‘collegial’ basis. While only three of the seven members sit on any one ‘division’ to hear a particular appeal, and the division retains full authority to decide the case, views on the issues are shared with the other Appellate Body members before a decision is reached. Consequently, members of the Appellate Body, in confronting prior decisions, are far more likely to be confronting their own decisions, or those of their close colleagues, than are WTO panelists. This relationship seems likely to lead to a stronger attachment to the reasoning and results of those decisions.

6. ‘WTO decisions generate international governmental rights/obligations but not necessarily for judicial arms of government at the national level.’ Communication from Howard Mann, trade lawyer, to Clarkson, January 2001.

their inclusion in such agreements. These governments (and many supportive NGOs and business groups) wished to apply the “teeth” of the trade regime to the enforcement of environmental treaties. They achieved a breakthrough in 1987 with the Montreal Protocol on ozone-depleting substances, which allows member states to impose general trade sanctions against other member states that violate their obligations under the Protocol. Ten years later, when states were negotiating the Kyoto Protocol on climate change, however, the Canadian government and many other governments had reversed their position and actively opposed the inclusion of trade sanctions in the agreement as an enforcement tool. Few governments will now openly support the use of trade sanctions in multilateral environmental agreements and one hears little of this idea nowadays. The conclusion of the WTO agreements in 1994 led many governments, which are unwilling to take the risk of adverse trade rulings, to fear that the use of trade sanctions to enforce multilateral environmental agreements may violate their trade-law commitments. In this way international trade rules have taken primacy over, and inhibit more robust action to enforce, international rules in other areas such as environmental protection. These other areas are thus denied the legal and political “teeth” reserved for the rules of economic globalization.

### **Enforcement**

As with other trade treaties, NAFTA has no enforcement capacity other than the parties’ sense of their long-term self-interest. If one member state does not comply with the judgments of disputes that it loses, it cannot expect its partners to do the same. Under the extreme asymmetry prevailing in North America, the hegemon is largely unconstrained by such prudential considerations. The U.S. remains able to flout the trade agreements’ rules as interpreted by its judicial processes, as Washington has repeatedly done with both Canada and Mexico.

Like NAFTA, the WTO has no police service capable of implementing its judicial decisions. But unlike NAFTA, the enforcement provisions supporting its dispute settlement rulings are significantly stronger.<sup>5</sup> Once the final decision on a trade dispute has been handed down in which a signatory state’s laws or regulations have been judged in violation of a WTO norm, the offending provisions are supposed to be changed or compensation paid. A non-compliant state is much more likely to be brought to “justice” by a litigant state because failure to abide by a WTO dispute ruling gives the winning plaintiff the right to impose retaliatory trade sanctions against the disobedient defendant. This retaliation can block any exports of the guilty state. The amount of the damage inflicted by the retaliation can equal the harm caused to the complainant by the violation. This self-enforcement system works better in the WTO where there is greater symmetry among the major powers, confirming that the global economic regime has a far more substantial supraconstitutionality for its members in its judicial dimension than does the regional NAFTA (Howse 2000).

Although most international organizations are shaped largely by the self-interests of their most powerful member states (Keohane, 1984: 63), many, like the United Nations Environment Programme (UNEP) or ILO, lack the mandate or capability to enforce respect for the commitments made by their members. As a result, Ottawa has observed or ignored their rules or rulings as it saw fit. Although Canadians assume that their governments generally elect to comply with the international obligations they undertake by taking steps to implement them domestically, the Department of Justice has no systematic documentation to validate this supposition.

In many cases, Canadian governments routinely accept and implement the decisions of these international institutions as beneficial for Canadian interests. This is especially true in highly technical areas where international coordination is desired by member states, like civil aviation (the International Civil Aviation Organization), maritime commerce (the International Maritime Organization), telecommunications (The International Telecommunications Union), and health (World Health Organization).

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7. Ostry (2001, 6) has called the DSU “the strongest dispute settlement mechanism in the history of international law.”

That the multilateral institutions of global governance are currently facing a significant set of challenges, or even a crisis, has by now become a relatively uncontroversial point of departure.... This crisis of legitimacy in many accounts centres upon the processes of decision making in multilateral institutions, which remain largely state-driven and shielded from direct input from or accountability to citizens and nongovernmental organizations. The crisis label also refers to widespread concern about the lack of substantive fairness of the policies adopted by these multilateral institutions, which are seen as contributing to the exacerbation of inequalities in the world economy between the richer countries of the North and the poorer countries of the South. While most agree that a crisis is being faced, and even that the crisis involves questions of the perceived legitimacy and accountability on the part of the multilateral economic institutions, there is no consensus on how to respond. (Buchanan & Rose, 2002: 1)

In other cases, Canadian governments are finding their margin of manoeuvre unwelcomely reduced by international rules and decisions to which they object. Canada is moving into a space where it can no longer ignore international rules that it does not like. Whether it is the Kyoto Protocol to combat global warming, ILO conventions, basic UN human rights instruments, pronouncements of the UN Commission on Human Rights, or decisions of the new International Tribunal for the Law of the Sea or International Criminal Court, we must ask whether Canada can (both in practice and as an ethical matter) disregard its obligations even though

they may have weak enforcement mechanisms. This is a particularly significant issue when the particular international rules with which Canadian governments disagree are not an explicit part of the original bargain to which Canadian diplomats agreed, but are made or interpreted by international bodies (such as tribunals, commissions, or meetings of the parties) established by the original agreement. Usually states negotiate the right to opt out of such decisions (as, for instance, in most international fisheries and environmental agreements), but this is not the case with most modern international trade agreements and in some other areas.

The global constitution has an uneven incidence, depending on the size of the state. The weaker it is, the more difficult it is to resist. For smaller countries on the periphery of the world power system, financial organizations -- notably the International Monetary Fund (IMF) and the World Bank -- have unapologetically and even dictatorially impinged directly on the internal policies of their weaker members, insisting that they radically restructure their governments. Having well governed financial institutions -- and long experience in floating its currency -- Canada has not been subject to the humiliation of these disciplines.

It has, however, been subject to a process of external oversight that keeps the Canadian state's behaviour under transnational scrutiny. The United States Trade Representative's Office keeps federal and provincial policies under regular review, reporting annually to Congress about Canadian compliance with the obligations it assumed in NAFTA and the WTO. The WTO's Trade Policy Review Mechanism reviews Canada's policies every two years. This surveillance mechanism presses governments to ever greater transparency before the epistemic community of trade liberalizers. At these encounters Canada's trading partners cannot force it to make changes, but they ask about governmental measures that interfere with their investments or trade and so put Canada's governing elite on the defensive if it is caught practising discrimination.

### **What to Do?**

International negotiations generate compromises between countries with different interests and different clout. As a result, the agreements to which Canada is a party often contain provisions inconsistent with its existing policies. Given that most such agreements have no enforcement mechanisms, Canada's record of compliance has been uneven. But more and more, these international organizations and regimes do exercise a constraint over Canadian governments' regulatory choices. This may be for the better, if it results in more effective protection of the environment or human rights. In other cases, it may be highly problematic, for example if it restricts Canadian governments from safeguarding Canadians' health and safety as it sees fit, or respecting the democratically expressed values of the Canadian public.

As with domestic constitutional borders, the supra constitution is not a fixed entity but one that is constantly evolving as new rules are negotiated and judicial decisions are made by international trade and investment dispute settlement or arbitration. The changeability of the country's external constitution raises a question

about whether Canada should attempt to change it as a result of deliberate, proactive intervention. In other words, to the extent that Canada is an agent of globalization, what should be its program of action? The answer to this question depends both on assessing of the global constitution's strengths and weaknesses and on defining Canada's national interest. In our own view, the global order's strengths are excessively powerful norms and institutions that serve the interests of the major powers and their transnational corporations. They may even perpetuate the vicious circles that keep the poor in poverty by denying them such public policy tools as tariffs and industrial subsidies that big powers used in the 19<sup>th</sup> and 20<sup>th</sup> centuries to industrialize their own economies. The corollary weakness is to be found in the other segments and institutions of the global constitution, principally the IOs defending human, labour, and ecological rights.

**Recommendation:** Twenty years ago a similar study to this one could well have recommended that the government of Canada establish a full inventory of the country's international obligations to be used as a necessary input by its own departments as they formulate policy, by judges working in the judicial system, and for the information of the general public. Now that NAFTA and the WTO have given international economic agreements supraconstitutional weight, what is even more urgently needed is a constantly updated documentation of what exactly comprises Canada's external constitution. While the implications of many of its norms, rights, rules, and institutions remain unclear, public officials as well as the general public, business people as well as civil society organizations need to have just as authoritative information about their external legal order as they do about the Canada Constitution Act, 1982. While most citizens will not know or care about most of their domestic constitution, accurate information becomes critical to them when an issue becomes significant – rights for same-sex couples, for instance. Similarly, vast areas of the country's external obligations are of little interest either to officials or citizens, who need nevertheless to have access to authoritative information when the need arises.

Following this analysis, we believe that Canada should strive to rebalance the global constitution in order to bolster weak rights by giving them equivalent weight to its already robust economic rights. This view assumes that it is in Canada's long-term national interest to achieve global cultural security for all – that is, global justice, redistribution of income, eradication of poverty, environmental sustainability, even if pursuing these goals is seen to contravene the short-term interests of Canadian corporations abroad and even the wealth of Canadian citizens at home. There is, of course, no objective definition of an interest. What Ottawa decides is the "national interest" in a particular international negotiation can be highly personal (the views of a particular minister), actually partisan (what will serve the election needs of the governing party), frankly popular (reflecting publicly expressed Canadian values), or narrowly sectoral (the interests of a powerful industrial grouping). Interests clash: when it is largely influenced by the neoconservative agenda of big business, Canadian foreign policy cannot reflect the far more liberal attitudes of ordinary Canadians, let alone the diversity of their society.

Ottawa participates in multilateral deliberations held by international institutions such as the UN, NATO, and the Pan-American Health Organization, along with hundreds of other institutions. These meetings cover topics ranging from economic development to investment rules to standards for health products and security measures. Along with Foreign Affairs Canada and International Trade Canada, a number of federal departments may be involved in negotiations and agreements. Canadian diplomats have customarily played important, if secondary roles in multilateral organizations and regimes. Signing international agreements and participating in international organizations increases its capacity abroad, because these activities give the federal government forums where it can defend its interests and have some influence over the policies of its counterparts. Decades of underfunding for Foreign Affairs have left Canada unable to play a significant role in most of these organizations, however. Even when Canada does manage to allocate personnel to take a significant part in treaty negotiation or an international organization's decision making, the public rarely learns about its representatives' day-to-day contributions.

A basic issue remains. Will the government of Canada pursue a rigorous strategy devoted to correcting the injustice of the global constitution or will it continue inconsistently to preach virtue while defending its corporate interests abroad?

Recognizing its own legitimacy problem, Ottawa has already taken steps to improve the transparency of its negotiating positions by making them available on the Internet. Its efforts to engage stakeholders in

consultations are worthy, but they have not eased the suspicion that the demands of corporate stakeholders are heeded, while citizen stakeholders are placated or co-opted.

Because of their continuing significance in the development of policies at the international level, there is a need to bolster the legitimacy of all international organizations by achieving greater efficacy and better accountability. Reform of the United Nations is particularly urgent since it remains the world's most important global institution. The challenge to address ways to enhance the legitimacy of the major international forums is currently being taken up by Foreign Affairs Canada.

#### **IV. The Globalized State**

One of the most widely noted aspects of contemporary globalization is the crisis that has gripped and transformed the state around the world. We use the term "the globalized state" to describe this transformation for two reasons. First, the crisis of the state is global in its spatial extent: it is informed by an ideological consensus that spans the globe, it affects states everywhere, from the welfare states of the advanced liberal democracies to the formerly socialist states of Eastern Europe and the developmentalist states of the former "Third World", and it is a reaction, in part, to worldwide changes in the conditions in which states operate (e.g. the globalization of financial flows, production networks and ecological degradation). Second, the resulting transformation of the state typically takes the form of the globalization of particular forms of state governance, that is, the exportation of certain governance structures, laws, norms, and practices from the most advanced states and the localization of globalized structures, ideas and practices in the legal and political systems of other states. Canada is both an importer and exporter in this process.

The story of the global crisis and transformation of the state is familiar. In the advanced industrialized democracies, the dismantling and "reinvention" of the Keynesian welfare state began with neoconservative offensives in the late 1970s and was continued and in some respects accelerated through the 1990s and beyond in the name of a reinvented social-democratic "Third Way". During this same period, the developmentalist states of the global South entered a period of profound crisis and transformation under the pressure of unsustainable foreign debt, unprecedented public health crises, IMF structural adjustment policies, World Bank "good governance" prescriptions, WTO trade disciplines, and demands from "Northern" governments and transnational corporations for liberalized foreign investment regimes. Finally, the socialist states of the former Soviet bloc collapsed at the end of the 1980s under a combination of democratic upswellings and the unsustainable weight of their own centrally planned economies. This implosion created a political opening into which rushed, with varying degrees of success, domestic and foreign (often American) reformers eager to install a particular brand of liberal democracy emphasizing private property, free enterprise, trade liberalization, foreign investment, and a scaled-back state.

We wish to focus on four points that arise from these familiar developments:

- First, all these disparate developments have been informed by a single, broad ideological consensus about the appropriate form and role of the state, one that Canadian governments of all stripes have embraced to varying degrees in the last twenty years.
- Second, the transformation of the state that has been effected in the name of this ideology is paradoxical, combining a "retreat" of the state in some areas (eg., environmental regulation, social services) with its muscular reassertion in others (eg., immigration, security and terrorism), especially among the advanced industrialized democracies. The lesson here is that the state has been one of the principal authors of its own purported demise and retains considerable, yet often unacknowledged, power to reestablish its own role in governance.
- Following from this, our third point is that the Canadian state, with the support of Canadian citizens, should exercise this power more confidently than it has in the recent past and it should do so in the service of hope rather than fear, human rights and freedoms rather than the suppression of dissent and difference, and cosmopolitan ideals rather than parochial self-interest.
- Finally, Canadian citizens and governments should look carefully at the myriad forms of private and hybrid public-private authority that operate "beyond the state." They should recognize the critical role many of these arrangements play in governance, demand that they meet minimum criteria for

legitimacy as governance institutions and nurture those that advance social emancipation while striving to transform or discredit those that do not.

## 1. A Global Ideology

The crisis and reconstruction of the state in the advanced liberal democracies, the former Soviet bloc, and the developing world have been informed by a remarkably similar set of diagnoses and prescriptions. While characterized by local variation and internal heterogeneity, this set of ideas supplies the ideological foundations for dominant forms of globalization. This ideology is local in its origins – having originated in neoclassical economics and neoconservative political movements in the US and Western Europe – but global in its scope and ambitions. The main features of this “global hegemonic consensus,” as Santos calls it, include a broad consensus about the economy, the state, liberal democracy, and the rule of law (Santos, 2002: 314-17).

The *economic consensus* holds essentially that economies should be, and increasingly are, global, involving global production chains and global markets for goods, services, and capital; and that private property, individualism, free markets, trade liberalization, export orientation, and international competitiveness are the keys to the success of this global economy (ibid.: 314).

The *state consensus* goes hand in hand with the economic consensus holding that a good state is a weak state, or at any rate a substantially smaller and less assertive state than what people in the advanced industrialized countries have been used to. According to this consensus, the state is fundamentally antithetical to the flourishing of both markets and civil society (ibid.: 315). This idea is as old as classical liberalism, but has enjoyed a vigorous reawakening in the last 25 years. It is reflected in numerous propositions that form the backbone of the state consensus, including:

- The welfare state, with its massive apparatus of social programs and regulatory laws, is fast approaching or has exceeded the cognitive, economic, technical, and political limits of its ability to effect social change and is at risk of “break[ing] down under its own weight” (Orts 1995: 1241);
- Modern state regulation and public service provision are excessively rigid, cumbersome, complex, costly, inefficient, ineffective, anti-innovative, and adversarial (eg. Bardach & Kagan, 1982);
- Contemporary global transformations – from global markets to global environmental change – increasingly escape or overwhelm the regulatory capacity of territorially bounded nation states (e.g. Cohen, 2004; cf. Strange 1996);
- Wasteful and inefficient public spending should be reined in, tax burdens reduced, public budgets balanced and deficits avoided;
- Government decision-making should be more transparent and accountable to citizens;
- State regulation of business and individuals should be eased back to unleash the creative potential of private enterprise, respect the autonomy of private decision-making, enlist private initiative in the service of public goals, make better use of market incentives, and eliminate unnecessary bureaucratic “red tape”; and what remains should be “smarter,” more responsive, more flexible, more cooperative, more narrowly focused on preventing market failures and justified by cost-benefit or regulatory impact analysis (eg. McConkey, 2003);
- While business may be the cause of some social problems, it is also an indispensable part of their solution. Indeed, corporate environmental and social responsibility is not only desirable but profitable. Partnership with business may be more important than the independence of regulatory agencies, since business is in a unique position to generate the knowledge and innovation that will contribute to a sustainable future, and states simply lack the resources and competence to dictate in detail how economic activity ought to be conducted for the social good (e.g. Schmidheiny 1992; Salter & Salter 1997; Elkington 1998);
- Individual liberty, autonomy and choice should be the foundational principles of the state, and individuals, rather than the state, should increasingly take responsibility for their own choices and welfare;
- State-owned enterprises should be privatized, state monopolies broken up, public delivery of goods and services decoupled from policy-making and contracted out, access to resources regulated primarily via private property rights, and the role of the state in these spheres restricted to the creation and oversight of markets (eg. O’Connor & Ilcan, 2005);

- Authority should be devolved to lower levels of government, and decisions should where practicable be made by the level of government closest to the people; and
- Public management should emulate private sector management ideas and practices, including efficiency, cost-effectiveness, quality assurance, “stakeholder” management, and an orientation toward “customer service”, “results” and performance (eg. Salskov-Iversen et al., 2000: 184).

All of these propositions reflect a renaissance of the old idea that rulers and governmental institutions (such as states and state law) have inherently limited capacity to produce social change by intervening directly in social systems and ultimately risk paralysis, collapse, or revolution if they overstep these limitations too far (e.g. Stone 1975; Nonet & Selznick, 1978; Teubner 1983, 1993; Yeager 1991; Ayres & Braithwaite 1992; Gunningham & Grabosky 1998). This proposition has been at the heart of Western political and legal philosophy since Plato (Plato, 1952), and few would deny its basic validity. What is significant is not the insight itself, which is far from novel, but the efficacy with which it has been employed to buttress a particular agenda to remake states as we have known them in the latter part of the 20<sup>th</sup> century.

The *liberal-democratic consensus* holds that representative democracy is the only viable and acceptable form of government and that its global spread should be hastened by all means including diplomatic pressure, economic coercion, and (in appropriate cases) military force. While liberal democracy is widely understood to require, at a minimum, free and fair elections, universal suffrage, freedom of conscience, expression, and association, and the right to oppose the government and stand for election, these are often treated as less urgent than the economic and “weak state” agendas (Santos, 2002: 315-16). These democratic ideals are typically assumed to have been achieved already in the advanced liberal democracies, supporting a triumphalist mission to export Western democratic models globally without necessarily subjecting them to a critical examination at home.

The *rule of law consensus* holds that a predictable and stable framework of official law, enforced impartially and effectively by an independent judiciary, is critical to economic development, trade, investment, prosperity, and social welfare. Government corruption must be rooted out, property rights allocated clearly and protected – especially of foreign investors and creators of intellectual property,, contracts respected, regulations applied evenly, and offenders punished consistently (ibid.: 316-17). Again, these priorities are understood to have been more or less satisfied in the advanced liberal democracies, leaving them to be pursued primarily in developing countries, (former) socialist states, and international relations, where respect for the rule of law is perceived as substantially lacking.

The main impetus behind this global ideological consensus was supplied by neoconservative political movements in the US and Western Europe in the 1970s, which were in turn influenced strongly by neoclassical economics, the revival of classical liberal political theory in reaction to fascism and communism, and the views and interests of domestic and transnational business elites. The “regulatory reform” movement, one of the pillars of the contemporary transformation of the state, was launched originally in the US as an attack on the excesses of the bureaucratic state in the name of individual liberty and free market capitalism (e.g. Bardach & Kagan 1982). The ideological consensus had early political successes in the Thatcher and Reagan administrations and went on to prominence in domestic politics in many countries. But it found its most sympathetic audience and keenest promoters in the World Bank, IMF, and OECD. Insulated somewhat from the constraints of domestic political bargaining and nurtured in an institutional culture of trade, finance and economic growth, the ideology flourished and reached its strongest expression in these international financial institutions, most prominently in the form of the so-called Washington Consensus. To a significant degree the ideology’s adherents were able to secure in these institutions the neoconservative agenda they had been unable to and still completely at the domestic level in many countries. The result was that some of the strongest ideological support for the contemporary refashioning of the state came from the IMF and World Bank, in the case of developing states (structural adjustment, “good governance,” etc.), and the OECD, in the case of developed states (the aborted Multilateral Agreement on Investment, regulatory reform – e.g. OECD 1995).

It would be a mistake, however, to identify this ideological consensus solely with the neoconservative right. By the 1990s, the consensus had permeated all but the margins of the contemporary political spectrum,

from the conservative or liberal-democratic right to the social-democratic left.<sup>9</sup> Many contemporary exponents of the ideological consensus characterize their position as a response to the excesses of neoconservatism (e.g. Ayres & Braithwaite 1992; Gunningham & Grabosky 1998). Social democrats adapted and embraced core elements of the earlier neoconservative ideology into a New Left ideology as they sought to recoup their political losses of the 1970s and 80s. Partly as a result, the radical early efforts to dismantle the Keynesian welfare state have been displaced for the most part by more subtle agendas to “reinvent” the state. The “Third Way,” as it is called by its proponents (e.g. Giddens 2000), attempts to harness to the social Democratic cause globalization, regulatory reform, and many of the ideas and practices associated with 1980s neoconservative politics. It calls on the state to do “more steering, less rowing”; govern not less but “smarter”; set overall directions, goals, and frameworks yet leave details of implementation to be sorted out through co-regulation, negotiated agreements, if and consumer activism; adopt private sector managerial methods and entrepreneurial ethics; use markets and competition in the provision of public services; be transparent and accountable; and employ a sophisticated mix of regulatory tools that enlist, to the greatest extent possible, non-state actors and resources in the task of regulation (e.g. Ayres & Braithwaite 1992; Osborne & Gaebler 1992; Gore 1993; US White House 1995; Gunningham & Grabosky 1998; Giddens 2000). What makes this new breed of social democracy particularly dangerous is that while the us-against-them mentality of intensified social exclusion and increased disparities between “haves” and “have-nots” is relatively explicit in the overtly neoconservative versions of the ideological consensus, the social-democratic variant disguises its exclusionary and regressive tendencies in the language of humanitarianism and progress.

The contemporary ideological consensus, in short, accommodates considerable diversity. It is adaptable to a variety of political conditions and its political affiliation is complicated (e.g. Jordana & Levi-Faur 2004). It makes political bedfellows of a Labour Prime Minister (Tony Blair) and a conservative Republican President (George W. Bush). It allows substantial local variation, from the “iron cage” neoconservatism experienced by many Latin American countries to the more flexible “rubber cage” experienced by some Asian countries (Santos, 2002: 314-15). In Canada, it has been embraced by governments of all political stripes. It had its first substantial national manifestation in the Mulroney conservative government of the 1980s, found if anything more intense incarnation in the Liberal federal governments of the 1990s and early 2000s, and had perhaps its most extreme expression in the radically conservative governments of Mike Harris in Ontario and Ralph Klein in Alberta. Even the leftist New Democratic government of Bob Rae in Ontario embraced important elements of the consensus, including fiscal restraint, government downsizing, and some of the business-inspired prescriptions of the New Public Management. Despite their substantial differences, then, political parties, governments and international institutions around the world have converged upon a single broad ideological consensus about the economy, the state, democracy, and the rule of law.

## 2. The Paradoxes of the Globalized State

The dominant ideological consensus described in the previous section contains within itself a paradox that is reflected in the contemporary state’s actual patterns of transformation. The paradox is that the weakened state demanded by the ideology in fact needs to be quite strong to produce and maintain its own weakness (Santos, 2002: 315). States have played central roles in giving up their monopoly over governance and regulating the “governance markets” that have emerged in their stead, with the paradoxical result that the rise of neoconservatism, with its deregulatory rhetoric, has in practice been accompanied by increases, sometimes massive, in the number of regulatory agencies, the volume of official regulation and the domains of activity subject to official regulation (Jordana & Levi-Faur 2004). A second aspect of the paradox is that, while states have retreated from or been “hollowed out” in certain policy arenas such as social welfare, environment, and consumer protection, they appear fully capable of asserting themselves muscularly in others, such as security, counter-terrorism, crime, immigration, and border control. These paradoxes have important implications for the legitimacy of contemporary forms of state law and governance.

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<sup>9</sup> In many observers’ eyes, what happened was not that the ideology spread across the entire political spectrum but that the left shifted substantially to the right to accommodate the ideological consensus.

**“The state is dead...”?**

Without subscribing to sensational reports of the demise of the state in the face of globalization, it is possible to discern many ways in which the state has retreated from its role in society and market. We focus here on the retreat and reconfiguration of the Canadian state.

There are many signs of the shrinkage or hollowing-out of the Canadian state over the last twenty years. We have seen substantial downsizing of government budgets and staff, retrenchment of social programs, devolution of authority onto lower-level governments and independent or private organizations, and relaxation of social, environmental, and labour-market regulation. Starting in the mid 1980s but accelerating dramatically after the election of the Liberal government in 1993, the federal government aggressively pursued balanced budgets and even budget surpluses, overwhelmingly by reducing public spending even though this had in fact only been a minor factor in the budget deficits that had built up since the mid 1970s (McBride, 2001: 83). Over the 1990s, federal and provincial program expenditures shrank to their lowest levels in decades. These program cuts were accompanied by massive staff cuts. To take environmental protection as an example, the federal government cut Environment Canada’s budget by almost one third in just three years, and its staff by one quarter.<sup>10</sup> The Ontario Conservatives cut Ministry of Environment staff by more than 40% between 1994 and 1999 and cut the Ministry’s budget in half, in constant dollars. The 2000 budget was actually below the 1971 budget when the Ministry was created by an earlier conservative government (Clarkson, 2002: 342).

The results of these federal and provincial government-wide cuts of the 1990s included gutting or contracting out of research, testing, monitoring, inspection, and enforcement capacity in many important areas of regulation. The staff that remained were often stretched beyond their limits or given explicit or implicit messages to relax their oversight of regulated entities. Private service providers were often inadequately monitored. As the Walkerton tragedy in Ontario demonstrated, conscious decisions by government leaders to cut regulatory capacity, privatize certain government functions without adequate oversight, and relax enforcement of existing laws, led to injury, illness, or death for thousands of Canadians (eg. O’Connor, \_\_\_\_\_ [Cite Walkerton Report]).

Devolution of governmental authority has also occurred on a substantial scale. The federal government devolved authority to the provinces and territories in various ways, including by signing federal-provincial-territorial agreements on environmental harmonization, delegating enforcement of various federal laws to provincial authorities, reducing the strings attached to federal transfer payments, granting the territories increased autonomy, and retreating from numerous social and economic arenas in which it had previously intervened extensively. Provincial governments in turn devolved responsibility for the provision of many public services onto municipalities. As many provincial, territorial, and municipal governments discovered, however, decentralization of authority was frequently accompanied by funding cuts, so that lower levels of government were saddled with substantially increased responsibility at the same time as the resources available to them for the discharge of those responsibilities were shrinking.

We have also witnessed a substantial delegation of authority from governments to independent agencies and private authorities as the Canadian state has “hollowed” itself out. Many public enterprises such as Crown corporations and public utilities have been privatized; delivery of many public services, from garbage collection to employment insurance, has been contracted out to private firms, and governments have delegated policy and regulatory functions to independent agencies (such as the Technical Standards and Safety Board in Ontario) whose transparency, public accountability, and freedom from industry influence may be doubtful.

Along with downsizing, devolution, and privatization there has been some deregulation – ie., rolling back of existing regulation, although, as we will argue shortly, the transformation of the state also involves an expansion of regulation in some areas. Openly neoconservative governments such as those of Mulroney and Harris came to power on promises to “cut red tape,” foster a more business- and investment-friendly

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<sup>10</sup> The budget fell from \$737 million in 1995-6 to \$503 million in 1997-8, and 1400 of 5700 staff were let go. Clarkson, 2002: 340.

regulatory climate and pursue more cooperative, voluntary, and flexible relations with regulated industries. And they did just that, with varying degrees of alacrity. Environmental, labour, and social groups of all kinds have documented the dismantling of federal and provincial regulation in fields as diverse as environmental protection, workplace safety, land use planning, and rental housing (eg [cite CELA and CIELAP reports]). Liberal and New Democratic governments have also relaxed or eliminated many social, environmental, and labour regulations. For British Columbia's current Liberal government, for instance, deregulation is an end in itself. The government, through its unabashedly-entitled "Deregulation Initiative," surpassed its own campaign promise of reducing the volume of provincial regulations by one third over three years and boasts on its web site that "ministries continued to look for ways to modernize the regulatory system and make gains in regulatory reduction. From June to December 2004 a further 1,112 regulatory requirements were eliminated" (British Columbia, 2005). A more subtle example of deregulation is the "one-window" approach to business regulation embraced by governments of all stripes in this period. The effect of this approach has often been that a ministry whose main mandate is to serve and promote the regulated business takes the lead on issuing permits and approvals while ministries tasked with protecting public interests in health, safety, or environmental sustainability are relegated to secondary roles.

Among the most remarkable developments in (de)regulation has been governments' willingness to accept or impose legal restrictions on their own ability to regulate. We have already discussed the supranational regulation of national regulation via international trade regimes. Canadian governments have also tied their own regulatory hands domestically by implementing various restrictions on the introduction of new regulations, from regulatory impact analysis procedures, to policies explicitly favouring voluntary or co-operative initiatives over regulation, to increasing sympathy for arguments that regulation constitutes a "taking" of private property (see, for example, the new federal Species At Risk Act's provision for compensating landowners whose property is subject to a critical habitat protection order; see Wood, 2001).

### **"...Long live the state"?**

So the Canadian welfare state has retreated on several fronts. But this retreat has been accompanied, paradoxically, by advances. Without recapitulating the entire deregulation-reregulation debate (on which see, e.g., Majone 1990; Ayres & Braithwaite 1992), this apparent paradox can be explained as a product of two complementary trends. First, as governments retreated from public ownership and direct service provision, they turned their attention to regulating the markets they had thereby created. Second, despite much neoconservative or neoconservative rhetoric to the contrary, state intervention did not disappear as a legitimate political tool in this period but was redirected toward other targets. While intervention in labour markets and business dealings retreated, a more conservative agenda of state intervention for law and order, national security, and border protection advanced, fuelled by a combination of anti-immigration sentiment and fear of global terrorism. Let us consider these two trends in turn.

First, the contemporary crisis and transformation of the state is best understood not as a withering of the state but as a global shift from the "positive" to the "regulatory" and most recently the "post-regulatory" state (e.g. Black \_\_\_\_\_, Majone 1997, Scott \_\_\_\_\_, 2004). The positive state owns resources, provides goods and services directly, employs a tax-and-spend model of public policy and maintains a unified civil service, large nationalized enterprises, and expansive bureaucracies. The regulatory state places more emphasis on the use of authority, rules, and standards, partially displacing this earlier emphasis on public ownership, subsidies, and service provision (Jordana & Levi-Faur 2004). The regulatory state is characterized by privatization of national enterprises, welfare functions and service delivery and a rule-making regime featuring flexible, highly specialised, and relatively autonomous agencies. The regulatory state shifts from direct service provision to arms-length regulation of the provision of services by others. In some cases, this takes the form of conventional command regulation: hierarchical regulation of firms via licensing, standards, mandatory disclosure rules, etc. In other cases states have shifted from regulating individual firms to regulating markets (Salter & Salter 1997). The shift to the regulatory state also involves a new emphasis on "meta-regulation," i.e. the regulation of regulation (Doern et al. 1999).<sup>11</sup> Meta-regulation takes such forms as state regulation of industry self-regulation (Jordana & Levi-Faur 2004) and

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<sup>11</sup> See also Dean 1999: 6, 176-177, 193-197, discussing this trend in terms of the "government of government".

private or quasi-private actors' regulation of state activity (e.g. Scott 2002). In addition, as we have already indicated, it may take the form of state regulation of its own regulatory activity (eg. cost-benefit analysis, regulatory impact analysis, auditors-general, "Charter-proofing" of proposed legislation) (Doern et al. 1999), and international regulation of national regulation (e.g. McConkey 2003).

A further shift is arguably underway from the regulatory to the "post-regulatory" state (Scott 2004, Black \_\_\_\_). The post-regulatory state is characterized by greater emphasis on information disclosure and less on detailed performance standards; greater use of flexible or creative law enforcement techniques; delegation of rule-making and rule-enforcing authority to industry or third parties (e.g. industry self-regulation, partial industry regulation, industry-government co-regulation, third-party certification; citizen enforcement); efforts to facilitate more effective market regulation of behaviour including increased reliance on economic instruments (taxes, economic incentives, tradable permits); increased reliance on information, the public purse (eg. subsidies, procurement, contracting) and capacity-building (eg. supporting community groups) instead of formal legal authority; and a focus on new targets of regulation including "gatekeepers" (financial institutions, third-party-certification bodies), and consumers.

Many of these changes were undoubtedly positive from the point of view of democratic legitimacy and public health and welfare. Auditors general, for example, have proven their worth in holding governments accountable, not least in the case of the notorious sponsorship program scandal currently embroiling the federal government, although in some issue areas their ability to shame governments into behavioural change appears minimal (eg. in the case of environmental commissioners). Innovative approaches to regulation have on occasion increased the protection of people and the environment, but they have just as often compromised them. A detailed assessment of the legitimacy and effects of all these changes is beyond the scope of this paper. The main point is that the purported retreat of the state from direct social intervention has in many cases resulted in an expansion in the number of regulatory agencies, the volume of official regulation and the domains of activity subject to official regulation.

A second, complementary explanation for the apparent paradox of the simultaneous weakening and strengthening of the state is a shift in the targets of state intervention. Crime, security, immigration, refugees and terrorism: these have long been priorities for government action. But they have acquired new significance in the last ten or fifteen years as borders fade, distances shrink, and the world becomes a scarier place for people accustomed to safety and security. Not since the early part of the twentieth century, with its concerns about the Yellow Peril and anarchist plots, have we seen such a strong or intertwined emphasis on crime fighting, immigration control, border protection, terrorism, and security in North American public policy. Of course this is not without reason, as the recent terrorist attacks in the US, Madrid, Bali, and elsewhere demonstrated. But a legitimate concern with vulnerability to terrorist attack has been exploited to advance a "lifeboat ethic" of immigration and refugee controls and anti-terror security measures. The newly invigorated state interventions pursued in the name of this agenda are problematic for many reasons (e.g. Daniels, Macklem & Roach, 2001). They heighten social exclusion both globally and domestically by targeting or disproportionately affecting Muslims, Arabs, people who appear Middle Eastern, new immigrants, refugee claimants, especially poor members of all these groups, and by seeking to erect a national or continental "fortress" against external incursions. They limit civil rights and liberties, not only of foreigners in Canada, but Canadian citizens. Detention of terror suspects in Canada without charge or trial on secret evidence; detention of Canadian citizens by American military authorities in Guantanamo Bay, Cuba; and rendition of Canadian citizens to third countries where they face torture and other human rights abuses: these are only the most questionable of many dubious legal and political practices. These governance activities, taken together, legitimize and foster a culture of government secrecy rather than transparency and accountability. And there is little evidence that they actually protect us from terrorist attack. To make things worse, this terrorism/security agenda reinforces some of the more regressive elements in the Canadian political scene, including anti-immigrant and hard-line law-and-order sentiments. Both of these tend to be socially exclusionary, not just because they are often inspired by racism and xenophobia but also because their effects tend to be felt disproportionately by economically and socially marginalized populations such as aboriginal peoples, the chronically un- or under-employed, immigrants and communities of colour.

These examples highlight a disturbing contradiction in the governance of globalization. The globalization of crime, terror, and insecurity have led Canada, the US, and other governments to reassert their coercive

power and tighten border controls against certain kinds of transnational movements (eg. immigration, refugees, organized crime, terrorism, ballistic missile attacks), just as economic globalization has led them to deemphasize their coercive capacities and dismantle border controls for other kinds of transnational movements (eg. capital, goods, services, tourists, and information). The tension between these two responses has been most evident in the media and political attention given to long waits for Canadian truckers at US border crossings since September 11, 2001, but the fact that disruptions to transborder trade have received so much attention in the post-9/11 environment emphasizes a more fundamental contradiction in contemporary governance responses to globalization. Governments actively encourage the global movement of capital, goods, and services while actively discouraging the global movement of people. With the exception of a tiny, overwhelmingly Northern elite of globally mobile executives, entrepreneurs, professionals, tourists, high-wage employees, and aid workers, the obstacles to human migration have not fallen away as a result of globalization even if there are a few counterexamples (eg. labour mobility in the European Union). Refugees, persons displaced by conflict, and other members of the poorest, most desparate, most vulnerable, most persecuted segments of human society, those in most need of a new start in a new place, continue to face massive obstacles to movement and great personal peril whether they move or not. The rich nations of the world have said yes to global capital flows, but no to human flows. The reason is simple: the emancipatory potential of such a change for the global majority is so great, its destabilizing effect on accustomed privileges of the global minority so serious, that its possibility cannot be seriously entertained.

**Recommendation:** it is beyond the scope of this paper to make recommendations on the many dimensions of governance in the field of security, immigration, refugees, crime, and terror, beyond urging Canadians and Canadian governments to question seriously whether the coercive state powers, armed interventions and restrictions on human rights, freedoms and movements invoked to manage these phenomena, both in Canada and abroad, in fact enhance security and well-being and if so, whose security and well-being, and at whose expense.

There are many other examples of contradiction, ambiguity, and paradox in the contemporary transformation of the Canadian state. In the following pages we single out four: the longstanding international campaign for “good governance” in developing countries, of which Canada has been a major supporter; the federal government’s current “Smart Regulation” initiative; the rise of transgovernmental networks; and the multifarious processes of globalization of state law, in which Canada is both an importer and exporter.

### *Good Governance*

Since the end of the Cold War, the World Bank, the IMF, the United States, other donor governments, and some developing country elites have aggressively promoted “good governance” as a program for the reform of developing country governments (e.g. World Bank 1992). The “good governance” campaign epitomizes the hyper-liberal agenda to dismantle developmentalist states and make them safe for transnational capital, even while it seeks to strengthen these states in certain respects. It also represents an important form of globalization of governance, insofar as it involves the global exportation (with strong Canadian backing) of a specific, American- and OECD-designed recipe for governing developing countries.

The good governance campaign has two pillars: on one hand adoption of and respect for the institutions of liberal democracy, individual rights and the rule of law, and on the other hand, efficient and accountable public administration. The first pillar of good governance requires, *inter alia*, free and fair elections (often monitored by international observers), representative democratic institutions, an independent judiciary, a legal framework for impartial and effective enforcement of contracts and property rights without discrimination, respect for law and civil and political rights at all levels of government, and a free press. The second pillar demands eradication of the corruption and inefficiency that are seen as endemic to public administration in the developing world. Good governance calls for an efficient, competent, and professional public service, openness and accountability in the administration of public funds and discharge of public functions, strong and effective anti-corruption rules, and oversight by an independent public auditor responsible to the legislature, all of which is to be achieved partly through “capacity-building” assistance from the rich Northern countries (e.g. Leftwich 1993; Rhodes 1996).

So far this all sounds admirable. But let us continue. The main thrust of the first pillar is to provide the legal and political conditions for the flourishing of capital, especially foreign capital which is viewed as indispensable to national development. The focus is on the stability of business expectations rather than on social emancipation. Such stability is to be guaranteed by political calm, predictable and consistent enforcement of private property and contract rights, and a relatively contented civil society. The second pillar, crucially, calls for public sector efficiency to be achieved by adopting a range of aggressive market-oriented structural adjustments, including competitive provision of public services, the use of markets in the provision of public goods, privatization of public enterprise, fiscal restraint, shrinkage of bloated bureaucratic staffs, decentralization of administration, and greater use of non-governmental institutions and resources to develop and administer public policy (Williams & Young 1994). Paradoxically, the very reforms intended to guarantee the stability of business expectations often result in increased instability and downward mobility for the populace, contributing to economic and social crises even in places, such as Argentina, that had seemed to be emerging as success stories for global hyper-liberalism.

Moreover, good governance is not just about reforming developing country *governments*. It is a project of thorough societal transformation. It is presented as an antidote to the allegedly failed experiment of postcolonial nationalist modernization in the Third World. It encourages submission to the global disciplines of neoconservatism, market liberalization, and privatization urged by international financial institutions, powerful states, banks and transnational corporations. By calling for domestic “capacity building” it encourages a strong state, but only insofar as needed to support an invigorated private marketplace, a healthy work force, and integration into a world economy that many commentators believe systematically reinforces a kind of neocolonial subjugation (e.g. Gathii 1998-99, 2000; Leftwich 1993, 1994). The good governance agenda unwittingly but effectively perpetuates an image of developing country governments as corrupt and predatory and developing country citizens as irrational and dependent, thus providing the self-fulfilling justification for intervention and rescue by a crusading, universalizing neoconservatism that leaves no room for democratic experimentation in pursuit of social solidarity and well-being (Gathii 1998-99, 2000).

Canada has been as vocal a champion of good governance as can be found. The federal government has made it a centrepiece of our foreign policy. It features centrally, for instance, in the New Economic Partnership for African Development, for which Prime Minister Chrétien campaigned vigorously among his G20 colleagues. Canada strongly supports the attachment of good governance conditions to multilateral development loans and bilateral aid. A hard look at the legitimacy of this purportedly constructive agenda is long overdue.

No matter how well-intentioned some of its supporters may be, the legitimacy of the good governance project is compromised at the level of both process and outcomes. Good governance prescriptions emanate mainly from the IMF and World Bank, whose decision-making structures reflect the economic power although the North, not representation by the population in the South; and they are pushed upon recipient countries as take-it-or-leave-it conditions for the receipt of much-needed financial aid. The ordinary people of developing countries have little or no say in the development or application of these prescriptions and often oppose them vocally. These process concerns would perhaps fade if the good governance prescriptions had a palpably beneficial impact on the well-being of the ordinary people of these countries. And there may be some instances where this is true. For example, Canadian legal academics, practitioners and judges have played positive roles in educating legal professionals in post-conflict situations about human rights and helping them to bring war criminals and génocidaires to justice. But there is substantial evidence that the effects of “good governance” prescriptions upon ordinary people are overwhelmingly negative, especially for such already-marginalized segments of the population as women and indigenous peoples (eg. Rittich, \_\_\_\_). To rely on the proposition that the “good governance” project is legitimate because Canada and other donor countries have a right to attach conditions to how their money is spent (it’s our money, after all) is insufficient. Canadians – both citizens and government officials – should ask themselves whether they would consider such prescriptions legitimate if they were developed and imposed on Canada by an external body in which Canadians had little or no voice, and if their actual effect on ordinary Canadians’ quality of life was negative or at best ambivalent. We should consider whether we should support an agenda of governance reform abroad that results in some changes (eg.

entrenchment of private property rights, elimination of basic social safety nets) that run counter to our own constitutional and political values.<sup>12</sup>

**Recommendation:** the government of Canada should reconsider its support for the “good governance” agenda, undertake a careful review of the package of state reforms advocated in its name with a view to isolating those that hinder social emancipation in developing countries from those that facilitate it, and recognize that local experimentation and self-determination, not imposition of a single legal and policy formula, are the keys to lasting economic and social development.

### *Smart Regulation*

The federal government’s “Smart Regulation” initiative is the most recent of many examples of globalized ideas about regulatory reform coming home to roost in Canada. It is significant for this paper for at least two reasons. First, it presents itself as a rational, progressive alternative to the ruthless, unsophisticated excesses of neoconservative assaults on the state and thus poses particularly subtle legitimation challenges. Second, it represents an adaptation to Canadian circumstances of a particular global agenda for regulatory reform and as such is an instantiation of globalized governance.

The federal government established an External Advisory Committee on Smart Regulation (EACSR) in May 2003 to provide external advice to the federal government on how it could redesign its regulatory system to better protect health, safety and environment and promote an innovative, dynamic and globally competitive economy in light of the needs and challenges of the 21<sup>st</sup> century. The EACSR reported in September, 2004. The government quickly endorsed its recommendations and mandated Treasury Board to launch a whole-of-government regulatory reform initiative.<sup>13</sup> According to the EACSR and the federal government, “smart regulation” is about simultaneously protecting health, safety, and environment and enabling trade, investment, innovation, and competitiveness; it is about “taking into account the views of citizens and, at the same time, being attentive to, and balancing, the needs of firms and the challenges they face in an international economy” (EACSR, 2004: 13).

The report and the government’s regulatory reform plan characterize the current framework of federal regulation as unsustainable in the face of global market dynamics, increasingly complex policy issues and rising public expectations for empowerment and accountability. They call for increased cooperation and harmonization among federal, provincial, and territorial governments, including more consistent environmental assessment procedures; more “timely” approval processes for drugs, medical devices and pesticides; increased international regulatory cooperation, including most importantly greater harmonization of regulatory standards and product approvals with the US; greater understanding and support for the needs of large industry, and less burdensome regulation of small business.

This smart regulation agenda will have far reaching implications for both the process and content of regulation in Canada. Its proponents in government, industry, and the EACSR itself claim to be able to effect these transformations while safeguarding the environment and public health, and maintaining a strong and effective system of regulations. On the contrary, the smart regulation initiative as presently conceived prioritizes economic competitiveness and industry promotion at the expense of the government’s responsibility to protect health, safety, and environment. The claim that the Canadian regulatory system is bloated, unsustainable, overlapping, and unduly burdensome is not supported by the evidence (in the area of environmental assessment, for instance, there was little evidence of needless duplication of regulatory requirements even before a 1998 agreement to harmonize federal and provincial

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<sup>12</sup> Canada, for example, supports the imposition of World Bank-prescribed user fees for health care in Tanzania, which reportedly make basic health care inaccessible to a huge segment of the Tanzanian population. Canada’s support for the user fees continued even after the World Bank has begun backing away from blanket demands for user fees in health care and education, and other donor countries, led by Britain, began to pressure the Tanzanian government to drop the fees. As a local Canadian International Development Agency official observed, there is an irony in the fact that the government of Canada supports health care user fees abroad while it resists their introduction in Canada. Nolen, 2005.

<sup>13</sup> See the government’s Smart Regulation website, <http://www.regulation.gc.ca> (visited 12 May 2005).

EA regimes: Hazell, 1999). Moreover, it neglects the more pressing problem that the federal government routinely fails to apply and enforce many existing regulatory requirements. The smart regulation agenda also ignores evidence that traditional command regulation has repeatedly proved more effective than voluntary or non-regulatory approaches at changing behaviour and protecting human and environmental health. And it ignores evidence that international regulatory harmonization tends to exert downward pressure on environmental, health, and safety standards and to hamper transparency, accountability, timeliness, and effectiveness, a subject to which we will return when discussing transgovernmental regulatory cooperation, below. In short, the “smart regulation” initiative is anything but smart, as numerous social and environmental groups have argued (e.g., CELA et al., 2004; WCEL, 2004; CELA, 2004; Vasil, 2005).

To assess the legitimacy of initiatives like Smart Regulation we need, then, to delve behind the rhetoric of innovation, competitiveness, and environmental and consumer protection, to assess the likely effects of the changes actually being proposed or undertaken. This reveals that the Smart Regulation program’s, and provincial initiatives like it, raise serious concerns in terms of outcome legitimacy. Process legitimacy is also a concern. The government’s main vehicle for consultation and policy development on “smart regulation” was the EACSR.<sup>14</sup> Six of the EACSR’s ten members were senior corporate executives or directors and one was the founding leader of the OECD’s regulatory reform program. Only three of the ten were there primarily as representatives of environmental, consumer, or aboriginal groups, although some of the other members also sat on non-profit boards, and one was a retired academic. With such disproportionate representation of business interests – the group with the most obvious incentives to seek a relaxation of regulation, it is difficult to see how this body can claim process legitimacy.

**Recommendation:** the solution to the problem of regulation in Canada must include a renewed commitment to the implementation and enforcement of existing laws designed to protect public health, safety, and the environment. The federal government should therefore make its “smart” regulation agenda truly intelligent by subjecting its commitment to efficiency, cooperation, and flexibility to an overriding commitment to protect ordinary Canadians’ health, safety and welfare and environmental integrity, and recognizing that mandatory legal regulation (whether through licences, taxes, enforceable contracts, etc.) can and should regain its pride of place in a sophisticated mix of policy instruments.

### *Transgovernmental Networks*

One of the most pervasive yet least remarked developments in governance in the contemporary period has been the growing volume and intensity of transnational networks of government officials. These networks offer substantial promise as flexible, effective ways for domestic government agencies to get their jobs done, especially in the regulation of phenomena with transnational dimensions. But they also pose serious legitimacy concerns in terms of transparency, democratic accountability, and public health and safety.

Transgovernmental networks have sprung up in myriad policy areas and involve all kinds of substate actors, from regulatory and law enforcement agencies to legislators and judges, and from federal to state/provincial and local government officials. What distinguishes them from the traditional interstate agreements and organizations which we discussed earlier is that they operate typically without direct participation or close oversight by foreign ministries and heads of state. They typically involve either actors that are formally independent of central governments (eg central banks and provincial premiers)<sup>15</sup> or lower-level, operational personnel who often fly under the radar of political and media attention. Leading examples include the Basle Committee of Central Bankers, the International Organization of Securities Commissioners (IOSCO), the International Association of Insurance Supervisors and INTERPOL, the international criminal police organization. North American examples include informal cooperation between the premiers of Ontario and Quebec and the governors of the Great Lakes states on environmental and economic policy in the Great Lakes region; formal defence cooperation through NORAD (the North

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<sup>14</sup> It also invited the OECD, the original champion of neoconservative regulatory reform, to conduct a country study of Canada.

<sup>15</sup> Some important transgovernmental networks exist at the level of central governments, however, including the G8 meetings of heads of state and G20 meetings of finance ministers .

American Air Defence Command); and environmental law enforcement cooperation through the trilateral Enforcement Working Group established under the North American Agreement on Environmental Cooperation. In addition there are countless formal and informal transnational networks of judges, intelligence agencies, military personnel, taxation authorities, immigration officials, mayors, child welfare agencies, education officials, food and drug regulators, customs inspectors, public health officers, elected legislators, etc. – almost every kind of government official imaginable.

Transgovernmental networks bring substate actors from different countries together in face to face meetings or electronic communication to exchange information and ideas, collaborate on discrete cases and often to develop and pursue shared goals and agendas. These networks are usually highly specialized. Their participants share similar backgrounds, training, experiences, and expertise. They usually also share similar values, priorities, and worldviews, although their immediate interests and objectives often clash as they interact strategically in pursuit of their own goals. The most informal of these networks are often the most dynamic and effective: ad hoc transnational task forces and personal networks of informal contacts that can mobilize transborder cooperation by a simple phone call or e-mail bypassing cumbersome channels for official intergovernmental communication.

The great strength of transgovernmental networks is their potential to enhance governments' ability to tackle issues with global reach, such as organized crime, money laundering, drug trafficking, the sex trade, terrorism, weapons of mass destruction, environmental change, global information networks, global markets, global travel, and transnational child adoption. This strength is also one of their primary weaknesses. If, as Anne-Marie Slaughter argues, "governments must have global reach" in a global age (Slaughter, 2004: 4), transgovernmental networks answer this imperative only for a handful of already dominant governments. While they may enhance somewhat the capacity of semi-peripheral and developing countries to govern transnational matters, their main effect is to consolidate and expand the global regulatory capacity of the main powers. They tend in particular to complement the United States' uses of traditional diplomacy and "hard" (military or economic) power, functioning unobtrusively to support US foreign policy priorities such as the War on Terror (eg networks of financial regulators cooperating to freeze terrorist assets, law enforcement officials cooperating to identify and detain terrorist suspects, and intelligence agents sharing information to identify and assess future terrorist threats) (ibid.: 2).

Another problem with transgovernmental networks is that they tend (especially those networks made up of regulatory and law enforcement officials) to be closed and secretive. Their meetings and internal deliberations are usually closed to the public. Typically, only members of the participating regulatory agencies are invited to participate. Civil society organizations are seldom offered a seat at the table, unless they offer some functional expertise from which the network could benefit. By meeting "off-shore" with their foreign counterparts, these actors may escape transparency and due process guarantees that would normally apply to them. These networks operate in the political background and typically do not seek or encourage media attention. Many of them are technocratic and elitist, portraying their work as technical and objective and downplaying the contestable political value judgments involved in their work. They are often only loosely supervised by central government authorities, even if many of their participants are in theory accountable to elected officials. In an era when both domestic regulatory processes and intergovernmental diplomatic fora have been progressively opened up to public scrutiny and participation by a wide range of non-governmental interests, after long struggles, transgovernmental networks represent in many respects a regression to a more opaque, unaccountable style of governance. For these reasons and others, numerous commentators have criticized transgovernmental networks as illegitimate and lacking in democratic transparency and accountability (eg Piccioto, 1996-97; Macey, 2000).

Finally, although there is not the space to delve into this here, there are reasons to be concerned about the outcome legitimacy of some transgovernmental networks. Some critics argue, for instance, that the Basle Committee's capital adequacy requirements contributed to a global recession, although as Slaughter points out this claim is disputed and in any event networks such as the Basle Committee and IOSCO have had very limited success in adopting unified regulatory requirements for their members (Slaughter, 2004: 220). It is also possible that some transgovernmental interactions contribute to personal insecurity and human rights abuses. Given the secrecy that continues to shroud some networks and events, we may never know the extent to which Canadian security, law enforcement and intelligence officials communicated with US officials or facilitated their decisions to "render" Maher Arar and other Canadian citizens to countries where

they faced torture. While transgovernmental networks may be instruments of the US and other powerful states, we must remember that Canadian government officials may act as transnational agents in their own right, not always for the better.

For middle powers like Canada, therefore, transgovernmental networks are a mixed blessing: they enhance Canadian governments' regulatory effectiveness in certain areas (eg. law enforcement) and give them opportunities to help build governance capacity in developing countries, but these networks are also instruments for the US and other major powers to influence Canadian governance policies and practices and expand the global reach of their own policies and laws. Consolidation of advantages already enjoyed by the people and corporations of these dominant countries is the main goal of these governments, even if it is accompanied by a secondary goal of improving security, stability, safety, and living standards elsewhere. Transgovernmental networks are thus primarily instruments for globalized governance "from above," notwithstanding their organic, often informal character.

**Recommendation:** At a minimum, Canadian governments should make reforms necessary to ensure that the governmental networks in which they participate are transparent and democratically accountable, and do not facilitate violations of human rights. A first step toward improving their transparency and accountability might be to subject such networks to the kinds of public scrutiny to which domestic regulatory processes are already subject (eg. public notice of meetings, opportunities to comment on proposals, opportunities for direct participation by interested and affected parties, reporting to Parliament, application of freedom of information rules, and reviewability by auditors-general). Reforms like these might make these networks less useful and effective as governance tools, but one thing we can conclude from the Arar case and other examples of transgovernmental interaction in the war against terrorism is that governments should not be allowed to sacrifice openness, democratic accountability, and civil liberties on the altar of effectiveness and national security.

### *Globalization of State Law*

The globalization of state law refers to a range of processes by which national law shapes or is shaped by pressures from other national legal systems. National legal systems often reach beyond national borders to affect laws, people, and conduct elsewhere in the world. When Canadian constitutional documents and doctrines are emulated or when the federal government attempts to regulate Spanish and Portuguese fishers on the high seas we see the "export" side of legal globalization. On the other hand, national legal systems often import, adapt to, and are otherwise shaped by elements of other legal systems, for instance when Canada amends its telecommunications regulations under American pressure to bring its laws in line with US laws, or US legislation purports to prohibit Canadian investors from doing business with Cuba. Defined in this way, globalization of state law is pervasive and has a long history (eg. legal unification projects like those pursued through UNIDROIT and UNCITRAL). The current phase is distinctive, however, because of the unprecedented breadth and depth of change in the role of the state and state law in governance, and the unprecedented asymmetry between the global North and South (Santos 2002: 194-95). The story of legal globalization in Canada follows a trajectory similar to the one we have traced in other areas: its experience of legal globalization is defined primarily by its efforts to manage American hegemony, but is also characterized by an unusually prominent role as a legal example to be emulated elsewhere. Although the categories are rather clumsy, in the following paragraphs we reflect briefly on Canada's contemporary role as an "exporter" and "importer" of law.

### Legal Exports

Canada's role as a legal "globalizer" takes two main forms. Firstly, "modelling" or "legal transplantation" occurs when Canadian legal norms and experiences – the Charter of Rights and related jurisprudence being the most prominent example – are emulated or incorporated in other legal systems. Canada's liberal approach to constitutional rights and its approach to balancing individual rights against democratically determined collective limits ("Section 1" jurisprudence) have been emulated in recent constitutional rights-building exercises in the Commonwealth and beyond. This modelling of Canadian law is at least in part inspired by efforts to shake off legacies of oppression, widen the social inclusivity of the "importing" legal systems, and improve the lot of the downtrodden and marginalized. To the extent that it contributes to these goals it is to be welcomed and Canadian judges, lawyers, and activists ought to encourage it.

Secondly, “extraterritorialism” occurs when the Canadian legal system purports to govern people or conduct outside its territorial borders. Canadian governments and courts consider this prospect often, with mixed levels of enthusiasm and success. Examples include the federal governments’ aggressive regulation of high seas fishing through the Coastal Waters Protection Act, including the use of force against foreign fishing vessels on the high seas; its much less assertive procedures for environmental assessment of overseas projects under the Canadian Environmental Assessment Act, such as the proposed sale of a CANDU reactor to China; the courts’ reluctance to entertain lawsuits seeking remedies for environmental damage committed by Canadian corporations abroad; Canadian prosecutors’ efforts to prosecute Canadian child sex tourists for acts committed abroad; the largely failed attempt to assert criminal jurisdiction over war crimes or genocide committed abroad; and so far unsuccessful attempts to introduce legislation to govern the social and environmental conduct of Canadian corporations abroad.

While legislatures play a leading role in efforts to regulate extraterritorially, courts are also highly significant. A huge body of largely judge-made law, including private international law or the law governing “conflict of laws,” governs when courts will assert jurisdiction over disputes with a transnational element or elements. Rules related to conflict of laws, comity, *forum non conveniens*, and nationality-based, effects-based, and universal jurisdiction are developed and applied routinely in commercial, family, personal injury, product liability, criminal and other lawsuits to determine whether Canadian courts and Canadian laws will regulate transnational disputes. New issues arise almost every day, especially in the age of the Internet. Take for example the case of Cheick Bangoura, a former UN official who lost his job in Kenya after the *Washington Post* published reports of his alleged misconduct. The alleged misconduct took place outside Canada and the allegedly defamatory statements were first published before he took up residence in Ontario. The reporters who wrote the articles were all US residents, stationed in Africa or Washington at the time. The *Post*, which is owned and operated in the US, had only seven paid subscribers in Ontario, although the articles were also posted on its website, which was accessible from Ontario. Bangoura commenced an action in Ontario, where libel law is more plaintiff-friendly than in the US. The *Post* moved to dismiss the action for lack of jurisdiction and *forum non conveniens*. In dismissing the motion, the court ruled that Ontario was as appropriate a forum to hear the dispute as any other, observing among other things that the *Post* is “a major newspaper in the capital of the most powerful country in a world now made figuratively smaller by, inter alia, the Internet” and “Frankly, the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided”.<sup>16</sup> The case continues to make its way through the courts.

One variety of transnational litigation is of particular interest to us: transnational public interest litigation, or the use of Canadian courts to remedy alleged abuses of human rights or the environment outside Canada. Plaintiffs from all over the world have used the US courts, with some success, to seek redress for human rights abuses perpetrated outside the US. This has been possible mainly because of a unique American federal statute, the Alien Tort Claims Act, which dates from the 18<sup>th</sup> century and makes violations of the “law of nations” against aliens actionable in the US. Attempts to try similar cases have been made in Spain (where a magistrate tried unsuccessfully to prosecute Augusto Pinochet for crimes committed in Chile), the UK (where the House of Lords refused to take jurisdiction over Pinochet when he was there temporarily); and Belgium (where prosecutors famously sought to prosecute a “sitting” state official for crimes against humanity). The targets of such cases range from heads of state (eg. Pinochet) allegedly responsible for large scale torture and murder, to private corporations allegedly responsible for environmental contamination. What unites them is the attempt to seek justice in the courts of a state far removed from the jurisdiction in which the impugned acts took place. Such attempts have not had much success in Canada, since *forum non conveniens* and “real and substantial connection” tests typically favour the jurisdiction where the acts occurred (see generally, Scott, [Torture as Tort]). This is especially the case where the plaintiffs were nationals or residents of the foreign country when the acts occurred. Thus Guyanese citizens were unable to sue a Quebec company in Quebec for damages arising from “one of the worst environmental catastrophes in gold mining history”, a tailings dam disaster at a Guyanese mine owned (via majority shareholding) by the Quebec company.<sup>17</sup> The court ruled that neither the victims nor their lawsuit

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<sup>16</sup> *Bangoura v. Washington Post* (2004) 235 DLR (4<sup>th</sup>) 564, 48 CPC (5<sup>th</sup>) 318 (Ont. Super. Ct. J.).

<sup>17</sup> *Recherches Internationales Quebec v. Cambior Inc.* [1998] QJ No. 2554 (Quicklaw) (Que Super Ct.).

had any real connection with Quebec and gave little weight to the plaintiffs' concerns that they could not get a fair trial in Guyana. Where plaintiffs seek redress for abuses by foreign state officials, state immunity is another obstacle. An Iranian-Canadian citizen's attempt to sue Iran in Ontario for torture in Iran by agents of the Iranian state was recently denied on the basis of state immunity,<sup>18</sup> and Maher Arar's current attempt to sue the governments of Syria and Jordan in Ontario for torture by state agents in those countries is likely to meet a similar fate.

These kinds of transnational public interest litigation pose complicated legitimacy issues. Canadian citizens and Canadian courts have a legitimate interest in regulating and judging the conduct of Canadian corporations abroad, and holding such corporations responsible in Canada for misconduct elsewhere. Canada and Canadians also have "universal" interests in preventing and punishing torture and other gross violations of human rights, wherever they occur. On the other hand, for a Canadian court to sit in judgment of events and actors, especially foreign state actors, in foreign countries may be perceived as presumptuous and would likely not be welcomed by Canadians if the situation were reversed. This dilemma is lessened by the fact that it is the foreign victims themselves, or their chosen representatives (as in the case of the Guyanese mine disaster) who are seeking the intercession of Canadian courts in these cases, usually because there is no reasonable hope of obtaining justice in their home jurisdiction. Such lawsuits are in their nature progressive and emancipatory and reforms to Canadian law should be considered to facilitate them.

An even more attenuated form of Canadian legal extraterritorialism is found in extradition law. The Supreme Court of Canada has held that Canada may not extradite accused persons who will face the death penalty if convicted. Canada's extradition treaty with the United States provides for compliance with American requests only if proper warranties are given that the death penalty will not be applied. While the influence of this legal requirement on US law is hard to gauge, it does apply a subtle pressure on the US legal system. Even more indirectly, some Canadian laws and policies -- federal, provincial, and territorial or municipal -- that are focused on domestic issues and the lives of Canadians can have an impact on the lives of people in other countries, particularly in the Third World. For example, seeking immigrants for their expertise and professional qualifications creates the same "brain drain" from other countries about which Canadians complain vis-à-vis the United States. Offering subsidies to Canadian industry to help its growth and exports makes it more difficult for producers elsewhere to compete, and in the case of the developing countries, to survive. Protecting Canadian farmers with tariffs or quotas or subsidies helps them prosper at the expense of their destitute competitors in the global South, even if the situation of Canadian farmers is also dire.

The irony is that at the same time as the Canadian legal system adversely affects the global poor in some ways, our governments provide aid, support development projects, and organize trade missions to developing countries. In a number of areas, Canadian government departments and private institutions fund experts to work with officials in other countries. Examples of such technical assistance include training judges, setting up health care systems, bolstering law enforcement expertise, and giving technical aid to agricultural production. Expertise is also provided when parties agree on standard practices or work out contracts whose terms reflect Canadian norms. It is widely believed in the South that developing economies would gain much more from genuine, no-tariff free trade with Canada than from all the aid it offers them.

### *Legal Imports*

The globalization of state law is a two way street. As in other areas, Canada experiences legal globalization more as an importer than an exporter. In particular, in the modern period it has experienced legal globalization mainly in terms of pressures to conform to US legal models. It is important to note, though, that this almost always involves local variation and adaptation at the "receiving" end, not uniform homogenization, so that the receiving legal system exercises some form of agency even if limited. By far the strongest external influence on the Canadian legal system in the modern period comes from the US, ranging from informal pressure for regulatory coordination to unilateral American assertions of

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<sup>18</sup> *Bouzari v. Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Ont. C.A.).

extraterritorial jurisdiction. Pressures to mould Canadian laws and regulations to American models does not just come from the US; it also arises internally from business and other interests who see it as critical to Canada's economic future.

Again, it is possible to discern two kinds of "legal imports": where external legal influences are incorporated or transplanted into Canadian law and where foreign legal systems seek to regulate Canadians extraterritorially. Starting with the first, adjusting Canadian laws to incorporate or align with foreign laws has always been part of Canada's legal history. In recent years it has taken the form mainly of pressures for regulatory harmonization with the US. By harmonization we mean everything from unilateral adjustment of Canadian regulatory requirements to match foreign ones (eg. unilateral Canadian adoption of US new vehicle emission standards), to mutual recognition of Canadian and foreign requirements as equivalent (eg. Canada-EU mutual recognition agreements for drugs and medical devices), to negotiated harmonization of regulatory requirements so that these are identical in both jurisdictions. One of the main priorities of the federal government's Smart Regulation initiative is greater harmonization of regulatory requirements and product approvals with the US. The EACSR report called for, among other things, more compatibility with US regulatory requirements in a wide range of policy areas, integrated regulatory processes for industries that are continentally integrated, and a single review and approval of products and services for all of North America (EACSR, 2004). The latter would answer industries' popular demands for a "tested once, approved everywhere" regulatory regime.

There is evidence that harmonization is likely to result in substantial economic gains for Canadian industry. It is also likely to result in gains for Canadian regulators, in that it would allow a small country like Canada, which has limited resources for developing and applying regulations, to "leverage" greater use of American and other foreign regulatory resources, especially by capitalizing on foreign research, testing, expertise, and best practices. It would also enable Canada to develop specialized regulatory expertise (eg in agricultural biotechnology) and use that leverage to attract investment (eg PRI, 2004). Finally, proponents of regulatory harmonization also argue that it will increase the quality and effectiveness of Canadian regulation and the social welfare of Canadians (eg EACSR, 2004).

The latter claim is hard to justify. As West Coast Environmental Law argued in its submission to the EACSR, pressure to align with foreign or international standards tends to exert a downward force on environmental, health and safety regulations, and to conflict with the transparency, accountability, timeliness and effectiveness objectives identified by the EACSR itself (WCEL, 2004: pp. 3-4).

Moreover, from a process standpoint regulatory harmonization with the US poses some issues for Canadians. Smart regulation proponents urge Canada not to wait for American regulators to come to the table, but to harmonize Canadian regulatory requirements with American ones unilaterally. This is probably good advice since it would approximate what would be likely to happen in a bilateral or trilateral negotiation. When you are dealing with a very small number of states with massive power disparities and highly asymmetrical interdependence, as in the North American context, harmonization is likely to mean convergence on the preferred standards of the dominant party.

Other national measures taken in Washington have an impact on Canada. For example, US monetary policy so directly affects Canadian monetary policy – and with it the value of the Canadian dollar – that the Bank of Canada has on occasion been referred to as the 13<sup>th</sup> of the US Federal Reserve Board's twelve districts. The US Federal Energy Regulatory Commission has promulgated directives that are forcing provincial electricity utilities to privatize and deregulate if they want to export power to the US electricity grid.

Let us not forget either that it is not just foreign governments seeking to align the Canadian legal system with foreign legal systems. Private individuals and corporations are also key players in this game. US-based multinational corporations and the global law firms that serve them have been at the forefront of efforts to spread US approaches to business regulation around the world. And foreign civil society organizations and lobby groups actively seek to influence Canadian legal developments. In the current debate over the legalization of same-sex marriage in Canada, for example, controversy recently erupted when it was revealed that the conservative US group Focus on the Family was funding opposition to same-sex marriage in Canada. The federal justice minister, Irwin Cotler, acknowledged that "we have free

speech, but at the same we want to protect the political equities in terms of the marketplace of ideas". He wished to "maintain the integrity of the Canadian political culture and the Canadian political debate" and not "see it skewered" by US-based lobbyists insensitive to the Canadian legal and cultural context. He concluded, however, that from a legal standpoint there was nothing he could do to stop foreign financing of the same sex debate. "Ideas cross borders," he said, and the main way to protect the integrity of the Canadian debate is for Canadians to become aware of the source of particular lobbying campaigns. (MacCharles, 2005).

This controversy brings into focus a number of long-standing dilemmas regarding the free flow of ideas. It reminds us not only that ideas cross borders, but that their movement is often hastened or hindered by the material resources – especially money but also technology – thrown behind their promotion or opposition. Knowledge is power, yes, but money has a powerful influence on determining which knowledge spreads and how far. The question thus arises, from campaign finance to abortion rights to defamation lawsuits to telecoms regulation, whether and how law should regulate the influence of money – especially "foreign" money -- on the spread of knowledge and ideas.

Another dilemma highlighted by this episode is how to delimit the community with a legitimate stake in a political or legal debate in an era of globalization. When do "foreign" parties have a legitimate stake in "domestic" debates? Do conservative American religious groups have a legitimate stake, and the right to a voice, in same-sex marriage debates in Canada? Do Canadians have a legitimate stake, and a right to voice their concerns, in debates about presidential elections in the US, female genital mutilation in Africa or human rights abuses in China? In fact Canadian individuals, non-governmental groups, aid agencies, and government officials do intervene regularly in such debates. Should we simply accept that foreign individuals, groups and governments have a similar right to intervene in Canadian political deliberation? What are the legal limits to participation in and funding of political debate in a globalized world?

We move now to the second principal form of "legal imports," namely extraterritorial regulation by foreign governments. Many laws -- notably American (and on occasion European) ones -- have extra-territorial application, in the sense that they apply not only to Canadian branches of American corporations but also to Canadian companies and citizens outside the United States. The most noticeable recent example affecting Canadian business is Washington's Helms-Burton Act, which made it retroactively illegal for foreign individuals and companies to have acquired Cuban assets that were expropriated from Americans during Castro's revolution. As a result, any employee of Sherritt, a Saskatchewan company that operates a formerly US-owned mine nationalized by Castro, who sets foot on American soil risks being fined and incarcerated. In the face of Helms-Burton's impact on Canadian business, Ottawa took the position that business activities in Canada must defer to Canadian law, but, to reassure the United States that US goods will not be exported to Cuba through Canada, the Export and Import Permit Act required companies wishing to export to Cuba to seek a special permit if these goods are of US origin.

When US law is applied extraterritorially to Canadian *citizens*, it is harder for government to take protective action. British Columbia's privacy commissioner has concluded there is no way to prevent the long arm of US anti-terrorism legislation from extending into Canada (figuratively, at least, since the information would actually be held in filing cabinets or computers in the US) and obtaining otherwise confidential information about individual citizens. The USA Patriot Act gives American FBI agents the right to obtain from such data bases as British Colombians' medical records whose administration is being contracted out to a US company --even if this violates privacy safeguards in Canada. Canada had a more straightforward experience with the European Union on privacy matters, when it issued a directive blocking the cross-border transfer of personal data to companies from countries that did not have legislation protecting individuals in this regard. Canada had to amend its own policies to meet the EU's conditions lest there be disruption of commercial relations.

The main legitimacy issues that arise in connection with these "legal import/export" processes relate to the contemporary disconnect between the traditional model of sovereignty (in which a government is generally regarded to have legitimate and exclusive authority to make laws for its territory and its nationals) and the complex cross-border and deterritorialized interactions that need to be governed. The problem of legitimacy is easy to see when Canadians are subjected to extraterritorial law or pressured to harmonize regulatory requirements with US ones, to the extent that this involves the imposition of rules which Canada

and Canadians did not develop through their own democratic processes. The legitimacy issue is less obvious when Canada exports its legal models, especially when other countries emulate our constitutional traditions – what could be wrong with that? But we should apply the same norms of legitimacy when we export law as when we import it: do the people affected by the laws have a meaningful say in the development and application of those laws, and are the outcomes of these laws substantively fair and just? If not, it may be hypocritical to celebrate the globalization of Canadian legal models while complaining about the imposition of American ones on Canadians.

### 3. A Revitalized State

In important respects, states are the masters of their own fortune in the context of globalization and have been among the leading architects of their own purported demise. They have been the “midwives of globalization” (Brodie, 1996: p. 386). For all their purported weakness or irrelevance in a globalized world, they play a pivotal role in the interplay between globalization from above and from below. On the one hand, economic and political elites, from Canadian and international business elites, to international institutions like the OECD, to the US government and Canada’s other trading partners, to Canadian governments themselves, have had considerable success instrumentalizing the Canadian state in the service of globalization-from-above. Most of the market-inspired and other contemporary transformations of the state we describe above have been driven by political or economic elites and as such operate from above rather than from below. The Canadian state has in many respects been a willing handmaiden of the forces of globalized governance from above.

States have been the authors of the globalization textbook....States have had choices, and they have exercised that capacity for choice to construct neo-liberal globalization. States are unequal; clearly, some of them, the United States in particular, have been in the forefront of recent developments. Still, this does not mean that other states, such as Canada, have been passive bystanders or victims of the globalization process. Canadian governments have played an active role in shaping the global economy. ... Canada, like other states, retains a distinct capacity to manage its continuing encounter with globalization. (McBride, 2001: pp. 15, 18).

On the other hand, Canadian state actors have the capacity, which they exercise on occasion, to resist the social, environmental, and economic harms of globalization-from-above, align themselves with progressive social forces, and seek to restore some balance between the success of global trade and investment and the pursuit of health, safety, well-being, cultural diversity, peace, and ecological sustainability. Some elements of the “globalized” state have progressive possibilities, including the use of Canadian courts for transnational public interest litigation, the role of the *Charter* in the spread of a culture of human rights protection worldwide, and the role of Canadian government officials and judges in assisting post-conflict societies to pursue justice and reconciliation. But on the whole, Canadian state actors have asserted their capacity in ways that reinforce the dominant forms of globalization-from-above. The discrepancies between Canadian governments’ assertiveness in fields like security, counter-terrorism, and immigration, and their relative retreat from fields like environmental and social regulation and provision of public goods have major consequences for human welfare and environmental quality. We need to call Canadian state actors to account for these discrepancies and press them to exercise their governance capacities in more progressive and emancipatory directions.

The present moment represents an opportunity for the re-emergence, albeit in new and unpredictable forms, of “compassionate states dedicated to human well-being and the international practice of responsible sovereignty” (Falk, 1999: 6). Liberal-democratic states such as Canada are particularly well positioned to take advantage of this opportunity, combining as they do well-established governance institutions, access to substantial material resources, and substantial “reservoirs” of democratic legitimacy. They are also, however, vulnerable (and often openly receptive) to a more regressive politics associated with globalization-from-above. The challenge, as Falk (1999: 7) recognizes,

... is to direct our energies toward this ongoing, yet seldom acknowledged, fight for “the soul of the state.” In its essence, the question being posed ... is whether the state will function in the future mainly as an instrument useful for the promotion and protection of global trade and investment or

whether, by contrast, the state can recover its sense of balance in this globalizing setting so that the success of markets will not be achieved at the expense of the well-being of peoples. The goal of this struggle is not to turn back history and reinstate the post-War bargain among state, capital, labour, and society. It is not to remake the Canadian state in the nostalgic image of a welfare state that never fully existed. It is simply to reclaim for the state a central, albeit nonexclusive role in the search for social emancipation in the changing and unstable conditions of contemporary life.

**Recommendation:** the Canadian state, with the support of Canadian citizens, should exercise its power to shape and govern human affairs more confidently than it has in the recent past and it should do so in the service of hope rather than fear, of human rights and freedoms rather than the suppression of dissent and difference, and of cosmopolitan ideals of human solidarity and betterment rather than parochial self-interest.

#### 4. Governing Beyond the State

A revitalized role for the state must also recognize that there is a whole array of governance relationships beyond the state. The state plays, and will continue to play, a crucial role in enabling, validating, coordinating, and limiting these complex governance relationships. One of the state's principal tasks should be to identify and foster those that support social emancipation, justice, health, welfare, and ecological integrity while reining in those that hinder them. In short, Canadians must recognize that the character of the struggle for democracy and social justice has changed with the transformation of the state and the relative rise of private authority. As Santos argues, "While before, the struggle was about democratizing the state's regulatory monopoly, today the struggle must be about democratizing the loss of such a monopoly" (Santos, 2002: 490).

The main role of the state today is to coordinate the various public and non-state organizations, interests, and networks that have emerged from the state's retreat from social regulation. As the preceding sections suggest, the state retains a monopoly over such coordination and "is more than ever involved in the politics of social redistribution" (ibid.). The result, in terms of political and legal action, is that "it does not make sense to democratize the state if the non-state sphere is not democratized at the same time" (ibid.). It is important, therefore, to consider briefly the growing salience of "private" actors, especially transnational corporations, in the governance arrangements they put in place (for example, self-regulation, voluntary codes of conduct, and the *lex mercatoria*) and the criteria for recognizing these arrangements as legitimate governance tools. Finally, it is important to acknowledge that contemporary developments involve not simply a "privatization" of governance but a complex hybridization of "public" and "private" governance.

If the state is retreating, does this mean that some other actors or institutions are advancing to take its place as authoritative sources of governance? While we do not believe that the state has relinquished its pre-eminent authority in governance, the contemporary transformations of the state and the advance of economic globalization have been accompanied by, and some would argue presuppose, an increasing concentration of power in private agencies such as transnational corporations, banks and credit-rating agencies. Corporations, not states, now represent more than half of the world's 100 largest economies [Cite]. The majority of international trade takes the form of intrafirm transfers. Many important decisions affecting national societies and economies are made in corporate boardrooms, outside the halls of government or outside national borders altogether – but this has always been true of peripheral and semi-peripheral states like Canada that are heavily dependent on natural resource industries, export markets, and imports of manufactured and consumer goods.

Business organizations of various kinds have been among the most dedicated proponents of economic globalization, advocating a more integrated, more prosperous world economy whose free market can produce at optimal efficiency. The Business Council on National Issues – now the Canadian Council of Chief Executives, the organization representing the major foreign-and domestically-owned transnational corporations operating in Canada, has lobbied for trade globalization since the late 1970s. The Canadian

Manufacturers Association converted from protectionism during the same period.<sup>19</sup> A big-business front, the Canadian Coalition for Job Opportunities, was set up as a vehicle to pour millions of dollars promoting free trade in the 1988 election.

Satellite-based computer technologies have allowed businesses to link production and marketing systems within capital markets that operate on a 24-hours-a-day, 7-days-a-week basis. The most noticeable consequence has been to increase the size, scope, autonomy, and transnational influence of private companies. Transnational corporations can locate their head offices, manufacturing facilities, and sales divisions in different regions and so determine which region, country, or city gets the tax benefits, jobs, spin-off contracts, and charitable donations that it generates. A TNC facing objectionable circumstances in one jurisdiction can relocate in another, although this is much easier for corporations that work through local licencees and contractors than those that construct and operate huge physical facilities.

Many corporations carry out operations in other countries, where they extract natural resources, engage in manufacturing, advertise their products, open branches, promote franchises of their business, or outsource services such as the preparation of tax returns. In all these cases, the local effects may be positive (increasing employment, transferring technology and know-how, expanding exports through opening a factory) or negative (endangering health through lax safety standards, depleting resources, or avoiding taxes through transfer pricing). TNCs operating in a number of host countries apply standards for labour practices, wages, human rights, and environmental impacts that may not be as stringent as the laws of their home country and sometimes do not even comply with host-country laws. Their economic muscle can provide them with a great deal of power over domestic politics and influence over the lives of local residents. While governments may in some cases be able to induce a regulatory “race to the top” in which companies are attracted to jurisdictions with higher regulatory standards, it is more typical for large TNCs to use their economic muscle to exert downward pressure on government regulation, leading to a regulatory “race to the bottom” or at least a “regulatory chill”. Corporations also affect the transnational movement of people by recruiting workers or promoting tourism. While they often provide local jobs, housing, education, cultural events, and community development, TNCs are generally exempt under existing international trade rules from taking on performance requirements that, in exchange for permission to operate in a host economy, would require them to pay taxes, hire skilled local workers, reinvest profits, or contribute to a developing country’s educational or physical infrastructure.

There has been a great deal of discussion among stakeholders, business groups, academics, and decision-makers about the need to foster a corporate social responsibility that would have TNCs respecting or promoting social, economic, human, and cultural rights within their industry. While many Canadian companies operate in a socially responsible manner, others do not. Irresponsible TNC behaviour occurs when they engage in corrupt dealings with foreign officials, adopt harmful labour practices that fail to respect people’s rights, exacerbate the security situation in conflict zones, ignore indigenous cultural practices, violate native traditions, or harm the environment. Corporations that play by their home-state rules or good-governance norms find it hard to compete against competitors which, in order to maximize their profits, refuse to comply even with voluntary industry standards.

Given these issues, the demand for effective and humane regulation of transnational capital is understandably high. But governing global business is an extremely complicated proposition (eg Braithwaite & Drahos, 2000). Some advocacy groups maintain that corporations should be forced by governments to adopt the same behaviour abroad that is required of them when operating in Canada. Other groups assert that restrictions placed solely on Canadian corporations will fail to stop their foreign rivals from continuing their own harmful practices and will simply reduce the competitiveness of Canadian industry. A number of questions arise regarding who should govern the behaviour of Canadian corporations, by what methods they can be held accountable, how they can be regulated outside the country, and whether international cooperation is preferable to unilateral Canadian action. When questioned, 78% of Canadians believe that the government should withhold contracts from Canadian businesses operating abroad that do not respect their host countries’ environmental or labour laws. 54%

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<sup>19</sup> In 1996 it merged with the Canadian Exporters Association to form Canadian Manufacturers and Exporters, the principal industry lobby group in Canada and a vocal supporter of economic globalization.

believe that Canadians boycotting these companies are doing the right thing (Mendelsohn, Roberts & Wolfe, \_\_\_\_).

This is an extremely complex set of issues. There may be no coordination among the players. Canada's corporate representatives may not be expressing the values that most Canadians espouse. Private law firms build terms into transnational contracts without guidance from a central authority. Teams of private sector experts may provide advice to a foreign government, which may be in their own interest rather than that of the host country or the Canadian government. One thing we can say about this situation is that the encroachment by non-state players, including transnational firms and industry associations, on the traditional functions of government is likely to continue to increase. This trend has begun and will likely continue to generate multi-level, multi-actor governance relationships in which the nation state mediates between international institutions and domestic business or civil society.

#### *Global Governance "By Business, For Business"*

Self-regulation – or global governance “by business, for business” – has emerged as an attractive option for many firms, trade associations, and even governments and some NGOs. Examples of such governance are myriad, and we can only suggest the range and variety of initiatives here. Transnational trade associations and councils of business leaders have developed numerous generic sets of principles for socially or environmentally responsible business practices, such as the International Chamber of Commerce's Business Charter for Sustainable Development and the Caux Round Table's Principles for Business. Industry-dominated standards development bodies such as the International Organization for Standardization (ISO) have developed voluntary standards for corporate environmental management (eg. the ISO 14000 standards series) and are now developing corporate social responsibility standards. Sector-specific principles and codes of conduct have also proliferated, from the chemical industry (eg. Responsible Care, first developed by the Canadian chemical industry in the aftermath of the Bhopal disaster), to forestry (eg. the American Forest and Paper Association's Sustainable Forestry Initiative and the Canadian Standards Association's Sustainable Forest Management standard, industry-led alternatives to the Forest Stewardship Council certification program), to mining (eg. the Canadian Mining Association's Towards Sustainable Mining initiative), to the financial sector (eg. the Equator Principles, developed by leading transnational banks). Firm-specific voluntary initiatives have also proliferated beyond measure, including codes of conduct, environmental management systems, fair labour auditing schemes, corporate environmental or sustainability reporting programs, community advisory processes, and so on.

The proponents of these industry-led corporate social responsibility initiatives typically seek to establish their legitimacy by appealing either to a core constituency of business actors or a wider audience of consumers, environmentalists, labour and human rights advocates, and policy makers (eg. Cashore, Auld & Newsom 2004). The former tactic typically implies emphasizing their responsiveness to the needs and demands of global business (eg. ease of implementation, cost savings, return on investment, increased competitiveness) and characterizing them as merely “technical” rather than political or value-laden. The latter typically involves emphasizing their ability to deliver substantial improvements of corporate social and environmental performance, their responsiveness to the wider public interest, and their ability to contribute to the realization of contestable public values such as sustainable development. The two tactics sometimes reinforce one another, for instance in the very popular argument that corporate social responsibility is simultaneously good for society and good for business (eg. Schmidheiny 1992, Elkington 1998).

But they are more often in tension with each other, especially since the “social responsibility pays” argument often runs out of steam once the “low-hanging fruit” have been picked. What makes a governance initiative attractive to business managers often tends to decrease its attraction among public interest NGOs, and vice versa. Intriguingly, contending arguments are often deployed by the same actors in an effort to establish legitimacy with competing audiences. Thus, for example, ISO and its sister standardization body the International Electrotechnical Commission seek to establish their authority with global business by emphasizing that their standards are created “by industry, for industry,” on the basis of market demand, to meet the needs of the industries that use them (eg. IEC, 2000; ISO 1998). These same bodies simultaneously seek to establish their *bona fides* with environmental, consumer, labour and human rights NGOs, as well as public policy bodies, by emphasizing the “consensus” character of their standards,

publicly encouraging participation by NGOs and public officials, and promising that their standards will improve environmental and social performance and advance the agenda of sustainable development.

The proof of these often conflicting claims is in the pudding, and the long-term success of these legitimation strategies will depend on the extent to which they satisfy criteria of process and outcome legitimacy. In terms of process legitimacy, the proponents of industry self-regulation can at least say that the rules are made primarily by the actors who are their principal intended targets, which should give them some claim to legitimacy. On the other hand, the range of actors with a stake in corporate social responsibility extends far beyond the targeted firms themselves to encompass workers, consumers, citizens, governments, human rights groups, etc. To the extent that these actors are excluded or marginalized (by design or otherwise) from the rule-making process, these governance initiatives' claims to legitimacy will ultimately fail. Furthermore, to the extent that these initiatives ground their authority in claims about their technical and value-neutral character they are also bound to fail in the long run, since everyone involved, including the corporate and "expert" participants, recognizes that determining the acceptable social and environmental impacts of business is a fundamentally political and value-dependent exercise.

What about outcome legitimacy? Fundamentally, self-regulatory initiatives will have to demonstrate that they can deliver environmental, labour, and social performance improvements that go substantially beyond "business as usual" if their claims to legitimacy are to hold up. Here industry-led corporate social responsibility initiatives may run into serious snags since rational business executives face strong incentives to take the minimum action necessary to secure desired public image gains, and to free-ride on the efforts of others. No matter how well intentioned, governance initiatives that are designed primarily by and for business itself are unlikely, in the long run, to produce outcomes that exceed expected business-as-usual technological improvements, let alone contribute substantially to social emancipation and the restoration of planetary ecological integrity.

So far we have been discussing examples in which business actors expressly seek to regulate themselves in the name of social or environmental responsibility. Global business has also devised a whole range of governance initiatives that are aimed not at social or environmental responsibility, but simply at facilitating and regularizing transnational business transactions. Standardized international contracts, bills of lading, insurance terms, credit ratings, and so on, are examples. The most significant development from the point of view of legal globalization is the emergence (or resurrection) of the *lex mercatoria*, a stateless body of law built up by international commercial arbitrators to govern transnational business disputes. To resolve their international disputes, many companies use private mediation and arbitration under processes worked out over the past century by the International Chamber of Commerce.

The legitimacy issues facing this form of legal governance are similar to those facing the corporate social responsibility initiatives discussed above. From the perspective of process legitimacy, it seems clear that a body of law developed almost exclusively by lawyers and arbitrators with no participation by labour or civil society would face a legitimacy deficit. Some wonder whether this development of a private transnational legal system should be resisted because it marginalizes national judicial systems, undermining nation states' sovereignty (although some scholars emphasize the role of national courts in giving concrete shape and meaning to the *lex mercatoria*, eg. Wai, \_\_\_\_). On the other hand, the *lex mercatoria* can make a more credible claim to being neutral, technical, and "private" than many of the corporate social responsibility initiatives that explicitly address highly politicized issues. The *lex mercatoria* is not about redistribution, environmental protection, or social justice; it is simply about regulating international business transactions. But even here it runs into difficulty, and on this point process legitimacy shades into the question of outcome legitimacy. By privileging "party autonomy" and freedom of contract over all other values and presupposing symmetrical bargaining relationships, the *lex mercatoria* marginalizes competing values (like consumer, labour, or environmental protection or social development) and masks the often huge disparities of knowledge and power that characterize dealings between multinational corporations and their contracting parties, especially in developing countries. Some Third World legal scholars argue that, for these reasons, international commercial arbitration perpetuates, in a subtle way, a form of neo-colonialism (Shalakany, \_\_\_\_).

If, as we argued in part II, we view these unofficial, privately initiated governance tools as a type of law, we should evaluate them against the same criteria of openness, transparency, accountability, fairness, and

justice that we expect of official legal systems. Viewed this way, the globalized governance of business by business has a serious legitimacy deficit. This does not mean that such forms of governance should be shut down, or worse, ignored. It means that Canadians should struggle to democratize these instances of non-state governance. Among many ways to do this, we will consider two below: asserting a role for the state in regulating such business-oriented governance, and asserting a role for civil society in governing global business. Before turning to these possibilities, we take a short detour into the implications of the globalization of business for the legal profession itself.

### *Globalization of the Legal Profession*

We have already made brief reference to the emergence of a contemporary *lex mercatoria*. It is worth inquiring briefly who the architects of this emergence are and what role they play in governing beyond borders. The principal architects of the *lex mercatoria* are the legal experts who draft transnational business contracts and serve as arbitrators in transnational business disputes (Dezalay & Garth, \_\_\_\_\_[Dealing in Virtue]). The spread of the *lex mercatoria* has been paralleled, and made possible, by the globalization of the legal profession. The globalization of the legal profession has in turn been made possible by the globalization of business. Because the legal profession is globalizing as a consequence of, and to serve the needs of, the globalization of business, it mainly takes the form of the globalization of the American legal profession and the spread of American legal practices globally. For Canada, ironically, this has meant a hollowing out and subtle marginalization of the Canadian legal profession as corporate Canada itself has been "hollowed out" by the increasing concentration of management functions in US headquarters rather than in Canadian subsidiaries (Arthurs, \_\_\_\_\_). As a result of these trends, the Canadian legal profession is less and less able to compete globally in its own market for legal services.

More interesting for the purposes of this paper is the fact that the globalization of private law firms has been paralleled by the globalization of the practice of public interest law, a development closely related to the rise of transnational public interest litigation, discussed earlier. Leading manifestations of the globalization of public interest law include Avocats sans Frontières (AsF), a federation of national groups doing human rights and criminal defence advocacy work in high risk areas around the world, and Lawyers Without Borders (LWOB), a US-based NGO which espouses a very different philosophy of neutral observation and legal assistance (see Box, below). Canada recently got its own transnational public interest law organization in Canadian Lawyers Abroad-Avocats Canadiens à l'Étranger (CLA-ACE). Similar networks also exist in specific fields such as human rights (e.g. US-based Human Rights First, [www.humanrightsfirst.org](http://www.humanrightsfirst.org)) and Canadian Lawyers for International Human Rights, [www.claihr.org](http://www.claihr.org)) and the environment (e.g. Environmental Law Alliance Worldwide, [www.elaw.org](http://www.elaw.org)).

Most of these groups are concentrated in the global “North” but the involvement of “Southern” legal NGOs is increasing. In some cases these networks have developed the capacity to establish and deploy integrated cross-national teams and multi-jurisdictional legal strategies in the service of peace, human rights, democracy or environmental protection, but most remain far behind private law firms in organizational capacity and reach.

The main legitimacy issue raised by these initiatives springs from their relation to the private bar. These organizations have an ambiguous and symbiotic relationship with the increasingly globalized private bar. Some are made up mainly of career public interest lawyers, but most rely heavily on *pro bono* work by lawyers in private, for-profit practice and financial support from private law firms and bar associations. Some, including LWOB and Canada’s CLA-ACE, rely explicitly on this private bar *pro bono* model and actively cultivate closer relations with large private firms. They thus respond to, and rely upon, the increasingly globalized private bar’s need for convenient outlets for *pro bono* work, which is driven, in turn, largely by the legitimization needs of a self-governing legal profession that grounds its self-governance authority in a commitment to serve the public interest.

### ***Pro Bono* Goes Global**

Two transnational networks of public interest lawyers with similar names but very different approaches exemplify the trend toward globalization of public interest law. *Avocats sans Frontières* (AsF) was established by human rights lawyers in Belgium in 1992 to protect the rights of accused persons and fight for human rights whenever and wherever circumstances demanded. After an early focus on emergency criminal defence work, AsF expanded its mandate to include legal training, technical assistance and criminal justice capacity building, with a strong emphasis on local needs, partners, assets and constraints rather than imposition of “Western” ideas and solutions. Independent national sections of AsF exist in Europe, west Africa and (since 2002) Quebec. Since 1998 an international federation, AsF-World, has provided a common voice on matters of shared interest, including the establishment and operation of the International Criminal Court.

The second group, Lawyers Without Borders (LWOB), was established by a Connecticut lawyer in 2000 to provide neutral legal support for NGOs worldwide, advance the rule of law, protect the integrity of legal processes through neutral observation of closed trials and detentions, support lawyers in the field and provide a clearinghouse for *pro bono* human rights and rule of law projects, events and internships. Unlike AsF, LWOB characterizes itself as a neutral observer rather than an advocacy group, although its current project to provide Arabic translations of American law textbooks, the Federalist Papers and the US constitution for courses taught by a US Army lawyer in Iraq may not seem entirely neutral to some observers. After a rough start (including a trademark challenge from Doctors Without Borders), LWOB has begun to build a profile in the US, Canada and UK and has supported legal projects in Africa, the Middle East, the US and elsewhere.

Canada recently acquired its own similar organization, Canadian Lawyers Abroad-*Avocats Canadiens à l’Étranger* (CLA-ACE), a non-profit group committed to serving the legal needs of developing countries by harnessing the experience and skills of Canadian lawyers in the areas of good governance, the rule of law and human rights.

For further information: AsF (Belgium), [www.asf.be](http://www.asf.be); AsF-World, [www.asfworld.org](http://www.asfworld.org); AsF (Québec), [www.asfquebec.com](http://www.asfquebec.com); Lawyers Without Borders, [www.lawyerswithoutborders.org](http://www.lawyerswithoutborders.org); CLA-ACE, [www.cla-ace.ca](http://www.cla-ace.ca).

It is an open question whether the future of these various transnational public interest law networks will depend ultimately on the extent to which they can serve the global private bar’s demand for *pro bono* outlets. It seems quite possible that those organizations that cultivate close symbiotic relationships with the predominantly Anglo-American global private bar will have more material success and longevity than those that do not. If so, will these groups’ increasing dependence on and alliance with the global private bar ultimately compromise their pursuit of social justice and genuine emancipation? Will they solidify the global dominance of Anglo-American legal culture at the expense of other legal traditions and endogenous legal capacity? The answers remain unclear.

### *The Hybridization of Public and Private Governance*

Before we can answer the question of how to ensure the democratic legitimacy of non-state governance, we must recognize that state actors and institutions play an integral role in such governance. Governance “beyond the state” does not, as many proponents and observers suppose, imply leaving the state behind, or making a binary choice between “state” and “non-state” modes of governance, between “private” and “public” spheres, or between “mandatory” and “voluntary” regulation. While these conventional dichotomies remain at the heart of most analyses of and programs for governance “beyond the state,” they break down under examination.

Firstly, state actors and institutions are deeply implicated in the constitution and operation of non-state authority at all levels and across all domains of human affairs. Non-state governance arrangements, whether developed “by business, for business” or by civil society organizations (which we discuss further in the next section), interact with and depend upon official governance systems in highly complicated ways. Non-state governance systems frequently adopt the forms and trappings of official law, including legislatures, formal rules expressed in mandatory language, formal adjudication and dispute resolution processes, and monitoring and enforcement mechanisms (eg. Meidinger, 2001, discussing the Forest Stewardship Council). Non-state governance initiatives are frequently designed as instruments for the enforcement of existing state or interstate legal requirements, such as when NGO-initiated corporate codes of conduct require apparel firms to demonstrate compliance with ILO conventions or domestic labour laws. The actors and organs of official state governance are entangled with “non-state” governance in myriad ways. It is possible to identify at least eight ways in which state actors and organs engage with non-state governance initiatives (Wood, 2002-03, 2003, forthcoming):

- **Steering** occurs when state authorities attempt to influence, directly or indirectly, the development or operation of non-state governance. Such steering takes many forms. State authorities are often deeply involved in the constitution and operation of nominally non-state governance initiatives. Many professional self-governing bodies, technical standardization bodies, and other “private” governance bodies are officially constituted by governments, have their powers and purposes defined by statute, report to legislatures, receive operational funding from governments, and in some cases operate as state enterprises or within government agencies. Many government officials make public statements intended to encourage, discourage, or influence the development or use of non-state governance initiatives. Some governments seek to exercise strategic leadership over non-state governance, for example by developing national strategies for technical standardization (eg. Standards Council of Canada 2000). Governments and intergovernmental organizations frequently participate actively in the development or implementation of non-state codes and standards. Some develop voluntary programs themselves, usually with the input or partnership of the target groups, such as the UN’s Global Compact, the OECD’s Guidelines for Multinational Enterprises or the European Union’s Eco-Management and Audit Scheme.
- **Self-discipline** occurs when state authorities subject themselves to governance by non-state codes of conduct. Thousands of government bodies around the world, for instance, from municipalities to federal government departments to military bases to public utilities, have implemented ISO’s quality or environmental management systems standards in their own operations. Many central government authorities make this a requirement for certain government departments and agencies. Most governments have also “lashed themselves to the mast” of non-state standards by enacting domestic laws<sup>20</sup> or signing international agreements (eg. the TBT Agreement) that require them to use international standards developed by recognized standardization bodies such as ISO as the basis for their own regulations. Such nations may face trade sanctions if their laws depart significantly from such international standards.
- **Knowledge production** occurs when state authorities generate or disseminate knowledge about the design, use or value of non-state governance initiatives, such as through public education, training programs, pilot projects, and research funding.

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<sup>20</sup> Eg., National Technology Transfer and Advancement Act of 1995, section 12(d), Pub. L. No. 104 113 §12(d), 110 Stat. 775 (7 March 1996) (US).

- **Reward** occurs when state authorities provide material incentives to adhere to the terms of non-state governance initiatives, for instance through regulatory flexibility, fiscal incentives, or government procurement policies. Regulatory flexibility involves relaxation of existing regulatory requirements or forbearance from introducing new ones for firms that implement non-state governance programs such as codes of conduct or environmental management systems. Such incentives may be incorporated in firm- or sector-specific negotiated agreements, generalized regulatory incentive programs, or relaxed enforcement policies. Fiscal incentives include grants, subsidies, preferential loan financing, and tax incentives to firms that implement non-state governance programs. Finally, public procurement policies may favour or even require suppliers to comply with specified non-state governance programs. All of these techniques feature prominently in “Smart Regulation” and other regulatory reform agendas.
- **Command** refers to the comparatively rare situation in which state authorities require firms to adhere to otherwise voluntary codes of conduct. Courts in a few countries, including Canada, have ordered firms to implement ISO 14001.<sup>21</sup> Most governments require firms to adhere to Generally Accepted Accounting Principles, and some have enacted legislation requiring firms to adhere to the Forest Stewardship Council sustainable forestry scheme or implement an industry-recognized environmental management system.<sup>22</sup> Another way non-state codes can be converted to legally binding commands is through civil lawsuits. A growing number of supply contracts, trade association membership agreements, and other commercial arrangements require parties to implement such codes. Parties aggrieved by breaches of these agreements might sue in contract, tort, or intellectual property law. To the extent that courts allow such actions, the terms of these agreements may effectively become legally binding ‘commands’ (eg. Webb 1999; Meidinger 2001).
- **Borrowing** refers to a range of other ways in which state authorities might incorporate non-state governance initiatives in legal instruments such as statutes, regulations, permits, or international agreements. Governments have a long history of ‘borrowing’ voluntary technical standards for the purposes of official regulation, either by reproducing them verbatim in legislation, permits, or building codes, incorporating them by reference, making implementation of a non-state program a default basis for issuing an approval, making violation of a non-state program the trigger for statutory duties, or authorizing the use of a non-state standard for testing, inspecting, or measuring a regulated entity’s activities or products (for example, Hamilton 1978).
- **Benchmarking** occurs when a court or administrative tribunal uses a non-state code of conduct as a benchmark for evaluating a party’s conduct and determining its legal liability. Canadian courts often treat a defendant’s failure to implement or comply with recognized non-state standards or codes of practice as evidence of a lack of “reasonable care” or “due diligence”. The terms of non-state codes can thereby be imposed on firms that take no part in their development or use, giving them a power they could not achieve on their own (Webb 1999).
- Finally, the term **Challenge** is used to describe those situations in which state authorities issue a public challenge for certain actors to adhere to voluntary governance programs. Such challenge programs have been popular with public authorities who wish industry to address health or environmental issues, but have no stomach for new regulatory requirements. Such challenges are usually addressed to firms (for instance, the federal government’s Voluntary Challenge and Registry program for greenhouse gas reduction) but may also be addressed to individuals (for example, its current “One Tonne Challenge”).

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<sup>21</sup> Eg. *R. v. Calgary (City)*, (2000) 272 A.R. 161, 35 C.E.L.R. (N.S.) 253 (Alta. Prov. Ct.); *R. v. Canada (Minister of Indian Affairs)*, [2000] O.J. No. 5076 (Quicklaw) (Ont. Sup. Ct. Justice 2000); *R. v. Prospec Chemicals* (1996), 19 C.E.L.R. (N.S.) 178 (Alta. Prov. Ct.); *R. v. Van Waters and Rogers Ltd.* (1998), 220 A.R. 315 (Alta. Prov. Ct.). The Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33, s. 291(1), authorizes a sentencing court to direct an offender to ‘implement an environmental management system that meets a recognized Canadian or international standard’.

<sup>22</sup> New Brunswick and Nova Scotia, for example, enacted regulations requiring gas pipeline operators to implement ISO 14000-based EMSs (Pipeline Regulations, N.S. Reg. 66/98, s. 19(1); Gas Pipeline Regulation, N.B. Reg. 99 61, s. 46 and Gas Distribution and Marketers’ Filing Regulation, N.B. Reg. 99 60, s. 7(12)).

State and non-state governance are, in short, thoroughly interwoven.

Secondly, almost all human choices and activities have both “public” and “private” dimensions, from marriage to child raising to business management. As early feminists reminded us, the personal is political. While there are some matters in which the state has no business interfering – in other words, there is a sphere of private autonomy within which individuals and associations should be free to choose and pursue their own goals without official interference – the questions of how to define the extent of this private zone and its relation to public authority are intensely political and are played out in public debate. Talking about non-state governance in terms of a dichotomy between “public” and “private” governance is therefore not very useful. The absence of state authorities from the development or implementation of a governance program, for example, does not mean the program is not “public” or that it has no implications for public policy. On the contrary, “private” authorities such as firms, trade associations, and technical standardization bodies regularly adopt norms and rules with intense “public” stakes. This is reflected in the fact that countless groups explicitly devoted to protection of “public” interests of various kinds (eg. environmental protection, poverty alleviation) regularly fight against or clamour to be heard in such initiatives.

Thirdly, it is misleading to think of non-state governance in terms of an opposition between “mandatory” and “voluntary” governance, and to identify the former with the state and the latter with governance “beyond the state”. Virtually all “voluntary” action is undertaken because the relevant actors have been effectively pressured to act. The question, then, is not whether this or that action is truly voluntary, but what factors effectively pressure individuals, groups, and firms to choose to act in a way that enhances equity, health, environmental protection, and so on. The drivers for corporate social and environmental action are by now well known and include: cost savings; the threat of regulation; a desire to enhance or avoid damage to public image; anticipation of competitive advantage; demands or requirements of creditors, insurers, investors, industry associations, customers, suppliers or consumers; pressure from employees or labour unions; pressure from environmental and community groups; and ethical commitments of top management. Canadian governments, in particular, should recognize that they have the capacity to shape, steer, and regulate “non-state” governance in profound ways. They should exercise this capacity to ensure that non-state governance works to the benefit of Canadians’ health, safety, and security. They should do so, among other things, by recognizing that a credible threat of regulation is one of the most effective incentives for “voluntary” action, and being willing to step in with regulation should voluntary action fail to protect health, safety and the environment.

Getting the “drivers” right is crucial to the effectiveness of any system of governance, whether by or “beyond” the state. It is also crucial to its legitimacy.

#### *The Legitimacy of Governance Beyond the State*

In this complicated environment where state and non-state, public and private governance blur into each other, what expectations should we have for the legitimacy of governance “beyond the state”? Fortunately many thoughtful Canadian academics, policy makers, business leaders, and civil society groups have already turned their minds to this question (eg., Canada, 1998; Gibson, 1999; Pollution Probe, 1999; Webb, 2004; Cragg, forthcoming). In 1997, a group of prominent industry leaders and environmental NGOs, calling themselves the New Directions Group, agreed on a set of principles and criteria for the use of what they called “voluntary non-regulatory initiatives” to achieve environmental policy objectives (New Directions Group, 1999). While the principles and criteria were directed at environmental issues, they are equally applicable in other issue areas and represent a minimum standard of legitimacy for non-state governance.

According to the New Directions Group, credible and effective non-state governance initiatives:

- are developed and implemented in a participatory manner that enables the interested and affected parties to contribute equitably;
- are transparent in their design and operation;
- are performance-based with specified goals, measurable objectives, and milestones;
- clearly specify the rewards for good performance and the consequences of not meeting performance objectives;

- encourage flexibility and innovation in meeting specified goals and objectives;
- have prescribed monitoring and reporting requirements, including timetables;
- Include mechanisms for verifying the performance of all participants; and
- encourage continual improvement of both participants and the programmes themselves (ibid.)

The New Directions Group also emphasized that non-state governance initiatives should be “positioned within a supportive public policy framework that includes appropriate legislative and regulatory tools,” that they should be used only where interested and affected parties agree that a voluntary program is “an appropriate, credible, and effective method” of achieving the desired objective, and that the roles and responsibilities of all participants must be clearly defined and supported with adequate resources (ibid., pp. 232-33).

While some modification may be necessary in particular cases or issue areas, the New Directions Group principles represent a minimum floor for determining when non-state initiatives can be legitimate governance tools. As the New Directions Group itself recognized, the principles apply not just to the state’s involvement in non-state governance (eg., government-industry negotiated agreements, government challenge programs, and regulatory flexibility initiatives), but also to examples of non-state governance in which there is no direct state involvement (eg., industry-community negotiated agreements) (ibid.: 231).

**Recommendation:** Canadian governments at all levels (federal, provincial/territorial, municipal, and aboriginal) should publicly endorse the New Directions Group principles and criteria as minimum criteria for the credibility and effectiveness of non-state governance, and should apply the principles and criteria whenever they consider relying upon voluntary or non-state governance initiatives to achieve policy objectives. Canadians should pressure both governments and industry to do so.

In relation to this recommendation, it is worth noting that some Canadian governments have applied the New Directions Group principles and criteria when designing voluntary programs. The Ontario government’s recent “Cooperative Agreements” initiative for improved environmental performance in industry, for example, implements all of the principles and represents an example of transparency, accountability, effectiveness, and credibility other governments would do well to emulate. Unfortunately, the program has not attracted significant participation by industry, apparently because it takes credibility and effectiveness too seriously and is thus unpalatable to industry. In particular, by threatening adverse publicity for participating firms that do not meet program requirements and by preserving the government’s right to step in with regulation should the voluntary program prove unsatisfactory – both of which are endorsed by the New Directions Group – this program has alienated the very “environmental leaders” it was intended to attract. The lesson may be that a sacrifice of legitimacy and effectiveness might be the price of voluntary industry action, at least in the short run. If non-state governance cannot satisfy these basic criteria for credibility and effectiveness, Canadians and Canadian governments should insist on a more assertive role for mandatory regulation.

## V. Canadian Citizens in the World: Governance by Global Civil Society

When thinking about global forces, many of us – particularly those bombarded with images of chaos and reports of crises over which no one seemed able to exert any control -- feel battered by relentless tides of technological or social change. As *victims* of seemingly irresistible global forces, it is indeed understandable if individuals feel helpless, whether they suffer as refugees, sweatshop workers, or victims of environmental disasters or whether they are beneficiaries of rising wages, high-tech jobs, and an increasing variety of consumer goods.

And yet it has never been more obvious – particularly to those who have come to consciousness with the Internet at their fingertips – that individuals can seek information from the most distant sources and interact with others anywhere in the world. It follows in principle that, if knowledge is power, then never has the average man and woman had so much potential as *agents* to influence their surroundings, not just locally but now globally.

Furthermore, simply in their role as individuals, citizens have global impacts when they buy something made in a third-world factory, travel abroad, or send a message to a friend, relative, colleague, power-

holder, or institution outside their own national borders. Determining if the global reach of these individual citizens is for the better or for the worse is another matter and depends on whether the factory in the South offers good working conditions or exploits under-age children, whether the tourist dollars are spent on supporting a region's handicraft economy that employs artisans or on sustaining a local sex trade that enslaves young women, and whether the communications streaking over the Internet are organizing a campaign to impede the spread of malaria or a terrorist plot to kill innocent civilians halfway around the world.

Certain individuals such as scientists can play globally influential roles as professionals, particularly when, in networks, their expertise persuades informed actors that a serious problem needs to be addressed. Transnational governance can be seen when the consensus generated by communities of experts induces governments to take the recommended action. Environmental policies related to ozone-layer depletion and global warming are a product of governments responding to advice received from the scientific community and mediated through environmental non-governmental organizations (ENGOS) to government officials.

Other influential individuals are the knowledge brokers in the news media who spread specific perceptions, theories, and policy prescriptions around the globe. Their gate-keeping role determines which information about globalization is transmitted (and so considered important) but also blocks the communication of other ideas (which consequently become insignificant).

Beyond their role as individuals, people can have a decisive impact on world affairs when they act in groups as "moral entrepreneurs" to catalyze social or legal change. In this regard, our concern in this section is less with the disempowered or re-empowered individual's relationship with globalizing forces than with how Canada's legal system should respond to the growing phenomenon of citizens who organize collectively to support some cause or other involving action outside their national borders. When these civil-society organizations (CSOs) mobilize in transnational advocacy groups operating outside government circles, they are generally seen as constituting globalization from below, because they urge economic and political elites, who operate from above, to respond to their demands. It is nevertheless the case that CSOs may also participate in globalization from above when they achieve sufficient legitimacy that governments consult or respond to them as accepted stakeholders on a particular international issue.

### **Globalization from Below**

Alongside the growth of international organizations and global business, there has occurred a lesser but still substantial expansion in the number and reach of CSOs. These organizations include non-profit, non-governmental organizations working on issues such as consumer protection, environment, human rights, humanitarian relief, and health. They include church groups, labour unions, private foundations, policy think tanks, and membership organizations. They range from local to global in their scope and they vary from radical to conservative in their ideology. They may be progressive organizations dedicated to eradicating a social evil, or they may have equally worthy sounding names that provide fronts defending the interests of businesses which create that problem. While globally active CSOs are predominantly based in the global North while sponsoring activities in the South, citizens in the Third World are also organizing themselves now that democratic rights have become more firmly established.

With access to greater amounts of information about what is taking place in remote corners of the world and in the daily lives of others, some citizens' organizations are able to engage directly with burning global issues such as helping subsistence economies integrate into the global trading system or reconstructing societies devastated by civil war. Oxfam has long been promoting fair trade campaigns to help Third-World farmers market their organic products in the North. With its Nobel peace prize for outstandingly courageous work among the sick and wounded in war-torn societies and among the victims of genocide, Brussels-based *Médecins sans frontières* is but the most spectacular among hundreds of CSOs in which Canadians take an active, often leading part.

Canadian advocacy groups interact with other like-minded groups in solidarity with which they work to influence their own and other governments' positions. Besides operating domestically to get Canadian government policies changed, they may also work in foreign countries to support social or political action there by raising funds, launching projects, and drawing media attention to situations requiring remedial

action -- which may include the local behaviour of Canadian TNCs. For instance, a young Canadian generated tremendous popular support for his campaign to boycott retailers whose products had been made in third-world sweatshops. Fearing bad publicity would affect their brand's acceptance by consumers, large chains such as The Gap have given public assurances that their suppliers will be required to accept certain labour standards for their workers.

The annual meetings of the World Social Forum have brought together tens of thousands of CSO leaders and grassroots activists and thereby helped spread a spirit of empowerment among the politically marginalized including aboriginal nations, antipoverty organizations, environmentalists, and lawyers struggling to defend human rights in oppressive régimes.

Canadians can often be found playing a leading role in these activities. Having become the best-known global CSO, Greenpeace, which was set up in Vancouver in 1970 to protest US nuclear weapons testing in Alaska, is a strikingly successful example of individual Canadians grouping together to have a definite impact on the world's consciousness of ecological issues. In generating these transnational players, our compatriots may be thought to be acting more as global than as Canadian citizens. But the national regulatory and legal context in which even a globally active CSO establishes its domestic organization can affect both its effectiveness and its legitimacy, whether it originates in Canada (Greenpeace) or whether it is a Canadian branch of a foreign-based CSO (Médecins sans Frontières).

The proliferation and increasing influence of CSOs prompts us to rethink the territorial and legal boundaries of public activism. A relatively small investment of public funds in response to initiatives already taken or proposed by individuals can leverage very high levels of organized citizen engagement. Gaining charitable-donation status, for instance, dramatically improves a CSO's capacity to raise funds from well-wishing citizens. At present, advocacy groups face severe obstacles to getting official standing with Revenue Canada, which does not sanction organizations with an activist mandate.

**Recommendation:** that the government initiate consultations with the network of transnationally oriented CSOs and ENGOs about encouraging citizen participation in their activities by granting charitable status to legitimate activist organizations that meet more permissive criteria both as far as social action is concerned and in stimulating Canadians to support foreign-based CSOs of their choice.

As non-governmental organizations become ever more organized on various global stages, where they speak in the name of international civil society, act on public opinion, and pursue a large number of political, economic, and social causes, serious questions of legitimacy arise. Not all CSOs are created equal or are equally benign. Their claims to speak on behalf of broad constituencies are not always easy to corroborate. Confusion arises when front groups for corporate interests or ideological extremists pose as responsible CSOs. Others are the public face for government operations. Many American CSOs, for instance, are funded by US AID, which requires them to adopt an anti-abortion position as a condition of their being funded with government money and puts them in a position to dictate policy to their clients.

While it is in the interests of the Canadian state to promote its citizens' engagement with global issues, the carrot of support for private generosity must be accompanied by the stick of stricter regulation. Just as Canadian political parties must submit formal accounts of their expenditures to the Canada Elections Office in order to qualify for the subsidies they receive from the public purse, CSOs need to be brought under a regulatory regime whose purpose would be to give the public the assurance that they are indeed genuine citizen organizations whose objectives are clearly stated, whose activities are adequately described, whose funding sources are credibly documented, and whose memberships are real individuals. Such regulation of transnational citizens' organizations would be the necessary cost to pay in order to maintain their legitimacy and so their efficacy.

**Recommendation:** Since there are major legitimacy issues surrounding global civil society's participation in transnational governance, (Buchanan & Rose, 2002) Canada could generate an international consortium of stakeholders to create a registry detailing the democratic bona fides of all nongovernmental organizations that are active in transnational governance. This could start by incorporating criteria developed by the United Nations for accrediting CSOs to observer status and by the European Union for evaluating interest groups lobbying in Brussels. At a minimum, this Registry should consist of putting on a

web site each organization's constitution, an annual statement of its revenues and expenditures that has been furnished by a chartered accountant, a current list of its members, and a description of its activities.

At a collective level, *transnational social movements* (TSMs) have emerged as significant phenomena. Distinct from the formal CSOs that may purport to, but may not adequately, represent them, TSMs are informal, unorganized, yet increasingly powerful. They include, for instance, the angry environmentalists, human rights activists, and trade unionists who answered the call of diverse CSOs in the fall of 1999 by trekking from a number of countries to Seattle when they helped close down the biennial ministerial meeting of the World Trade Organization. Whether Islamic fundamentalists, adepts of the Christian Right, or globally dispersed ethnic diasporas such as the Jews or Tamils, the mobilized energy of TSMs can have powerful impacts on national and global governance.

Also at a collective level, peoples such as Canadian First Nations and other indigenous peoples are ambivalently related to globalization. On the one hand, aboriginals are often disproportionately affected by the adverse impacts of those TNC's operating in resource areas inhabited by members of the "fourth world" who are marginalized in their own nation states. Yet Aboriginals have shown that they can also operate as agents, starting with the construction at home of innovative self-governance structures. Outside the formal régimes of global governance, native nations, along with other social-justice organizations, have enhanced their autonomy by generating their own solidarities. Forming transnational networks abroad and using the international system defensively may increase their domestic political capacity. If an aboriginal group fails to achieve its local objectives through political negotiations, it can share its experience with other native groups at global conclaves such as the World Social Forum and bring its complaints to committees within the United Nations' system. International confirmation that its rights are being violated can shame a provincial or federal government into making the demanded concessions.

During the Uruguay Round of negotiations which transformed the General Agreement on Tariffs and Trade of 1947 into the World Trade Organization of 1995, trade union leaders, environmentalists, cultural leaders, and human rights activists had not realized that the global corporate community was writing new economic rules for itself that would have major repercussions not just on each country's economic order but on its environmental, social, and cultural systems. By the late 1990s, when they saw various domestic measures being struck down by the WTO's dispute panels on the surprising ground of being trade or investment barriers, they woke up to realize that the transnational marketplace had stealthily prevailed over the nation state. Suddenly, market globalization had become a synonym for local political disaster. There was nothing to be done but protest.

The practice of excluding civil-society groups from the governments' trade-negotiating process had given corporations direct access to the bargaining table but had created what many started to call a global "democratic deficit," that is, a giant legitimacy problem. The only way that civil-society organizations felt they could hold to account this new global governance, which they deemed beyond their control, was to organize massive demonstrations when the WTO, or the IMF (International Monetary Fund), or the World Bank convened. We have already mentioned Seattle's WTO meeting (fall, 1999). Washington for the annual meeting of the World Bank and International Monetary Fund (winter, 2000), Québec for the Summit of the Americas (spring, 2001), Genoa for the G7/G8 Economic Summit (summer, 2001) followed, entering the public vocabulary as protest events. It seemed as if, wherever an international economic institution held its annual meeting, throngs of demonstrators convened to protest the imbalance that gave so much more weight to the economic rights of capital than to the labour, environmental, and human rights of citizens.

Because Canadian activists had been engaged in political battles against neoconservative deregulation since the mid-1980s, organizations such as the Council for Canadians (COC) assumed international leadership when the issues they had been fighting domestically moved onto the global stage. In 1997, the COC played a significant role in mobilizing support from CSOs in other countries to defeat the Multilateral Agreement on Investment (MAI), a corporate code to enhance TNCs' freedom from state control which was being negotiated at the Organization for Economic Cooperation and Development (OECD) in Paris. Using networks they had developed during the fight against the MAI, these Canadian citizen activists were prominent in the subsequent protests against the WTO, the IMF, and the World Bank.

Several years after Seattle's protests, the social justice movement could claim some success. Supported outside Cancún's meeting halls by protesters representing globally networked social-justice organizations, twenty Third-World governments including China, India, and Brazil, which had come to believe that their WTO-based external constitution was working better for transnational corporations than for themselves, brought the September, 2003 WTO ministerial meeting to a halt.

In response to these first-world activist critics and, more immediately, in response to the complaints of Third-World dissident governments, the WTO has made significant efforts to include the formerly excluded CSOs and recognize the weaker states' need for reinforcing, rather than undermining, their governments' regulatory capacities. Ideationally, the momentum behind the neoconservative model of market globalization has stalled. Global economic institutions still operate, of course. The IMF watches out for the stability of global currencies, but is less inclined to impose as the condition for its loans the draconian belt tightening that helped ruin Argentina until the new President Kirchner defaulted on the Argentinian debt. The World Bank maintains its focus on economic development but has recognized that governments need to enhance their capacity, not devolve state functions to the marketplace. And at the WTO, the Doha Round of negotiations continues, but in a political context in which the Third World's demand for greater access to protected first-world markets has become the prime issue.

Like most conceptualizations, the distinction between globalization from below and globalization from above is not watertight. Since successful grassroots action typically ends up with governments responding, even co-opting CSOs into advisory capacities, globalization from below can morph into globalization from above.

### **Globalization from Above**

Civil society organizations in some cases establish enough political legitimacy for their cause and sufficient intellectual capacity that governments find themselves forced to lean on their expertise and work out a modus operandi that gives them access to the councils of state. Within states, this can be seen when governments negotiate a fee schedule with the association representing doctors. Transnationally, this negotiation process could be seen when the Canadian government was mobilizing peace organizations internationally to have them press their own governments to support Ottawa's effort to achieve a treaty to ban anti-personnel landmines.

Because all international agreements can have direct effects on corporate prospects, business lobbies typically press to have their representatives incorporated in government delegations, a phenomenon we could call transnational *market* governance. In the specialized transnational negotiations involved in working out multilateral environmental agreements on such issues as biodiversity or global warming, Canadian government delegations also now include experts from CSOs that have developed a knowledge base that is often superior to that of the federal civil servants whose job is to speak on behalf of Ottawa.

The potential for transnational citizen governance became obvious a few years after the power of transnational market governance had been dramatically demonstrated by the world's leading drug companies. During the Uruguay Round in the early 1990s, the global pharmaceutical oligopoly had pushed the US, the European Union, and Japan to entrench draconian intellectual property rights in the WTO's TRIPs agreement. Once it became clear that these monopoly rights on privatized scientific knowledge were leading big pharma to charge extremely high prices for drugs to treat HIV/AIDS victims in the Third World, *Médecins sans frontières* mobilized public opinion and proceeded to negotiate directly both with governments and the industry. The result was to reduce the per-capita price of drugs for HIV/AIDS patients in the South from a few thousand dollars a year to a few hundred dollars. Subsequently, an amendment to the WTO's TRIPs agreement extended the scope of compulsory licensing to facilitate the manufacture and distribution of generic drugs for HIV/AIDS patients in developing countries.

Although apparently united by what it opposed in market globalization, the broad movement for global social justice has deep divisions within its ranks. Inspired by nostalgia for the Keynesian welfare state, some protest is directed at domestic politics. The public's unease about current problems is related to an awareness that not only has its quality of life not improved, but there has been actual deterioration in countries such as Mexico whose public had been assured that economic progress would follow in the wake

of NAFTA's new continental free trade régime. The neoconservative promise that freeing the marketplace from government control would lead to unprecedented prosperity has proven a chimera, given that the level of public services, especially in healthcare and education, and the quality of public goods such as bridges and roads, parks and air quality, sewers, and water provision have fallen. The consciousness of the state's deteriorating performance is directly linked to an awareness that it has been financially strangled by politicians who cut taxes in the belief that the imperatives of globalized competition required them to lighten the fiscal load on footloose corporations if investment is to flow into their economy. This is the paradigm laid out in the Washington Consensus which premised a new era of economic progress on liberating corporate initiative from public regulation. Citizens who lament the decline of the state also point out that shrinking budgets have cut back its administrative capacity by firing the civil servants needed to enforce existing labour laws and environmental regulations.

Other dissenters, who bewail the liberation of the marketplace from democratic control, look towards a globalization of a different kind. To prevent the "race to the bottom" that jeopardizes the quality of citizens' lives by lowering national standards in order to attract investment, they are searching for a new ideology of globalism that would give priority to meeting social and human needs but would do this by bringing corporations under international control. In effect, this movement is projecting the Keynesian state forward in the hope of creating an effective governance that works at the global level to fine tune the world economy in the same way that governments once worked nationally to maintain a balance between economic growth and social welfare.

Future developments are likely to see progress along both paths. Citizens still expect their governments to maintain a sustainable environment and an adequate standard of public services. But they also expect transnational governance to ameliorate the world disorder, not aggravate it. With government expenditures on aid to the Third World having fallen to 0.27% of GNP, any serious commitment to global justice will have to start with the citizenry being willing to pay more taxes to fund a more vigorous Canadian contribution to human security.

This suggests that, while legal reforms are of some importance, supporting Canadian citizens' transnational efforts to achieve global justice requires their representatives to put their money where their mouth is and provide financial support both to traditional aid and to newer forms of CSO engagement on the ground in the South.

## **CONCLUSION**

Given the nature of globalization, Canada and Canadians are far from alone in coping with its ramifications, most of which are shared in all countries, though with varying intensity and different local applications. As a significant player on the world stage, how the state and its citizens react will be important and matter in any case. But their impact will be more substantial – whether as government or as business or as civil society – if we work in concert with like-minded associates. Given the widespread acceptance of liberal, humanitarian values, Canadians' effectiveness will be enhanced the more they work in transnational coalitions with like-minded governments, civil society organizations, businesses and individuals. Turning globalization to emancipatory effect will be a more realistic project the more allies there are.

## References

[Incomplete]

- Arthurs, Harry. 2000. "The Hollowing Out of Corporate Canada?" In J. Jenson and B. Santos, eds. *Globalizing Institutions: Case Studies in Social Regulation and Innovation*. London: Ashgate.
- Arup, Christopher. 2000. *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property*. Cambridge: Cambridge University Press. 96.
- Bakan, Joel et al. (2003) *Canadian Constitutional Law*, 3<sup>rd</sup> ed. (Toronto: Emond Montgomery).
- Barfield, Claude E. 2001. *Free Trade, Sovereignty, and Democracy: The Future of the World Trade Organization*. Washington, D.C.: AEI Press. chapter 2.
- Bernstein, Steven (2004) "The Elusive Basis of Legitimacy in Global Governance: Three Conceptions," Working Paper GHC 04/2, Institute on Globalization and the Human Condition, McMaster University (May)
- Bhagwati, Jagdish (2004) *In Defense of Globalization* (New York: Oxford University Press).
- Bhala, Raj. 1999. "The Myth About Stare Decisis and International Trade Law." *American University International Law Review* 14. 847.
- Black's Law Dictionary, 5<sup>th</sup> ed. (1979) (St. Paul, MN: West).
- Blank, Stephen and Krajewski, Stephen. 1995. "U.S. Firms in North America: Redefining Structure and Strategy," *North American Outlook* 5:2 (February).
- British Columbia. Regulatory Reform Office (2005) "Message from the Minister" <http://www.deregulation.gov.bc.ca/> (visited 12 May 2005).
- Canada (1998) *Voluntary Codes: A Guide for their Development and Use* (Ottawa: Government of Canada).
- Canada-U.S. Free Trade Agreement. 1988. Article 1605.
- Canadian Environmental Law Association (CELA) (2004), letter to Prime Minister Paul Martin (22 October), online: <http://www.cela.ca> (visited 12 March 2005).
- Canadian Environmental Law Association (CELA) et al. (2004), letter to Chair and members of the External Advisory Committee on Smart Regulation (16 August), online: <http://www.cela.ca> (visited 12 March 2005).
- CDA-92-1807-01, *Interpretation of Canada's Compliance with Article 701.3 with respect to Durum wheat sales*.
- CDA-95-2008-01 *In the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products*, Secretariate File No., Final Report of the Panel, 2 December 1996.
- Chang, Ha-Joon. 1998. "Transnational Corporations and Strategic Industrial Policy." In *Transnational Corporations and the Global Economy*, Eds. Richard Kozul-Wright and Robert Rowthorn, (The United Nations University). 232-237.
- Chayes, Abram & Antonia Handler Chayes (1995) *The New Sovereignty* (Cambridge, MA: Harvard)
- Clark, Tony. 1997. *Silent Coup: Confronting the Big Business Coup of Canada*, Toronto: Lorimer.

- Clarkson, Stephen (2002) *Uncle Sam and Us: Globalization, Neoconservatism, and the Canadian State* (Toronto and Washington: University of Toronto and Woodrow Wilson Presses)
- Clarkson, Stephen (2004) "Canada's External Constitution under Global Trade Governance," in Ysolde Gendreau, éd., *Dessiner la société par le droit/Mapping Society Through Law* (Les Éditions Thémis, CRDP, Université de Montréal), 1-31
- Cohen, Maxwell (1974) "Canada and the International Legal Order: An Inside Perspective" in R. St. J. MacDonald, Gerald L. Morris & Douglas M. Johnston, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto) 3.
- Cox, Robert (1996) "A Perspective on Globalization" in J. Mittelman, ed., *Globalization: Critical Perspectives* (Boulder, CO: Lynne Rienner).
- Cragg, Wesley, ed. (forthcoming) *Ethics Codes: The Regulatory Norms of a Global Society?* (Aldershot, UK: Edward Elgar)
- Daniels, Ronald J., Patrick Macklem and Kent Roach (2001) *The Security of Freedom* (Toronto: U Toronto Press)
- Davey, William J. 1996. *Pine and Swine* (Ottawa: The Centre for Trade Policy and Law), 65.
- Dunberry, Patrick. 2001. "The NAFTA Investment Dispute Settlement Mechanism: A Review of the Latest Case Law," *Journal of World Investment*, v. 2, n. 1, March.
- External Advisory Committee on Smart Regulation (EACSR) (2004) *Smart Regulation: A Regulatory Strategy for Canada* (Ottawa: EACSR)
- Falk, Richard (1999) *Predatory Globalization: A Critique* (Cambridge: Polity).
- Folson, Rose B. (2004) *Calculated Kindness: Globalization, Immigration and Settlement in Canada* (Halifax: Fernwood).
- Gibson, Robert B., ed. (1999) *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough, Ontario: Broadview)
- Habermas, Jürgen (1975) *Legitimation Crisis*, trans. Thomas McCarthy (Boston: Beacon)
- Hazell, Stephen (1999) *Canada v. The Environment: Federal Environmental Assessment 1984-1998* (Toronto: Canadian Environmental Defence Fund).
- Held, David *et al.* (1999) *Global Transformations* (Stanford: Stanford University Press)
- Hogg, Peter W. (2004) *Constitutional Law of Canada*, Student ed. 2004 (Scarborough, ON: Carswell).
- Horlick, Gary and DeBusk, F. Amanda. 1993. "Dispute Resolution Under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID", *Journal of World Trade* 27:1, 52.
- Howse, Robert 1998 "Settling Trade Remedy Disputes: When the WTO forum is better than the NAFTA," *C.D. Howe Commentary* 111 June 1998. 15.
- Howse, Robert. 2000. The Canadian Generic Medicines Panel-A Dangerous Precedent in Dangerous Times, *Journal of World Intellectual Property* 3:4 (July, 2000), 493-508.

- Howse, Robert and Regan, Donald. 2000. "The Product/Process Distinction -- an Illusory Basis for Disciplining Unilateralism in Trade Policy", *European Journal International Law* 11:2, 268.
- Hughes, Patricia (2004) "The Rule of Law: Challenges in a Global Economy" in Patricia Hughes & Patrich Molinari, eds., *Participatory Justice in A Global Economy: The New Rule of Law* (Montréal: Thémis) 29.
- Kent, Christopher. 1994 "The Uruguay Round GATT, TRIPS Agreement and Chapter 17 of the NAFTA: A New Era in International Patent Protection," *Canadian Intellectual Property Review* 10, no. 3, 711-33.
- Keohane, Robert O. & Joseph S. Nye, Jr. (1976) "Introduction: The Complex Politics of Canadian-American Interdependence" in Annette Baker Fox, Alfred O. Hero, Jr. & Joseph S. Nye, Jr., eds., *Canada and the United States: Transnational and Transgovernmental Relations* (New York: Columbia University Press) 3-15.
- Kissinger, Henry (1999) "Globalisation and World Order", public lecture delivered at Trinity College Dublin (Oct. 29)
- Latham, Robert (1999) "Politics in a Floating World," in Martin Hewson and Timothy J. Sinclair, eds., *Approaches to Global Governance Theory* (Albany: State University of New York Press) 23-53.
- Levin, Richard C, and Marin, Susan Erickson. 1996. "NAFTA Chapter 11: Investment and Investment Disputes," *NAFTA: Law and Business Review of the Americas* 83, no. 2 (summer). 90.
- Likosky, Martin (2002) "Editor's Introduction: Transnational Law in the Context of Power Disparities" in Martin Likosky, ed., *Transnational Legal Processes* (London: Butterworths) xvii-xxxiv.
- Loungnarath, Vilaysoun and Stehly, Céline. 2000. "The General Dispute Settlement Mechanism in the North American Free Trade Agreement and the World Trade Organization System: Is North American Regionalism Really Preferable to Multilateralism?" *Journal of World Trade Law* 34 (1), 43.
- MacCharles, Tonda (2005) "Cotler: 'Ideas Cross Borders'", *Toronto Star* (10 February) A8.
- McBride, Stephen (2001) *Paradigm Shift: Globalization and the Canadian State* (Halifax: Fernwood).
- McBride, Stephen and Sheilds, John. 1997. *Dismantling a Nation: The Transition to Corporate Rule in Canada.*, 2<sup>nd</sup> Edn., Halifax: Fernwood.
- Meidinger, Errol (2001) "Environmental Certification Programs and U.S. Environmental Law: Closer than You May Think" 31 *Environmental Law Reporter* 10162
- Monahan, Patrick (2002) *Constitutional Law*, 2<sup>nd</sup> ed. (Toronto: Irwin Law).
- New Directions Group (1999) "The New Directions Group Position," in R. Gibson, ed. *Voluntary Initiatives* (Peterborough, Ont.: Broadview) 229-238.
- Nolen, Stephanie (2005) "In Tanzania, 'death doesn't wait' for the poor to raise money" *Globe and Mail* (19 Feb), p. A17.
- O'Connor, Daniel & Suzan Ilcan (2005) "The Folding of Liberal Government: Contract Governance and the Transformation of the Public Service in Canada" *Alternatives* 30, 1-23

- Ó Tuathail, Gearóid, Andrew Herod & Susan M. Roberts (1998) "Negotiating Unruly Problematics," in Andrew Herod, Gearóid Ó Tuathail & Susan M. Roberts, eds., *An Unruly World? Globalization, Governance and Geography* (London: Routledge) 1.
- Ostry, Sylvia. 2001. *Global Integration: Currents and Counter-Currents*, Walter Gordon Lecture, Massey College, University of Toronto, May 23, 6.
- Palmeter, David and Mavroidis, Petros C. "The WTO Legal System: Sources of Law", in *The American Journal of International Law*, Vol. 92: 398, 1998. 405.
- Pauly, Louis W. 1997. *Who Elected the Bankers? Surveillance and Control in the World Economy*. Ithaca: Cornell UP.
- Petter, Andrew. 1988. "Free Trade and the Provinces." In eds. Gold, Marc and Leyton-Brown, David. *Trade-Offs on Free Trade: The Canada-U.S. Free Trade Agreement*. Toronto: Carswell Legal Publications.
- Peters, B. Guy (2003) "Democracy and Political Power in Contemporary Western Governments: Challenges and Reforms" in Thomas J. Courchene & Donald J. Savoie, eds., *The Art of the State: Governance in a World Without Frontiers* (Montreal: Institute for Research on Public Policy) 81.
- Plato (1952) "Statesman", in Robert Maynard Hutchins, ed., *Great Books of the Western World, vol. 7: Plato* (trans. Benjamin Jowett) 580-608 (Chicago: Encyclopedia Britannica)
- Pollution Probe (1999) *Towards Credible and Effective Environmental Voluntary Initiatives: Lessons Learned* (Toronto: Pollution Probe).
- PRI (Policy Research Initiative), Special issue, "North American Linkages", 7 *Horizons* 1-82 (June).
- Schneiderman, David (2004) "Canadian Constitutionalism, the Rule of Law, and Economic Globalization" in Patricia Hughes & Patrich Molinari, eds., *Participatory Justice in A Global Economy: The New Rule of Law* (Montréal: Thémis) 65.
- Schwanen, Daniel. 1998 "The Summer of Our (Canadian) Content: Thinking About Canada's Response to the WTO Magazine Decision." C.D. Howe Institute *Backgrounders*. June, 29.
- Shrybman, Steven. 2002. "The Impact of International Services and Investment Agreements on Public Policy and Law Concerning Water" paper presented at From Doha to Kananaskis: The Future of the World Trading System and the Crisis of Governance, Organized by Roberts Centre for Canadian Studies, York University and Munk Centre for International Studies, University of Toronto, March 1-3, 7.
- Sinclair, Scott. 2000 *GATS: How The World Trade Organization's New Services Negotiations Threaten Democracy*. Ottawa: Canadian Centre for Policy Alternatives. 44.
- Streeck, Wolfgang. 1996. "Public Power beyond the Nation-State: The Case of the European Community," in Robert Boyer and Daniel Drache, eds., *States Against Markets: The Limits of Globalization* (London: Routledge), 299-315.
- Szablowski, David (2004) *Legitimation and Regulation in the Global Economy*, Ph.D. dissertation, Osgoode Hall Law School (October).
- Toope, Stephen (2000) "Emerging Patterns of Governance in International Law" in Michael Byers, ed., *The Role of Law in International Politics* (Oxford: Oxford University Press) 91.
- Trakman, L. 1997 *Dispute Settlement under the NAFTA* (New York: Transnational Publishers), 277.

Trebilcock, Michael and Howse, Robert. 1999. *The Regulation of International Trade* 2<sup>nd</sup> Ed. New York: Routledge.

WCEL (West Coast Environmental Law Association) (2004) "West Coast Environmental Law's Comments on 'Smart Regulation for Canada'," submission to External Advisory Committee on Smart Regulation (August), online: <http://www.pco-bcp.gc.ca/smartreg-regint/en/06/01/index.html> (visited 12 March 2005).

Weber, Max (1947) *The Theory of Social and Economic Organization* (New York: Free Press).

Weber, Max (1968) *Economy and Society*, translation edited by G. Roth & C. Wittich (New York: \_\_\_\_\_).

Webb, Kernaghan (1999) 'Voluntary Initiatives and the Law', in R. Gibson (ed.), *Voluntary Initiatives: The New Politics of Corporate Greening*, Peterborough, Ontario: Broadview, pp. 32-50.

Webb, Kernaghan (ed.) (2004), *Voluntary Codes: Private Governance, the Public Interest and Innovation*, Ottawa: Carleton University Research Unit for Innovation, Science and the Environment.

Weiler, J.H.H. (1999) *The Constitution of Europe* (Cambridge: Cambridge).

Weiler, J.H.H. 2001 "The Rule of Lawyers and the Ethos of Diplomats' Reflections on the Internal and External Legitimacy of WTO Dispute Settlement." *Journal of World Trade* 35 (2), 194.

Weiler, J.H.H. & Marlene Wind, eds. (2003) *European Constitutionalism Beyond the State* (Cambridge: Cambridge).

Wood, Stepan (forthcoming) "Three Questions About Corporate Codes: Problematizations, Authorizations and the Public/Private Divide," in Wesley Cragg, ed., *Ethics Codes: The Regulatory Norms of a Global Society?* (Aldershot, UK: Edward Elgar, forthcoming) 245-288

Wood, Stepan. (2002-03), 'Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance', *Buffalo Environmental Law Journal*, **10**, 129-210.

Wood, Stepan. (2003), 'Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law and Private Authority in Canada', in Law Commission of Canada (ed.), *New Perspectives on the Public-Private Divide*, UBC Press, pp. 123-65.

World Trade Organization. 2000. Canada--Term of Patent Protection. Report of the Panel. 5 May. Geneva: World Trade Organization.

World Trade Organization. 1998. UNITED STATES IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS, Report of the Appellate Body, para. 129. Geneva: World Trade Organization.

World Trade Organization. 1997. Canada--Certain Measures Concerning Periodicals. Ruling by the Appellate Body. Geneva: World Trade Organization.