

**Theorizing Institutional Influence:  
The WTO, Canadian Trade Policy and Domestic Sovereignty 1994-2004**

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## Introduction

This paper argues that historical institutional theory can bring together the strong domestic focus of neo-institutional political economy with a consistent consciousness of the increasing impact of international organization on public policy priorities, processes and outcomes. In an era of globalization, effective public policy formulation increasingly requires that policymakers steer a course between the apparent responsibilities of multilateral participation and the domestic goals of the modern welfare state.<sup>1</sup>

Canada has participated in 42 dispute settlement processes at the World Trade Organization. Of these, 24 were resolved before judgment, 11 were resolved after the release of the panel report and only six went as far as the appeals process, suggesting that at least in the Canadian case, the WTO Dispute Settlement Mechanism is working as it should – as a juridical mechanism with a strong diplomatic component. Canada has been a party to more than 15% of all trade dispute settlements undertaken—a massive institutional investment compared to other G7 economies.<sup>2</sup>

The WTO has become an integral part of Canadian foreign policy in a way that it has not for other countries. Assessing this institutional impact has yet to be undertaken—this is not surprising because there is no single institutional theory which enables scholars to undertake this task. To date, the most interesting work has been undertaken by neo-institutional political

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<sup>1</sup> This paper has benefited greatly from the continuous support of my dissertation supervisor, Daniel Drache who has shaped my thinking about the Canadian political economy and Kurt Huebner, who helped me to think about institutions and market regulation in new ways. Both read numerous drafts and gave countless helpful suggestions. As always, the gaps, omissions and errors are all mine.

<sup>2</sup> WTO online statistical databases

economists who challenge the political assumptions of free trade theory, and with it much of the perception and practice of Canada's political elites and foreign policy experts.<sup>3</sup>

Neo-institutional political economy challenges three basic suppositions of free trade theory. First, it confronts the neo-classical economic assumption that supply and demand are the only primary motivators for market actors. Power asymmetries among states and the institutions which structure markets also play a very large role in determining why actors behave as they do.<sup>4</sup> Second, it disagrees with the assertion that market access is only a matter of nominal regulation to maintain a level playing field for trading partners. International regulatory institutions also configure a unique combination of opportunities and constraints for national political economies.<sup>5</sup> Finally, neo-institutional political economy questions the conventional wisdom that states must significantly adjust their market institutions in order to integrate with the global political economy. Free trade proponents argue that restricted policy autonomy is the price to be paid for high growth rates.<sup>6</sup> But they ignore the fact that economic success also requires proactive state intervention in the domains of economic and social policy. As nations are squeezed between the downward pressure of international regulatory regimes and the upward pressure of domestic business interests, state responsibility for correcting market failures and softening the impact of economic integration is becoming more important.

The first section of this paper discusses different approaches to neo-institutionalism, examining the significant divergence between rational choice institutionalism and historical institutionalism. Then it highlights the strengths of historical institutionalism for probing Canada's connection with the international trade regime. The second section examines the

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<sup>3</sup> Daniel Drache. *Borders Matter: Homeland Security and the Search for North America*. Halifax, Nova Scotia: Fernwood Publishing, 2004.

<sup>4</sup> Kathleen Thelen. "Historical Institutionalism in Comparative Politics." *American Review of Political Science* 2 (1999): 369-404.

<sup>5</sup> Lisa L. Martin and Beth A. Simmons. "Theories of Empirical Studies of International Institutions." *International Organization* 52, no. 4 (1998).

<sup>6</sup> John Williamson. "What Washington Means by Policy Reform." Washington: Institute for International Economics, 1990.

tensions and contradictions between Canadian multilateral commitments and public policy. It asks whether the WTO's rules generate the best possible outcomes for the Canadian political economy, and examines the gaps and omissions in the WTO's legal regime as they relate to Canada's domestic sovereignty. Strategies for further research on the regulatory impacts of WTO discipline for the Canadian political economy are examined in some detail.

### Historical Institutionalism in an Era of Globalization

Despite the great influence of markets, the international system remains the offspring of organized institutions, not free trade. Best known are the World Trade Organization, the International Monetary Fund, the World Bank group of organizations, and the sprawling network of institutions under the auspices of the United Nations. There are hundreds of others regulating regional trade, international political relations, environmental standards and international human rights principles, to name a few jurisdictions. Certainly the institutionalization of the international system is not new. Scholarly pioneers from Hedley Bull to Karl Polanyi and Andrew Schonfield have commented on the institutionalization of society beyond the state.<sup>7</sup>

Institutions are rules, and as such, are the foundations of all political behavior. They are "formal and informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy. They can range from the rules of a constitutional order or the standard operating procedures of a bureaucracy to the conventions governing trade union behavior or bank-firm relations."<sup>8</sup> Neo-institutional political economy frames the relations between state and society in structural terms because, as Ikenberry put it,

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<sup>7</sup> Hedley Bull. *The Anarchical Society: A Study of Order in World Politics*. New York: Columbia University Press, 1977; Karl Polanyi. *The Great Transformation: The Political and Economic Origins of Our Time*. Boston: Beacon Press, 2001; Andrew Schonfield. *Modern Capitalism: The Changing Balance between Public and Private Power*. Oxford: Oxford University Press, 1965.

<sup>8</sup> Peter A. Hall and Rosemary C.R. Taylor. "Political Science and the Three New Institutionalisms." *Political Studies* 44 (1996): 936-57.

they are not “straightforward reflections of social forces.”<sup>9</sup> Rather, institutions are both organizational frames, which structure social groups as well as the rules, norms and values, which configure relations between actors. Importantly, neo-institutional analytical methods do not formulate deductive theories or test them. They begin with empirical socio-political observation and build inductively around a set of theoretical reference points.<sup>10</sup> This allows researchers to develop medium-range theory to account for historically specific institutional change.

Institutionalism in the discipline of political science carries within it a creative tension between historical modes of analysis and positive social science. Junko Kato and others have pointed out that there are at least two brands of new institutional theory: historical institutionalism which draws upon classical institutional theories and behavioralism, and rational choice institutionalism which traces its lineage from the rise of rational choice theory and the neo-classical economic tradition.<sup>11</sup> Steinmo describes the difference between these two methods by suggesting that rational choice institutionalists ask, ‘what is the game, and how is it played?’, while historical institutionalists ask, ‘who wins, who loses, and why?’<sup>12</sup>

Rational choice institutionalism constructs positive theory of institutions, aiming for a rigorous theoretical understanding of institutional processes, and looking for the laws of political behavior. Case studies are taken from the real world to test institutional theory, aiming for a broader understanding of the real world through rigorous theorizing first and empirical research second. Reflecting the traditional strengths of economic theory, rational choice institutionalism

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<sup>9</sup> G. John Ikenberry. "Conclusion: An Institutional Approach to American Foreign Policy." *International Organization* 42, no. 1 (1988): 219-43.

<sup>10</sup> *ibid*

<sup>11</sup> Junko Kato. "Institutions and Rationality in Politics: Three Varieties of Neo-Institutionalists." *British Journal of Political Science* 26, no. 4 (1996): 553-82; Sven Steinmo, Kathleen Thelen, and Frank Longstreth, eds. *Structuring Politics: Historical Institutionalism in Comparative Analysis*. Cambridge: Cambridge University Press, 1992.

<sup>12</sup> Sven Steinmo. "The New Institutionalism." In *The Encyclopedia of Democratic Thought*, edited by Barry Clark and Joe Foweraker. London: Routledge, 2001.

views institutional equilibrium as the norm, emphasizing the importance of exogenous shocks for institutional change.<sup>13</sup>

Historical institutionalism probes normative themes of consistency and change. It privileges the temporal element of institutional change, and looks at the ways that a variety of factors influence change over time.<sup>14</sup> Ultimately, the overarching concern of historical institutionalism is the role of institutions in shaping actor interests and influencing behavior.<sup>15</sup> Consequently, historical institutionalism emphasizes the unintended consequences of institutional design and functional dynamics.<sup>16</sup> In the context of Canada's relationship to the WTO, these are timely concerns because they speak directly to the large political investment that Canada has made at the WTO and the outcomes, both intended and unintended, of this course of multilateral diplomacy.

#### *Empirical problems in historical institutionalism*

It is important to note that institutionalism in the social sciences is not a new phenomenon, nor one particularly associated with one region or discipline. Institutionalism has blossomed in economics, where Paul Krugman and Douglass North have been influential in North America,<sup>17</sup> and the Regulation School led by Robert Boyer has enjoyed much success in Europe.<sup>18</sup> In sociology, the work of Max Weber is foundational and rigorous practitioners such as

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<sup>13</sup> *ibid*

<sup>14</sup> Paul Pierson. "Not Just What, but When: Timing and Sequence in Political Processes." *Studies in American Political Development* 14 (2000b).

<sup>15</sup> Daniel Drache and Marc Froese. *The Great Global Poverty Debate: Balancing Private Interests and the Public Good at the WTO* [PDF file]. Robarts Centre for Canadian Studies, York University, September 2003. Available from [www.robarts.yorku.ca](http://www.robarts.yorku.ca)

<sup>16</sup> Paul Pierson. "The Limits of Design: Explaining Institutional Origins and Change." *Governance: An International Journal of Policy and Administration* 13, no. 4 (2000c): 475-99.

<sup>17</sup> Paul Krugman. *Rethinking International Trade*. Cambridge, MA: MIT Press, 1990; Douglass C. North. *Institutions, Institutional Change and Economic Performance*. New York: Cambridge University Press, 1990.

<sup>18</sup> Robert Boyer. "The Political in the Era of Globalization and Finance: Focus on Some Regulation School Research." *International Journal of Urban and Regional Research* 24, no. 2 (2000): 275-322.

Michael Mann reassert the value of large scale theory and *longue durée* historical analysis.<sup>19</sup> In political science, the new institutionalism has enjoyed marked success in both its European and American variants. In Europe, Anthony Giddens, David Held and Gosta Esping-Anderson represent a broad cross-section of research highlighting the structural importance of institutions for liberal democracy, the modern welfare state and international relations.<sup>20</sup>

The historical institutional scholarship of American political scientists is especially relevant. The traditional strength of American historical institutional scholarship lies in its ability to cut through abstract theory and build an empirical picture of public policy in clear win/loss terms. As a result, the empirical problems dealt with by these historical institutionalists tend to be both broad and deep, often with a clearly prescriptive policy focus. John Zysman, David Soskice and Peter Hall, Theda Skocpol and Paul Pierson, are only a few historical institutional scholars producing A-level research. Their work exemplifies historical institutionalism at its best – clear, concise and relevant for scholars and policymakers alike.

John Zysman conducts research on production patterns. His account of how the historical trajectory of institutional development shapes national economic growth suggests that the institutional shape of Canadian society matters because markets are anchored in national regulatory institutions.<sup>21</sup> As the institutional foundations of markets, nations play a critical role in the structural development of the international system, and remain a highly influential element shaping international economic interactions. Political economic continuity and change are the

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<sup>19</sup> Michael Mann. "In Praise of Macro-Sociology: A Reply to Goldthorpe." *The British Journal of Sociology* 45, no. 1 (1994): 37-54.

<sup>20</sup> Anthony Giddens. *The Constitution of Society: Outline of the Theory of Structuration*. Berkeley: University of California Press, 1984; Held, David, Anthony McGrew, David Goldblatt, and Jonathan Perraton. *Global Transformations: Politics, Economics and Culture*. Stanford, CA: Stanford University Press, 1999; Gosta Esping-Anderson. "Three Political Economies of the Welfare State." *Canadian Review of Sociology and Anthropology* 26, no. 1 (1989): 10-36.

<sup>21</sup> John Zysman. "How Institutions Create Historically Rooted Trajectories of Growth." *Industrial and Corporate Change* 3, no. 1 (1994).

result of dynamic institutional interaction, not a singular power working its will on national political economies.

Hall and Soskice address the institutional foundations of comparative advantage in their magisterial work, *Varieties of Capitalism*.<sup>22</sup> They underline the important role played by national institutions in trade integration, contending that “differences in the institutional framework of the political economy generate systematic differences in corporate strategy between [liberal market economies] and [coordinated market economies].”<sup>23</sup> National institutions shape the trade advantages of domestic firms in international markets. The varieties of capitalism research is highly informative for IPE debates around the relationship between states, the forces of trade integration and international governance mechanisms. It unlocks a space to theorize international institutional evolution at the national level without simplifying the interactive complexity of global governance patterns.

Pierson and Skocpol’s piece in the recent APSA publication *Political Science: State of the Discipline*, lays out the traditional strengths of historical institutionalism.<sup>24</sup> They emphasize the issue-orientation of historical institutionalism, noting that “historical institutionalists make visible and understandable the overarching contexts and interacting processes that shape and reshape states, politics and public policymaking.”<sup>25</sup> The many studies of institutions and welfare state policy cited by Pierson and Skocpol draw upon multiple analytical strategies, emphasizing the creative linkages between constructivist and rationalist modes of interpretation.

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<sup>22</sup> Peter A. Hall and David Soskice. "An Introduction to Varieties of Capitalism." In *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, edited by Peter A. Hall and David Soskice. New York: Oxford UP, 2001

<sup>23</sup> Hall and Soskice 2002 p. 16.

<sup>24</sup> Ira Katznelson and Helen V. Milner, eds. *Political Science: The State of the Discipline*. New York: W.W. Norton and Company, 2002.

<sup>25</sup> Paul Pierson and Theda Skocpol. "Historical Institutionalism in Contemporary Political Science." In *Political Science: The State of the Discipline*, edited by Ira Katznelson and Helen V. Milner, 693-721. New York: W.W. Norton and Company, 2002. p. 693



Historical institutional theory presents three empirical problems which are increasingly central to our understanding of the Canadian political economy. First, Canadian trade patterns did not change with the advent of NAFTA or the WTO. Historical institutionalism must then account for other, less obvious impacts of international regulatory institutions. Second, despite an increase in economic integration, Canada has become more autonomous in the international arena. In the context of Canada's trade dependence upon the US, how do we explain enduring foreign policy autonomy? Finally, the insight that markets are not the only shapers of comparative advantage suggests that Canada's relationship with the WTO is much more complex and perhaps less beneficial to the Canadian political economy than originally thought – despite the seemingly obvious benefits of adherence to a rules-based system for trade and economic growth.

#### *The Canadian Context*

Over the past decade, Canadian trade has increased dramatically, but trade patterns have changed very little. Free trade was supposed to stimulate diversification, but it has not. Nor has Canada become a 'northern tiger,' leading the G7 in productivity, jobs and rising incomes. Rather, Canada has remained a leading trader, ranking among the top ten economies in merchandise trade (seventh largest exporter and eighth largest importer),<sup>26</sup> and continues to trade strongly in commercial services (ranked 11<sup>th</sup> in exports, ninth in imports).<sup>27</sup> Canada remains the largest single market for American manufactures, and ranks as the second largest supplier of goods to the US.<sup>28</sup> Despite the recent economic downturn, Canadian GDP growth has exceeded that of the US, despite increasing exports and imports only marginally (US trade volume decreased by 4% during the period).<sup>29</sup>

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<sup>26</sup> "International Trade Statistics 2003." Geneva: World Trade Organization, 2004, p. 21.

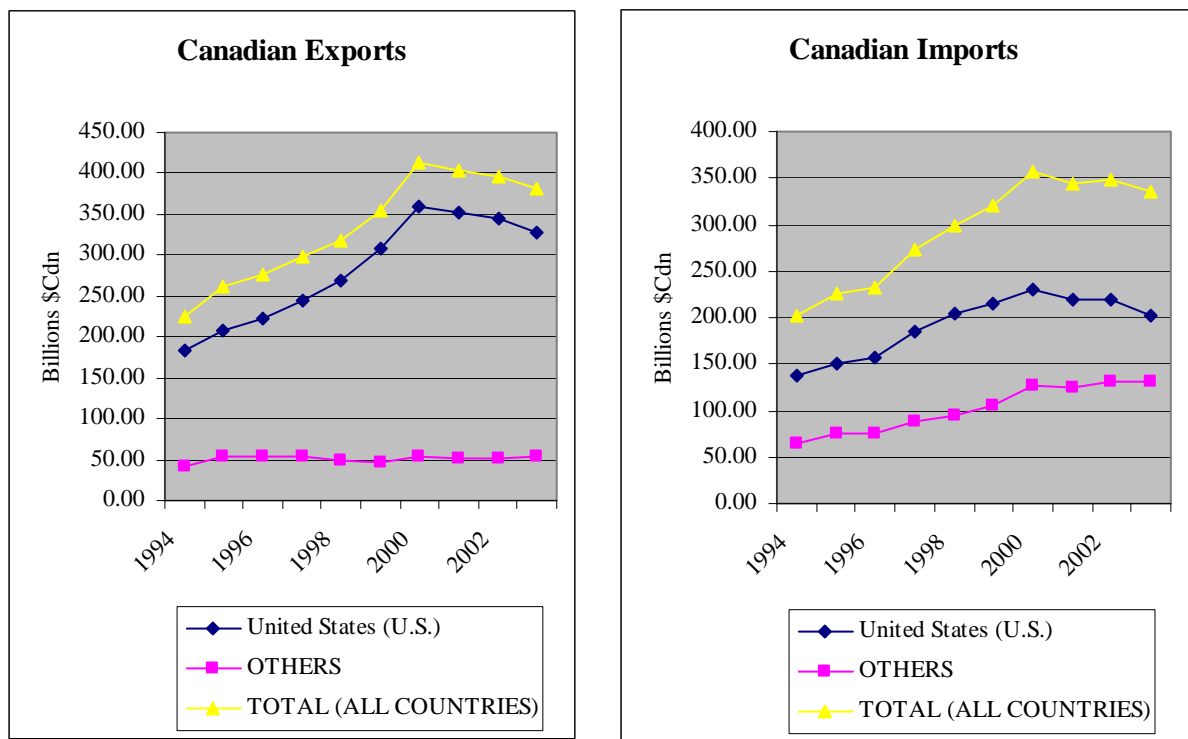
<sup>27</sup> WTO 2003 p. 23

<sup>28</sup> WTO 2003 p. 50

<sup>29</sup> WTO 2003 p. 5

As the charts below show, Canadian business remains heavily dependent upon US markets. Canada's trade dependence can be seen most clearly in export markets. While the value of Canadian exports has risen above \$400 billion annually in years past, the United States continues to take seven-eighths of this. Canada's export markets grow as trade with the US grows. Over the past decade, Canada's export volume to the rest of the world has remained steady around \$50 billion per year.

**Figures 1 and 2**  
**A Decade of Canadian Trade**



*Source: Industry Canada online databases*

Imports are a different story. Over the past ten years, imports from the US have grown at a slightly slower pace, and imports from the rest of the world have increased appreciably. Despite the market downturn following the technology bubble of 1999-2000, Canada has continued to do more business with the rest of the world, while imports from the US have

declined slightly. While this pattern does not portend any long term change in Canada's trade dependency, it may suggest a strengthening (albeit slight) of trade ties with other partners.

In real terms, Canadian trade has never been more skewed towards the American market. While NAFTA has been good agreement for the Canadian economy, the last decade has seen Canada's trade dependence on the US continue to grow. Furthermore there are only 3 or 4 areas of specialization where Canadian producers have excelled. Canada has a huge American market for energy, agricultural products and softwood lumber. The largest value-added trade is in auto parts. Canada and Michigan trade almost \$70 billion worth of autos and parts per year.<sup>30</sup> Nevertheless, on average total trade with Europe remains below \$2 billion a year and trade with the rest of the hemisphere remains negligible.<sup>31</sup>

At the same time, NAFTA has hardly assisted Canada's foray into the new economy. The US has gained in high value-added exports to Canada. Canada's trade with Texas tells a familiar story. Texas exports more than \$1.4 billion worth of computers to Canada and brings in more than a billion dollars per year in crude petroleum.<sup>32</sup> Overall, Canada's trade balance with the US in computer and electronic product manufacturing has remained in the red for the last decade. Since 1994 Canada has run a high-tech trade deficit of approximately \$5 billion a year. Clearly, Canada has failed to gain market share in high-tech manufacturing. NAFTA's impacts on the Canadian industrial bottom line have been uneven—a big trade in staples products, but less export diversification than many trade experts hoped for (See figure 3 below).

Canada and the US have very different institutional relationship to markets. The Canadian state maintains an integral part of Canadian economic success. Innis first noted the importance of centralized planning and priority setting for Canadian development, and this

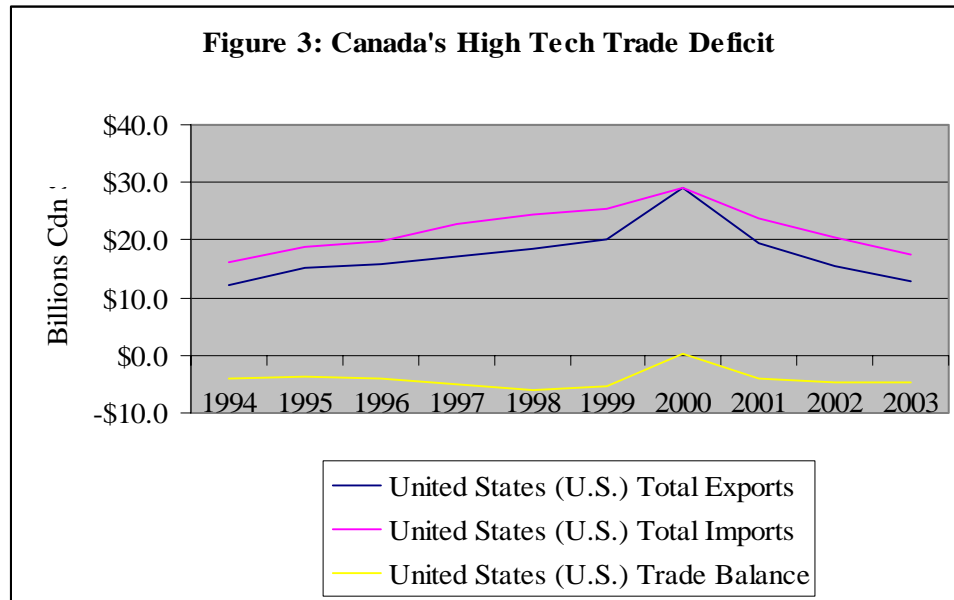
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<sup>30</sup> For more information, visit [www.can-am.gc.ca](http://www.can-am.gc.ca)

<sup>31</sup> Industry Canada online databases

<sup>32</sup> Trade statistics available at [www.can-am.gc.ca](http://www.can-am.gc.ca)

insight remains relevant today.<sup>33</sup> The welfare state is the central institution in the Canadian political economy. In terms of employment, social programs, education programs and poverty levels, Canada and the US have very different trajectories. Social Canada more closely resembles the European model, while market Canada is being pulled towards the US orbit.



*Source: Industry Canada online databases*

The prominent tax and spend functions of the Canadian government only serve to emphasize the impact of national institutions on market priorities and social policies. Despite the free trade formula for economic success, taxes are high and spending is up. Globalization has not led to a 'race to the bottom' for Canadian revenue and expenditure policies.<sup>34</sup> Nor have America's bilateral trade policies and unilateral foreign policy adventures eroded Canada's commitment to an international system based upon the rule of law.

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<sup>33</sup> Harold Innis. "The Importance of Staple Products in Canadian Development." In *Staples, Markets and Cultural Change: Selected Essays*, edited by Daniel Drache. Montreal: McGill-Queen's University Press, 1995.

<sup>34</sup> Christian Lammert. "Modern Welfare States under Pressure: Determinants of Tax Policy in a Globalizing World." Montreal: Institute for Research on Public Policy, 2004.

### *Canadian Multilateralism*

Andrew Cooper has termed Canada's unique rules-based approach to international governance a 'reputational impulse,'<sup>35</sup> suggesting that Canadian interest in the international system has been best served by developing a reputation for multilateral cooperation. Diplomatic skill and an international reputation for principled 'followership,' have been the mainstays of Canada's statecraft post-1945. Canada has been by far one of the most enthusiastic supporters of the WTO system, and a leading middle power proponent of the current multilateral organizational form of trade governance.<sup>36</sup> It is important to note, however, that Canadian followership has always been an *ad hoc* answer to international challenges and never a grand plan for a middle power foreign policy.

In the post-war trade regime, Canada played a diplomatic role which contradicts its economic status as a small, trade-dependent economy. In throwing its support behind the post-war economic structure, policymakers hoped to achieve not only "symbolic prestige, but also tangible benefits in terms of institutional 'special' privileges and posts" – in essence, the status of 'insider,' at the GATT.<sup>37</sup> All this quiet diplomatic maneuvering was an attempt to play a role in modifying US behavior, something Canada lacks the political clout to do through bilateral relations. "Given the unequal nature of the Canada/US relationship. . . multilateral means [hold] greater salience as a vehicle for constraining US policies and practices."<sup>38</sup>

### Trade and Public Policy

The world of trade and sovereignty is structured by complex and overlapping jurisdictions. Frieden and Martin suggest that the narrow range of analytical problems addressed

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<sup>35</sup> Andrew F. Cooper. *Canadian Foreign Policy: Old Habits and New Directions*. Scarborough: Prentice Hall, 1997, p. 71.

<sup>36</sup> Paul Martin, and Ernesto Zedillo. "Doing Good by Doing Well." *The Globe and Mail*, August 1 2003.

<sup>37</sup> Cooper 1997 p. 76

<sup>38</sup> Cooper 1997 p. 77

by positive IPE in North America leaves much room for new understandings of the complex interaction between international governance and national political economies.<sup>39</sup> The case studies presented attempt to address this gap with an inductive, historical and neo-institutional approach to Canada's international economic relations as they relate to domestic sovereignty.<sup>40</sup>

The WTO is a very different institution from NAFTA. Not only is the obvious division of labour much different—the WTO is multilateral rather than bilateral in nature—but in the developing hierarchy of global governance, the GATT has evolved into an umbrella agreement under which NAFTA is an unequal and decidedly lower-order trade regime.<sup>41</sup> The founding principle of international trade post-1945, the Most Favored Nation (MFN) principle, states that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”<sup>42</sup> Equal treatment of like goods, regardless of origin is the founding principle of the post-war liberal trade regime—and represents a set of core values upon which all subsequent preferential trade regimes have been based, including NAFTA. Accordingly, any discussion of Canadian trade patterns and policy must take into consideration the legal framework for global trade regulation (see Figure 4 below).

When considering the unique relationship that Canada has had with the GATT, the most significant question to ask after the Uruguay Round is how has Canada's relationship to the international trade regime changed with the signing of the Marrakech agreement in 1993? From a historical institutional perspective, this is a question of the “reciprocal effects of domestic

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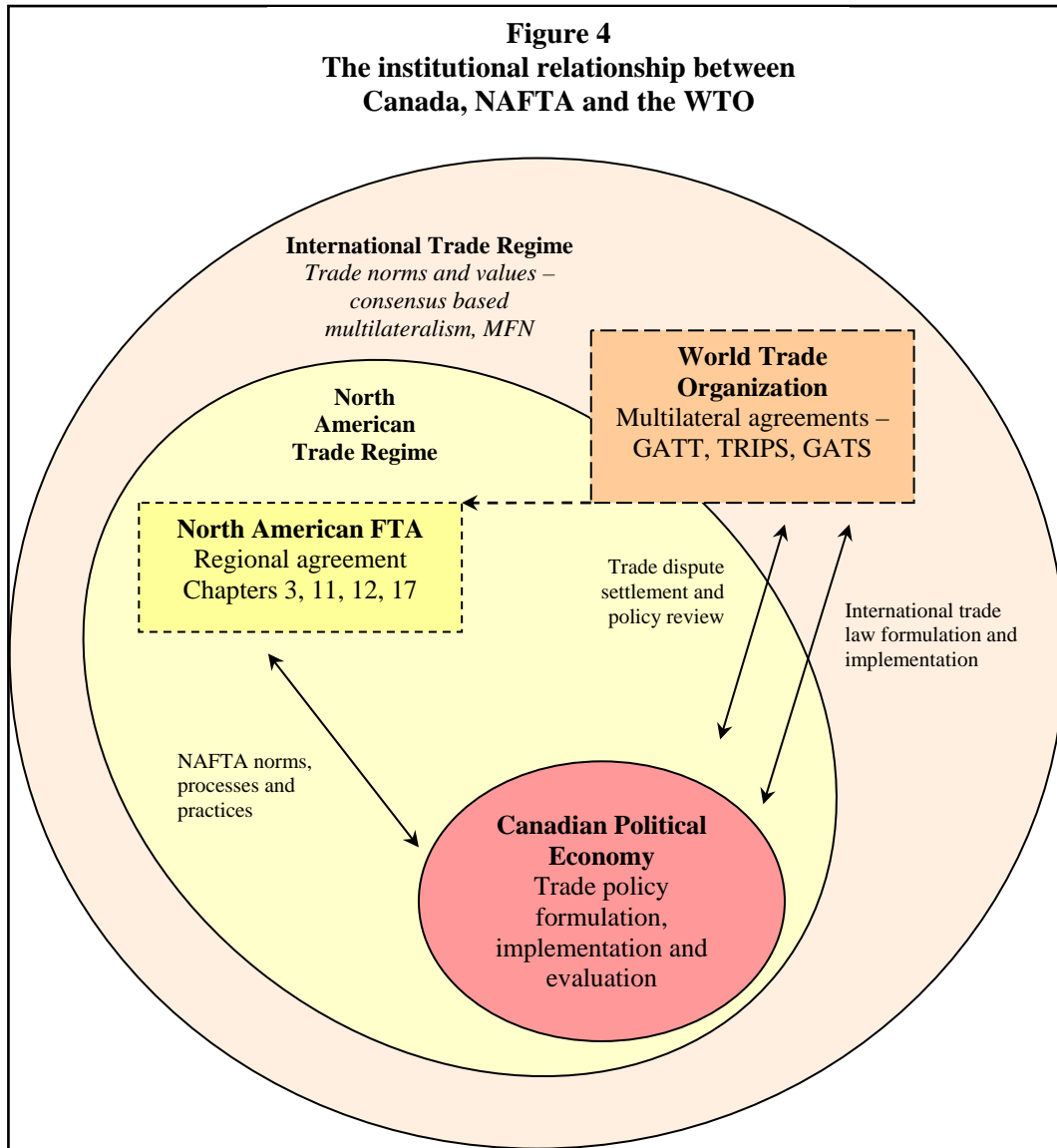
<sup>39</sup> Frieden and Martin 2002 p. 145.

<sup>40</sup> John Gerard Ruggie and Friedrich Kratochwil. "International Organization: A State of the Art on an Art of the State." *International Organization* 40, no. 4 (1986): 753-75.

<sup>41</sup> Michael J. Trebilcock and Robert Howse. *The Regulation of International Trade*. 2nd ed. London: Routledge, 1999, pp. 25-50.

<sup>42</sup> *The General Agreement on Tariffs and Trade, 1947* [PDF document]. World Trade Organization [cited April 1 2004]. Part 1, Article 1.

structures and the international political economy.”<sup>43</sup> Canada’s trade patterns may not have been substantially affected by the creation of the WTO, but the issue of domestic political autonomy in the context of evolving trade governance is increasingly central to Canada’s foreign policy goals.

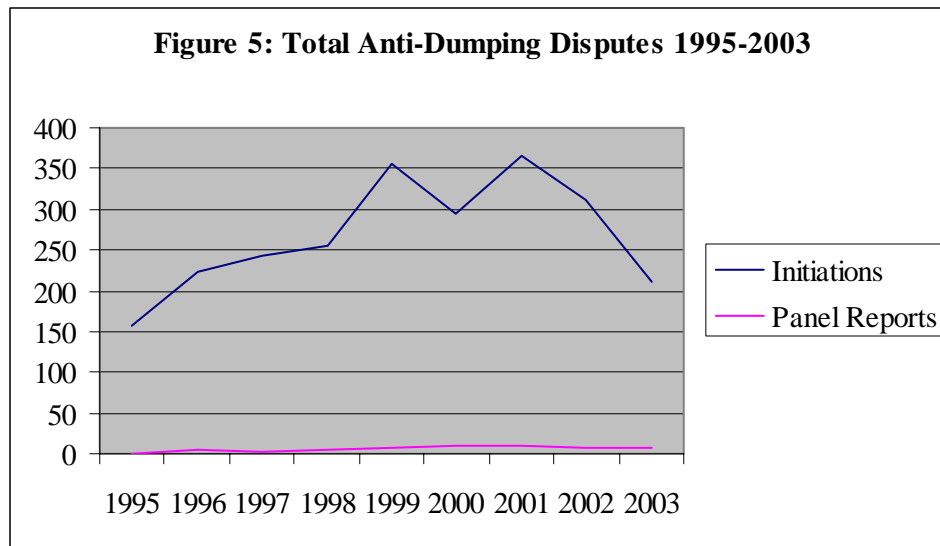


Four case studies shed light on the often troubled relationship between the state and international trade governance.

<sup>43</sup>Katzenstein, Peter J., Robert O. Keohane, and Stephen D. Krasner. "International Organization and the Study of World Politics." *International Organization* 52, no. 4 (1998): 645-85, p. 670.

1. *Antidumping: The Stealth Rise of Nationalist Industrial Policy*

Antidumping actions are initiated when a country charges that one of its trading partners is ‘dumping’ goods or services into its domestic market at artificially low prices—often charging less than it costs to produce the product or service. There are two reasons that a country may dump goods into another market. First, producers may wish to rid themselves of a glut on their own markets, or recoup the some of the losses associated with overproduction. Second, they may be hoping to capture some of the market for a particular good or service in another country by offering their products at artificially low prices. Whatever the motivation, antidumping action at the WTO has become a preferred form of trade litigation for domestic interests retaliating against the perceived asymmetries of international trade.



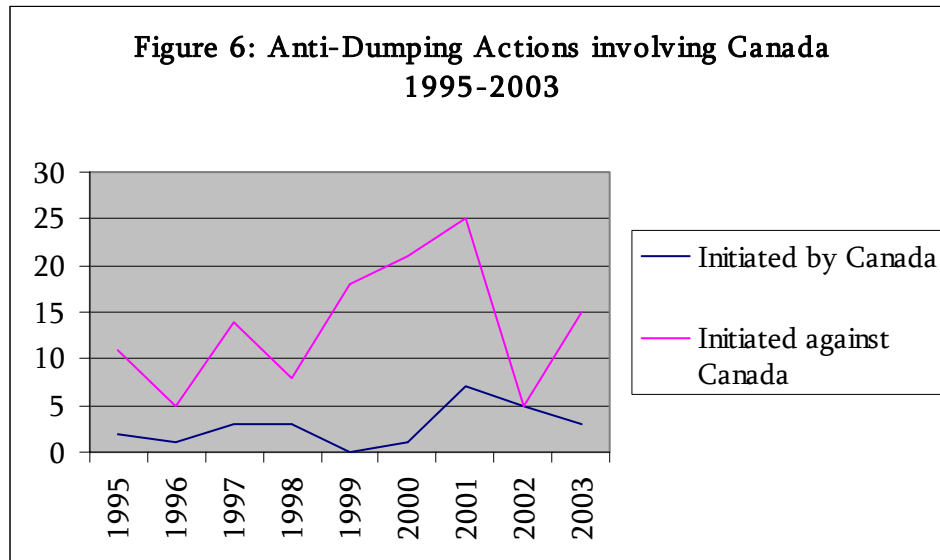
*Source: WTO online databases*

On a global scale, antidumping disputes are initiated by the hundreds every year. The figure below shows that despite recent reports by the WTO’s secretariat heralding the decline of antidumping, this action remains one of the most noteworthy forms of trade retaliation. Significantly, most of these disputes are resolved before a dispute panel can



rule on them. Despite the relative decline of antidumping litigation in the past year or so, the number of disputes that reach the panel report stage have remained steady around six per year, for the past eight years (a total of 55). This discrepancy highlights the gap between trade remedy and mercantilist reprisal that marks use of antidumping litigation at the WTO.

Over the past decade, Canada has initiated 25 antidumping actions, an average of 2.7 per year. Conversely, 122 antidumping actions have been initiated against Canadian producers, an average of 13.6 a year. As the figure below shows, antidumping litigation dropped to near record lows in 2002, but rose again in 2003. Historical institutional theory suggests that the rise in antidumping litigation has been an unintended consequence of the WTO organizational structure, as well as of the norms and values that guide its institutional evolution. The consequences for Canada may include the increased cost of institutional participation as well as various long term consequences for Canadian industrial policy and practice.



*Source: WTO online databases*

The figures above suggest that we need a better way to understand antidumping litigation at the WTO. In this context, antidumping action may be used as a surrogate

industrial policy, intended to provide short-term relief to industries hard hit by open markets. Antidumping litigation is widely practiced by the EU and US, and it is uncertain at this time whether antidumping litigation is really on the decline. It could be that states are gravitating towards other industrial protection mechanisms, or it could be that there is a cyclical trend in antidumping litigation. Either way, trade theory needs to consider the institutional outcomes of organized trade.

## 2. *Intellectual Property Rights and Public Health: The Battle Between Private Gain and the Public Good*

The WTO's approach to intellectual property rights has been heavily weighted in favour of multinational corporations. The WTO struck down Canada's bid to restrict patent terms (DS 114, 170), but recently made some public health concessions for least developed countries. The implications for Canadian generic drug producers seem promising, but the Martin government's strict adherence to the spirit of TRIPS threatens to derail an initiative with political and economic benefits for Canada as well as the global south.

When the WTO announced in August 2003 that it would allow the manufacture and export of generic copies of certain patented medications in order to combat HIV/Aids and other public health pandemics in the global south, Canada was the first member to begin work on domestic legislation. When the Martin government unveiled its draft legislation in early 2004, it contained a clause that allowed patent holders the right of first refusal on all manufacturing deals brokered by generic manufacturers with southern countries. After facing tremendous public and diplomatic pressure, the government agreed to amend the bill.

Initially well-received, the amended draft has recently drawn criticism for a clause that allows brand-name pharmaceutical companies to sue generic manufacturers whose

deals with southern countries are suspected of being too commercial—more about profits than pandemics. Critics charge that the draft in its current form allows big pharma continue to use litigation to bully generic producers—a valid concern considering the 300 plus legal actions taken against generic producers in the past decade.<sup>44</sup>

Despite taking an early lead on the issue of life-saving medicines for the world's poorest countries, Canada remains unable to balance global need with private profit. The Canadian government has learned well the first lesson of principled multilateral followership: strict adherence to the letter and spirit of WTO law is required if middling nations wish to reap the political benefits of membership. The lesson for Canada here is similar to the one learned by the EU in the 1997 Bananas case: pursuit of the public good must take a back seat to private gain if domestic policy is to pass muster at the WTO. The playing field of international trade governance is seriously tilted in favor of private gain over public good. Trade governance constricts foreign policy alternatives for non-trade issues which threaten corporate profits.

### 3. *Profiting from Diversity? The Future of Cultural Policy after the Uruguay Round*

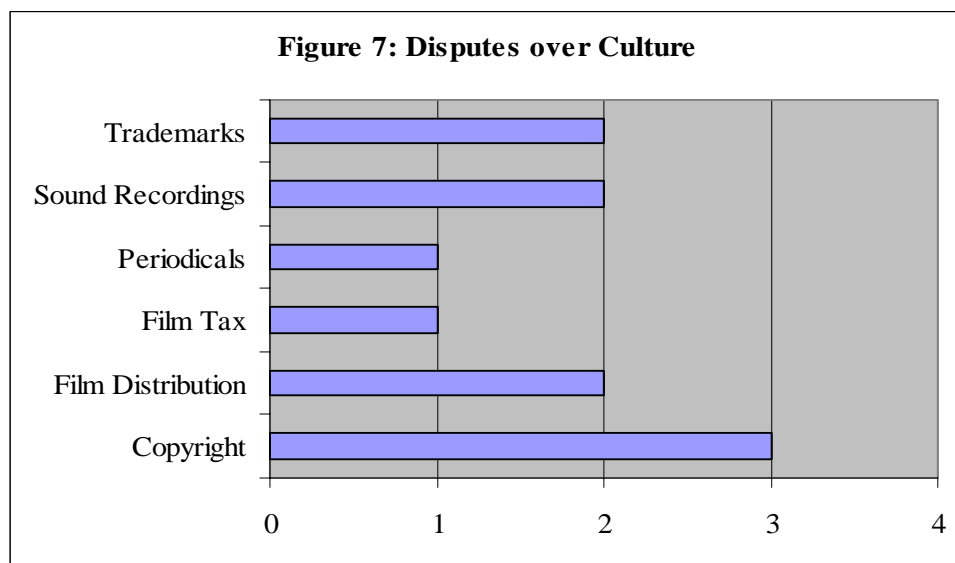
The WTO's free-trade values clash with state priorities for the safeguarding of national cultures. With the increase in scope and scale of global flows in goods, services, capital and ideas, culture flows easily across national boundaries, and rising levels of global trade make the regulation of trade in culture difficult. While free trade theory argues that trade in cultural commodities is no different than trade in any other good, historical institutional theory suggests that treating culture as a commodity may have unintended consequences for national political economies. Peter Grant has argued that the economics of cultural production are such that free trade in cultural commodities

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<sup>44</sup> Steven Chase. "Bill on Cheap Drugs for Poor Countries May Still Impede Generic Firms, Critics Say." *The Globe and Mail*, April 21 2004, A5.

often destroys the ability of smaller traders to develop viable cultural industries of their own.<sup>45</sup>

Canada is a leader in setting boundaries for the clear demarcation of trade and non-trade cultural priorities since the well-publicized split-run magazine battle with the US (DS 31). Nevertheless, over the past nine years, culture has begun to enter the mainstream of dispute settlement at the WTO, with eleven dispute settlement proceedings completed (see Figure 7 below).



*Source: WTO online databases*

The regulation of trade in cultural commodities is difficult to assess, yet critical to any discussion of the future application of WTO rules. Des Freedman rightly assesses the issue of trade in culture by stating that “While cultural policy is by no means at the forefront of multilateral trade agreements it is, as we have seen, implicated in various GATT disciplines and connected to wider arguments about the direction and scope of

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<sup>45</sup> Peter S. Grant and Chris Wood. *Blockbusters and Trade Wars: Popular Culture in a Globalized World*. Toronto: Douglas & McIntyre, 2004.

free trade negotiations.”<sup>46</sup> This is especially true of current GATS and TRIPS negotiations. TRIPS has been the agreement in the media spotlight as of late because it deals directly with patents and trademarks – issues front and centre in American movie industry’s battle against bootlegging and piracy.

Canada’s only brush with cultural protection so far was decided under the GATT, but current negotiations around the trade in cultural services are now taking place at the GATS (see Text Box 1 below), especially in the contentious realm of film and television. There have been no culture trade disputes so far under the GATS, partly because negotiations are moving so slowly. One reason for this slow movement seems to be that only American service providers are the clear winners in GATS negotiations on cultural policy as they now stand.<sup>47</sup>

#### **Text Box 1: The General Agreement on Trade in Services**

GATS covers the international trade in services in four different modes:

**Cross-border supply** – services supplied from one country to another (such as banking)

**Consumption abroad** – the use of a service in another country (such as tourism or outsourced service contracts)

**Commercial Presence** – Businesses setting up branches in a foreign country for service provision (such as hotel chains or insurance companies)

**Presence of Natural Persons** – People who travel from their own country to offer services in another country (such as teachers, physicians or musicians)

The GATS is “the first multilateral agreement to provide legally enforceable rights to trade in all services including cultural ones.”

--*Culture, Trade and Globalization: Questions and Answers*  
UNESCO available from [www.unesco.org/culture](http://www.unesco.org/culture)

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<sup>46</sup> Des Freedman. *Trade Versus Culture: An Evaluation of the Impact of Current Gats Negotiations on Audio-Visual Industries* International Studies Association, 2002 [cited May 5th 2004]. Available from [www.isanet.org/noarchive/freedman.html](http://www.isanet.org/noarchive/freedman.html).

<sup>47</sup> *ibid*

Canadian policymakers must be mindful of the contradictory effects of GATS for Canadian culture. Preliminary historical institutional analysis suggests that GATS will have deeper institutional impact on the Canadian political economy than even TRIPS – due to the wide definition of services covered and the uncertain impact of national treatment for services on Canadian markets. Canada may be better off throwing its multilateral support behind an alternative regime more conducive to the protection of Canadian culture such as UNESCO’s mechanism for cultural diversity.<sup>48</sup>

#### 4. *Hard Power, Soft Law: The American Bid for Structural Adjustment in Canadian Staples Industries*

Softwood lumber and the Canadian Wheat Board have been subject to long-running disputes where state power and interests have played a key role in shaping the trajectory of dispute settlement. Softwood lumber has been described as the ‘world’s largest bilateral trade dispute.’<sup>49</sup> The American objection to the Canadian Wheat Board is also significant because it too goes to the heart of the WTO’s institutional rationality in regards to the reading of international law.

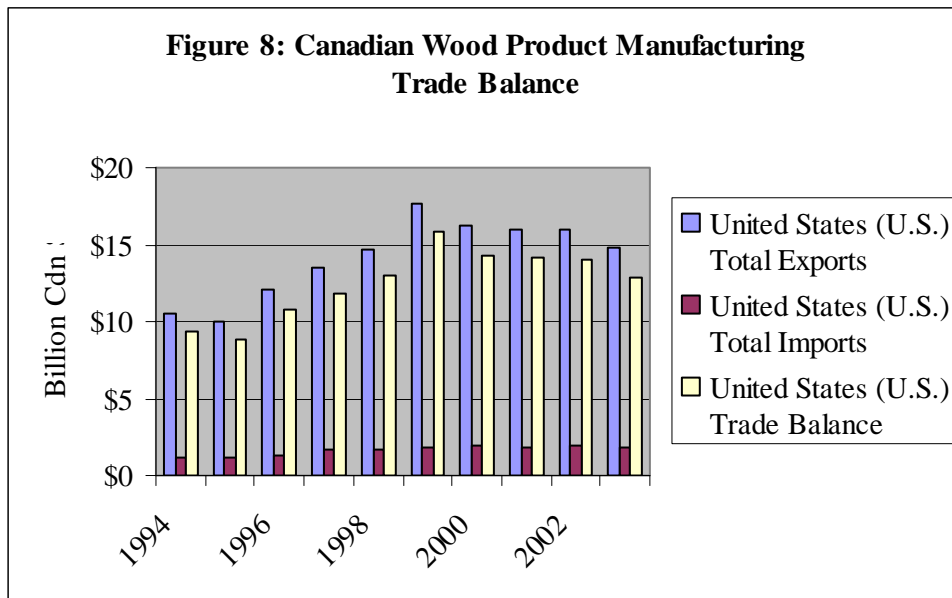
The softwood lumber dispute goes back more than twenty years to 1983, when the US first charged that Canadian lumber was subsidized. Since then, the dispute continues to flare up periodically – the most recent altercation proceeding simultaneously through WTO and NAFTA dispute settlement processes. In a working paper for the Groupe De Recherché Sur L’intégration Continentale, Gilbert Gagne has argued convincingly that state interest is at the heart of the lumber dispute, with the American government

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<sup>48</sup> "UNESCO Universal Declaration on Cultural Diversity." Paris: United Nations Educational, Scientific and Cultural Organization, 2001.

<sup>49</sup> Gilbert Gagne. "NAFTA and the Softwood Lumber Dispute: What Kind of Canada-US Partnership?" In *Cahiers De Recherche - CEIM*. Montreal: Groupe De Recherche Sur L'Integration Continentale, 2002.

attempting to protect a politically sensitive industry from the competitive threat of often subsidized imports. Because of the political factors at play, he suggests that “Canadian industries should be aware that continued access to the American market depends critically on not exceeding some explicit or implicit market share”<sup>50</sup> (see Figure 8 below).



*Source: Industry Canada online databases*

For American regulators, the goal is protecting domestic economic interests, not developing even-handed best-practice rules for trade. Furthermore, in protecting its lumber markets, “state interest has proved determinant rather than any other factors such as international trade provisions.”<sup>51</sup> He concludes that the effective basis of Canada/US integration is not international trade regimes, but rather state power and interests – at least in major trade disputes. North American trade rules have been shaped to benefit the more powerful partner.

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<sup>50</sup> Gagne 2002 p. 26.

<sup>51</sup> *ibid*

The most recent case at the WTO bears out this assessment to a certain degree (DS 277). Canada scored a point on the most contentious issue the panel considered – the method by which the US Commerce Department calculated antidumping duties. According to the panel, the practice of not giving credit for exports that are not dumped when assessing dumping margins (known as ‘zeroing’ in trade parlance), is inconsistent with WTO rules. But as to the rate of antidumping duties, the WTO deferred to the US Commerce Department. According to Lawrence Herman, a prominent Canadian trade lawyer, “the panel will tend to give the benefit of the doubt to the investigating agency. . . consistent with the overarching principle of the Antidumping Agreement.”<sup>52</sup> The fact that this case is only about the process of trade remedy, not the substance of state power goes to the heart of the WTO’s troubled governance regime. Its unwillingness to engage with the normative dimension of international trade beyond the assumptions of free trade theory is a serious gap in WTO logic which is sure to have long-term consequences for Canada. The historical institutional implications for Canada’s relationship with the WTO are better seen when this dispute is compared with the Canada Wheat Board case.

The wheat board case is significant because it focuses on the role of State Trading Enterprises and the WTO’s determination about the explicit role of the state in international trade (DS 276). The notion of a state-organized consortium of traders is antithetical to free trade theory of individual market actors responding individually to market forces. The US maintained that the CWB’s export activities violated GATT article XVII in two ways. First, American wheat is transported and stored separately from Canadian wheat. Second, the very nature of state-sponsored trade consortiums is

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<sup>52</sup> Lawrence L. Herman "Trade Law Memorandum: Canada Partly Wins a Round in the Softwood Case." Toronto: Cassels Brock & Blackwell LLP, 2004a, p. 4.



such that political considerations are bound to take precedence over market priorities at least some of the time.<sup>53</sup>

Upon close reading of GATT article XVII the panel concluded that there is nothing in the agreement that prohibits STEs from using their state-sponsored “exclusive or special privileges” for gaining a competitive advantage over other economic actors. “The mere fact that STEs use their market power to sell advantageously is not, in itself, a reason to conclude that they are not behaving in accordance with commercial considerations.”<sup>54</sup> This WTO endorsement of STEs is a significant win for Canada, especially given that this the WTO’s first cut at the issue of STEs under GATT article XVII. It has yet to be seen if there will be an appeal.

There are significant political economic differences in the way that Canadian and American staples markets are organized. The American attempt to force structural adjustments of these sectors speaks loudly about the nature of free trade in the current economic system. Furthermore, these two cases underline the troubled nature of the WTO’s understanding of free trade in the context of continued regulatory diversity. Softwood, which was a marginal win for Canada (the subsequent NAFTA decision was a bigger win), addressed some of the technical issues around dumping, but was less favorable because it failed to address the normative dimensions of international trade. The wheat board case, on the other hand, was a qualified win for Canada because the WTO refused to read these larger principles into the existing GATT text.

Historical institutional theory suggests that the WTO decisions in these cases are less incongruous than they seem. The WTO does not always act in accordance with current

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<sup>53</sup> "Trade Law Memorandum: Important Conclusions in the Wheat Board Litigation." Toronto: Cassels Brock & Blackwell LLP, 2004b.

<sup>54</sup> Herman 2004b p. 5.

neo-liberal trade principles, or the whims of the world's largest economy. Rather it has its own institutional rationality – underpinned by specific attitudes towards trade law and international agreement. WTO prefers to consider larger principles when making decisions contingent upon small points of law, but uses a narrower reading of text agreements when making decisions with larger implications for the trade regime. This may be because dispute settlement panels need to be on a firm legal footing when deciding cases which set big precedents of legal interpretation. Nevertheless, this conservative approach to international governance often plays to the interests of the US, because so much of international law is based upon the American model. It is this institutional rationality that will become more important for Canadian policymakers in the future.

### Conclusion

Historical institutionalism introduces a broadly significant insight for scholars and policymakers alike—institutions are as important as markets for the organization of Canadian trade relations. In theory an unsurprising truism, but in practice the outcome of multilateral cooperation is seldom examined. This paper is the theoretical starting point for further empirical research into the impact of the WTO on domestic policy formation in Canada. Historical institutional scholarship asks big questions of normative and empirical significance to experts across the social sciences, as well as the interested public.<sup>55</sup> The impact of exogenous structures on domestic institutions is one of these big questions, certainly not new to the study of political science, but given new contours in an era of globalization when political, economic and technological factors have come together in a historically unique way.

While the causes of policy dependence are often invisible to policymakers committed to the current governance structures, the consequences of international trade regulation are both

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<sup>55</sup> Pierson and Skocpol 2002

bigger and smaller than many countries understand. Current antidumping patterns have the potential to seriously impact Canadian industrial policy, although the actual impact is unknown at this point. The WTO's rigid approach to public health crises has already significantly constrained Canadian humanitarian response. On the culture front, both concluded dispute settlement and ongoing GATS negotiations are serious threats to Canadian cultural sovereignty. Finally, in the biggest disputes that involve attempts by the US to impose a different institutional form on Canadian staples industries, the WTO's decisions have been mixed. Both qualified wins for Canada, neither a definitive conclusion to long-running disputes.

On balance, the WTO's impact on the Canadian political economy is likely to be less positive than many experts contend, but maybe not as damaging as most critics charge. The loss of policy autonomy is often a very real byproduct of deeper integration, but a line must be drawn between mental and actual constraint. The WTO is a powerful ideational construct, and while it may be comprehensive in scope, its dispute settlement outcomes are often unpredictable and seldom authoritative. The Canadian policy elite assume that both free trade and the international rule of law are always in Canada's best interest. These assumptions obscure a more complex reality in which multilateral trade governance widens the gap between international goals and domestic priorities and magnifies the perception that domestic sovereignty is a necessary casualty of deeper economic integration.

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