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**THE TRANSNATIONAL CORPORATION AND THE EROSION OF DOMESTIC
ENVIRONMENTAL REGULATION: TOWARDS NEW CONCEPTIONS OF
GOVERNANCE IN THE ERA OF ECONOMIC GLOBALIZATION**

By: Jonathan David Jones

**A thesis submitted to the
Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of**

**Master of Arts
Department of Law**

Carleton University

Ottawa, Ontario

March, 2000

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**The Transnational Corporation and the Erosion of Domestic Environmental Regulation:
Towards New Conceptions of Governance in the Era of Economic Globalization.**

Submitted by

Jonathan David Jones, B.A. Hons.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

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**Carleton University
March 2000**

ABSTRACT

This thesis examines how the phenomenon of economic globalization and the advent of the Transnational Corporation (TNC) have undermined environmental law, potentially resulting in environmental degradation. Traditional methods of regulation are premised on the supremacy of state sovereignty. The TNC calls this assumption into question by eroding the governing capacities of the state. The thesis illustrates how TNCs have impacted on the reform process of the Canadian Environmental Protection Act, leading to a significantly weakened piece of legislation. International governance is based on the ideology of state supremacy and thus is at least as limited as the state as an arena for effective environmental regulation. It is argued that a global model of governance, comprising the grassroots voice of civil society and the governing structures of the state, must be embraced to stem the deleterious effects of economic globalization, especially as it pertains to the environment.

Acknowledgements

Looking back at the process leading to the completion of this thesis, and my overall success in graduate school, I know that I have relied heavily on a backbone of support from many. Although I owe a debt of thanks to a countless number of people, I would like to acknowledge in print a few of those whom without which I wouldn't have realized this goal.

I would not have completed this thesis without Paul MacNeil. We have spent countless hours in the coffee shop doing 'work', stressing about school, and gulping coffee. Thanks also to Chris and Paul Cameron, the two people who know me best. Jamie and Jen have become pseudo-parents for my dog as I was away from home so much during my final year of school. I am indebted to them. Thanks also to the Stephensons who have been a second family to me since I was a kid.

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And to Liz - thank you. I am truly lucky to have such a wonderful person in my life. I hope you know how incredible I think you are.

I would like to humbly dedicate my efforts in this thesis to the people across the globe who struggle everyday, some just to survive and some who strive to make this world a better place.

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PREFACE

-Introductory statement given to committee at thesis defense on March 3rd, 2000

I would like to go over three things as a way of introduction. First, I would like to tell you a bit about how I came to address this topic. Secondly, I want to tell you why I think this research area is of importance. Finally, I would like to tell you what I intend to do next and how my research interests fit into my future endeavors.

My mother tells me that I ultimately must give credit to her for my interest in environmental issues, this stemming from an incident when I was about 7 years old. While at our cottage, I had struck a tree with a hatchet and my mom, witnessing the incident, made me apologize to the tree for hurting it. I remember distinctly lying in bed that night feeling terrible about what I had done. Beyond that though, all through high school, my mind was continuously wracked with philosophical questions relating to our treatment of the environment. These questions helped direct me into the undergraduate environmental studies program here at Carleton University, where I gained a solid background about the physical, social, and economic issues surrounding the environment and its degradation. As I progressed through undergraduate school and took a few law courses in the process, I began to wonder if a solution to environmental degradation

could be found through law. The textbooks often told me that law is the confluence of a common societal morality. I was also attracted to its coercive power - how the law could punish people who stray from the moral fabric of society. I began to question the potential of law as a tool in which to reduce environmental degradation and advance the notion of environmental sustainability.

During my fourth year as an undergraduate student, I researched Canada's environmental laws and the issues surrounding them in some depth. I quickly learned that Canadian environmental regulation has been a dismal failure and our country continues to be faced with dire environmental situations such as deforestation and acid rain. I wanted to know why. Here we have a legal system designed to espouse and enforce notions of morality and good, yet our environment continues to degrade at an increasing rate. Why had the law failed? I took this question to graduate school.

In my graduate coursework, 3 issues crystallized for me revolving around the relationship between law and the environment, and these issues ultimately formed the framework of my thesis. Firstly, I was constantly troubled with the notion of state territorial boundaries. In my mind, they often constituted a false and, as Benedict Anderson says, an "imagined" construction.¹ In so many ways, political territoriality does not jive with the phenomena that help to dictate our reality. The falseness of political territoriality first began to bother me when I came to the realization that the environment and its degradation does not respect political boundaries, yet our attempts at resolving environmental problems stems mostly from the territorial state. The United States contributes to and attempts to regulate acid rain, yet does rain stop at its border? This is an age-old environmental issue.

I did a presentation in our graduate theory class on an article written by David Held entitled: *Cosmopolitan Democracy and the Global Order: Reflections on the 200th Anniversary on Kant's Perpetual Peace*.² It was through this reading that I learned about the phenomenon of globalization. I was clued in, so to speak, that many goings on in the world do not respect the political boundaries of the state. I was intrigued. What did this mean for the environment? What did this mean for environmental law?

Much of my graduate coursework research focussed on the impact of globalization on the state and its governance. In the era of globalization many social and economic processes are loosening their ties to territoriality, and I had come to the realization that the physical environment does not have very many ties to political territoriality in the first place. As I began to further research the phenomenon of globalization, I stumbled upon the transnational corporation as a perpetrator of globalization and as a perpetrator environmental degradation. I saw that the transnational corporation was an ideal variable in which to illustrate the deleterious impacts of economic globalization on domestic environmental regulation.

The second issue that developed for me focussed on the supposed supremacy of sovereignty. I remember a definition of sovereignty that was given to me during a first year, undergraduate law course. It depicted a supreme state ruler, not influenced by any other actors, handing down the laws of the state. This immediately troubled me. In the span of a few minutes, I had thought of various instances where indeed, our governments are influenced in their decision making processes - the corporation, the United States, social and environmental movements. I questioned whether our laws were premised on a false assumption of sovereignty.

The third issue that was constantly on my mind during my graduate course work was that much of the literature I read discussed the terms 'government' and 'corporation' as these externalized and formidable entities, existing independent of the citizen. The concepts seemed to have taken on a life of their own. What intrigued me more was that once we externalize these entities, we have an outlet in which to lay blame for environmental degradation. You and I don't personally degrade the environment, it is the corporation. We can't do much about environmental degradation, that is the role and responsibility of government. But these constructs are ultimately born from the self. You and I have built these institutions. They do not exist independently of the citizen - they are the citizen. I mused over how we really ultimately have the power over such constructions, and we thus also harness the power to reform them. The citizen has constructed a government to resolve immoral issues, and the citizen has constructed the corporation. Reality is our own construct, and we do have power over it. I wanted to bring to light in this thesis that governance fundamentally stems from the self.

I wanted to show in this thesis that economic globalization and the transnational corporation does not fit into traditional notions of governance, a process that is premised on state sovereignty and territoriality. I also wanted to show that if our traditional conceptions of governance aren't working, it is possible to re-construct them. Finally, I wanted to argue that if we were to foster social change leading to the effective management of issues surrounding economic globalization, especially as it pertains to environmental issues, any new constructions of governance must be global in scope and reach.

So this is how I came to be addressing the issues in my thesis. I think I ultimately dealt with these quandaries that had developed throughout my undergraduate and graduate career, namely the limitations of the state due to global forces such as the TNC, and the power of the citizen to expand governance beyond these limitations.

I would like to briefly discuss why I think that my topic is of importance. I firmly believe that environmental degradation is one of the most crucial issues facing humanity today, an issue that I contend has reached a crisis level. Environmental degradation is threatening humanity's very survival on this planet. Maybe we have not yet experienced the consequences of environmental degradation and I think that, being from a developed country, we have been especially shielded from it. However, given the current trends of environmental degradation, chances are that someday soon we will. This might be in the form of skin cancer, illness from dirty water, severe weather due to global warming, loss of jobs due to deforestation and fish stock depletion, or a plethora of other environmental problems. It seems that the media is constantly reporting on yet another environmental issue; towns that need clean drinking water trucked in, areas with unusual amounts of birth defects, and rivers full of dead fish. Environmental degradation is steadily encroaching on our lives. We need to begin to proactively engage in discourse about the tools needed to address this problem.

I predict a paradigm shift in the future about the way we impact on the environment and the governance that we rely on to manage it. Thomas Kuhn argues that a paradigm shift occurs when the traditional tools in place cannot explain current social phenomena.³ This what I think will happen with current dominant processes of governance. I remember being a pessimist about environmental issues and the possibility

of resolving them, but now I think that achieving environmental sustainability is a feasible task. We just need to begin to flesh out the tools needed to achieve this goal. New conceptions of governance might just be the tool we need.

I understand that the arguments in my thesis constitute a steep uphill battle, but I think that it is a battle that we are going to face soon. Thus it is vitally important to begin to become aware of the issues before us. I think that my thesis covers an important area of environmental degradation. Hopefully it will increase the awareness of those who might read it. I would also like to think that my thesis brings within reach some solutions with which to deal with the issue. I am not talking about an instant transformation to global governance. I am talking about the power of the citizen to foster social change. It is as simple as not buying products from transnational corporations that pay no heed to their impacts on the environment, or supporting a non-government environmental organization. This is how shifts in the notion of governance will be achieved, and I believe that this is how the notion of global governance can be fostered. I therefore hope that my thesis might bring to light one path in which to achieve environmental sustainability. It may not be the right one, but it is one to consider. I would feel that I have succeeded in my goals even if I have just fostered any sort of dialogue on the subject. Dialogue is a necessary and important precursor to social change. Finally I think that my thesis is important because it sets the tone for further research and that brings me to the final part of my talk; what I intend to do next.

I would like to pursue my research at the doctoral level. I think that currently much globalization literature is heavy on description and doomsday scenarios, and light on empirical analysis. This leaves it open to question and often globalization literature is

met with skepticism. One of my goals in a doctoral program would be to statistically ground the impacts of TNCs on domestic environmental regulation. I believe that public awareness about the negative impacts of economic globalization on the environment is low. I certainly didn't understand the issue prior to this graduate program and I have a degree in environmental studies. I think statistics are a powerful tool in which to heighten awareness about the issue and propel social change. Statistics can be an effective teacher. People listen to them and easily grasp their message. Just think about the powerful message portrayed when the media talks about percentage increases in cancer rates etc...

If I don't pursue a doctoral degree, I would like to realize a professional goal that helped to initially lead me to the Masters program in Legal Studies. For a long time, I have aspired to become a government policy consultant. I would like to specialize in the field of environmental regulation. Environmental policy changes quickly and often it is hard to decipher. I think that there is a market niche for people well informed in the field of environmental policy to consult to the private sector.

Finally by way of a conclusion I would like to say that I have learned a great deal from writing this thesis. I think that I have really improved my research and writing skills. I have also learned how to complete a large project, a skill that I know will be invaluable in my future endeavors. I have also acquired a heightened self-discipline that comes with writing a thesis. It is a difficult thing to get out of bed every morning and flip on the computer with the light at the end of the thesis tunnel sometimes seeming very far off. I hope that some of these newly acquired skills have come through in this thesis.

¹ B. Anderson, *Imagined Communities* (New York: Verso, 1991), at 5-7.

² D. Held, "Cosmopolitan Democracy and the Global Order: Reflections on the 200th Anniversary of Kant's 'Perpetual Peace'" (1995) 20:4 *Alternatives* 415-429.

³ Kuhn discusses in depth the concepts of paradigms and paradigm change in T. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970).

INTRODUCTION

An excursion through the Canadian Rocky Mountains during July of 1999 has etched a dark spot on my conscience. A good portion of the three-day drive involved travelling through the mountain's seemingly vast national parks. One is left with a sense of wilderness and the importance of its preservation. Forest rangers are everywhere to be seen, protecting flora and fauna. Special bridges have been constructed to enable wild animals to pass over the few highways that traverse the parks. Literature is available at most gas stations and restaurants, touting the importance of nature, and what we can do to help preserve it. There are marked lookout sites every few kilometers or so where one can either stop and marvel at a deep valley, or appreciate an interesting mountain formation.

These parks actually comprise a minute proportion of the Rocky Mountain terrain. A much different picture of nature awaits the traveler outside their boundaries. After cresting a small hill on a highway immediately beyond one of the parks, I was greeted by barren mountainsides left naked by the devastating impacts of clear-cut deforestation; a logging technique that involves cutting down every tree in the area, regardless of its size or age. Whole mountainsides had been stripped of their cover. Tree stumps and broken branches lay strewn all over the ground. There was a buffer of trees about two metres

deep presumably left standing alongside the highway in a halfhearted attempt to hide the destruction. As I gazed down the mountain range, I saw that deforestation had ravaged the landscape for as far as my eye could see. I stopped by the side of the road to snap a photograph, my feelings about the notion of 'wilderness' and 'environmental preservation' dramatically altered. Whereas in the parks the mountains seemed alive, teeming with a diversity of plants and animals, the portion of mountains that lay outside the parks had an aura of silence and death. As I looked through my viewfinder, I felt a profound sense of despair. One simple question occupied my thoughts. "What have we done?"

The first step in an examination of environmental degradation is to understand the meaning behind the word 'environment'. The term encompasses a complex conceptual framework. Human beings inhabit three types of environments; the social, the physically constructed, and the natural. We are born into a community bound together by social practices that constitute the *social environment*. This environment helps shape the behaviour of the individual. The *physically constructed environment* consists of those physical objects designed by humans to bolster satisfaction, such as cars or computers (although the concept of what constitutes human satisfaction is a source of controversy). The *natural environment* consists of those entities that have the potential to affect an organism's ability to survive, reproduce, and flourish.¹ Of course across the globe the social, the physically constructed and the natural environments differ substantially in their characteristics. Some societies have managed to balance all three environments so that they co-exist in harmony, though most have not.

Environmental degradation stems from the incongruous relationship that has developed between the social and physically constructed environment of some societies, and their natural environment. Humans have generally developed their social and physically constructed environments in such a manner that these two entities degrade the natural environment. Environmental sustainability can only be achieved through changes in the social and physically constructed environments of those who have a destructive relationship with the natural environment.² Unfortunately the reality is that the practices of those who degrade the natural environment have spilled over into the entire global community.

Nature is on the brink of a global ecological catastrophe. Humanity continues to run rampant across the earth, inflicting environmental destruction in its wake. Approximately 1.8 million hectares of cropland have devolved into desert over the last 50 years. Every year, at least 26 billion tons of topsoil are eroded from the earth's surface. Five million people die each year from waterborne diseases. Some scientists have predicted that emissions of carbon dioxide and other greenhouse gasses will raise the average temperature of the earth's lower atmosphere by several degrees by 2050. Chlorofluorocarbons and Halons released into the atmosphere are depleting stratospheric ozone resulting in an increase in earth absorption of ultraviolet radiation from the sun. Each year, approximately 36,500 species become extinct.³ The environment has entered into an era of human induced metamorphosis.

Critical decisions must now be made. In all the complexities of environmental degradation, our choices really are simple. Either we alter our unsustainable behaviors and pull ourselves back from the brink of potential environmental devastation, or we

teeter over the edge into unknown consequences facing the environment that we depend on for our survival. Herein lies the frightening reality. No one can foresee with certainty the long term consequences of environmental degradation, yet we continue to methodically destroy the natural environment with unprecedented and accelerating speed. Perhaps we will adapt and the environment will also adapt. Perhaps we will continue to flourish somehow. More likely though continued environmental degradation will come at a high cost to the environment and humanity.

Science has provided the important evidence of environmental degradation. The next step towards a comprehensive analysis of the issue is to turn from scientific evidence to an examination of our destructive behaviours. Framing the issue mainly through science prolongs dispute, as scientific theories and conclusions about environmental degradation are tested and re-tested (as is the way with empirical analysis). For change to occur, the social context of environmental issues must also be addressed. Why do we act in such a manner toward the environment? What tools are required to repair the damage that we have inflicted? Where do the answers to environmental sustainability lie? Embracing these types of questions will hopefully propel the processes of social change and open a path to environmental sustainability.

Social change is the underlying theme throughout this thesis. For the purposes of this paper, I define social change as a change in the status-quo due to social unrest. As I analyze some of our destructive behaviors towards nature, I contend that social change is a vital precondition that must be satisfied if we are to ensure the construction of a reciprocal and sustainable relationship among humans and the global environment. The call for social change with respect to environmental issues is not a new phenomenon. I

am merely drawing on a widespread social movement among those who have consciously decided not to leave the fate of this earth and our existence to chance.

This thesis does not undertake a complete synopsis of the issues surrounding environmental degradation. It does not also conclude with an exhaustive summary of solutions. Attempting to examine the issue in such a comprehensive manner is highly problematic, diluting the scope of the task so that an effective study is virtually impossible. It is essential to instead to dissect the issue somewhat so that analysis is a feasible task. This process provides the foundations for a study of humanity's relationship with the natural environment. Only then can the link between human behaviour, and an understanding of the consequences of our actions be made. Only then can reconciliation with the environment be meaningfully attempted.

This thesis addresses some of the underlying reasons behind environmental degradation by examining the erosion of environmental regulation due to the influences of Transnational Corporations (TNCs). TNCs are corporations whose operations span several countries. Weak environmental regulation leaves nature prone to human induced degradation. Although the corporation has largely resulted from the entrenchment of the ideology and practice of the so-called 'free market', one is espoused by exponents of liberal capitalist systems of production. The rise of TNCs in industrial society has resulted in important social decision making processes transferring into the hands of those with a vested interest in profit. This trend has accelerated environmental degradation at an alarming rate and has thus become a critical issue requiring examination.

The phenomenon of globalization, in which social and economic processes are increasingly transcending political boundaries, has propelled the TNC into the global arena. The globalizing process has provided the tools for the corporation to become global in scope and reach. Many corporations have historically been perpetrators of environmental degradation. Globalization has served to exacerbate environmental problems associated with TNCs. The TNC has risen to become a powerful force of environmental destruction.

The TNC represents one small piece of the puzzle that depicts environmental degradation, but its particularly strong environmental impacts render it a critical piece of that puzzle. Illustrations of the destructive capacities of TNCs are ubiquitous. Placer Dome, a transnational copper mining company headquartered in Canada, dumps 40,000 cubic metres of tailings into the Maipam-Strickland River every day. It is thought that the dumping of such harmful waste into this river contributes to the unusually high incidences of deaths among the residents who inhabit the area along the river.⁴ In 1992, the United Nations Centre on Transnational Corporations reported that TNCs have contributed to over 50% of all greenhouse gas emissions.⁵ The production of toxic chemicals is on the rise. It has been predicted that industries around the world will be creating approximately a billion tons of synthetic organic chemicals yearly by the turn of the century. This is paralleled by increases in cancer rates.⁶ These are just three examples. Further evidence is not difficult to come by.⁷

This thesis examines how the powers of TNCs have expanded to place a stranglehold on society's ability to advance the ideal of environmental sustainability. TNCs are, metaphorically speaking, holding humanity hostage and exacting from us a

ransom in a currency that ensures the continued growth in profits, to the detriment of the environment.

The TNC represents a fairly recent popular and academic element of concern in environmentalist discourses. The relationship between humanity and the natural environment has proven to be complex. The advent of the TNC, and the consequential reconceptualizing of the corporate relationship with the natural environment due to its global scope and reach, has further complexified the issue of environmental degradation. This is especially so in the realm of environmental regulation.

Regulating the environment has traditionally been the mandate of the state (although it must be acknowledged that historically, the state is a relatively recent entity). The TNC has called this process into question by eroding domestic sovereignty, resulting in weakened environmental regulation. Chapter one explores the concept of the state and addresses the impacts of non-state actors, such as the TNC, in the process of state governance. The 'state', although an ambiguous term, is fundamentally constructed around the notions of sovereignty and territoriality.⁸ Sovereignty is the vehicle by which the decision-makers in the state are vested with the authority to govern. The concept of sovereignty legitimizes the process of domestic governance and hence is integral to the effective functioning of the state. Those who hold sovereign powers within the state thereby harness the power to govern. Territoriality defines the boundary within which the sovereign authority can govern.

Perspectives diverge in state theory literature regarding the construction and role of sovereignty in the process of governance. One perspective is rooted in a realist interpretation of the state. Realism theory maintains that sovereign authority rests with

one unified body of governance, wielding power in the territorially bound state.

According to realist thinkers, the TNC cannot undermine the sovereign authority of the state. In this view, effective governance of the environment can be achieved by deploying many of the mechanisms available to the state.

The antithetical approach to the definition of the state is found in theories that subscribe to the notion of pluralism. Pluralistic perceptions of sovereignty hold that power within the state rests with a multitude of state and non-state actors (such as TNCs and non governmental organizations), who all serve to influence the process of governance. This is a dangerous premise with respect to environmental issues. If the TNC is indeed a powerful enough actor so as to have a hand in the process of environmental governance, yet it remains a profit oriented entity, widespread environmental destruction will continue to occur without much hope of redress or amelioration.

The powers of TNCs have dramatically increased in the era of globalization. Chapter two examines the era of globalization and the subsequent empowerment of the TNC. One common misconception of the globalizing process is that it is occurring universally across the world. Globalization is in fact a northern dominated and economically driven phenomenon. TNCs are perpetrators of this process. Their flexibility and mobility are a constant threat to states who compete with each other for the foreign investment dollar. States are thus pitted against one another and the result has been the downward harmonization of environmental regulation. In the era of globalization the state is losing its grip on its ability to regulate the environment.

A study of the history of Canadian environmental legislation serves as a good illustration of how TNCs have weakened environmental regulation. Chapter three empirically examines how the TNC has impacted on and ultimately undermined the regulatory capacities of the state by analyzing the ten-year history of Canada's most important piece of environmental legislation. The Canadian Environmental Protection Act (CEPA) is Canada's main vehicle of environmental regulation at the federal level.⁹ Its purpose is put forth in a Declaration at the beginning of the act, which states that; "[i]t is hereby declared that the protection of the environment is essential to the well-being of Canada."¹⁰ With its focus on environmental protection, the Act had the potential to impede the day to day affairs of TNCs in Canada. So TNCs took action.

Proclaimed in June of 1988, the Act has gone through more than a decade of revisions, strongly influenced by TNCs. The *Canadian Chemical Producers Association* (CCPA), representing a multitude of TNCs, has impacted on the reform process over the last decade and has subsequently succeeded in deterring the federal government from the mandate of the legislation. TNCs are undermining the state as a vehicle for environmental regulation. This is an important premise because while the state speaks to a number of social issues such as health, and the environment, the TNC's primary mandate is profit and growth, two concepts not in conjunction with environmental sustainability.

The phenomenon of globalization has tightened economic and social linkages between states. Globalization has also propelled politics into the extra-state realm as domestic governments scramble to embrace economic and social trends that are losing their ties to territoriality. Domestic governance power has to a significant extent shifted

to international institutions such as; the International Monetary Fund, the World Bank, and the World Trade Organization. International law stems largely from an attempt to govern the global economy. It is a medium of governance that transcends the realm of the state, and thus has a perspective that is transnational in scope. If the state is losing its ability to regulate the environment due to the influences of TNCs, can international law step in and fill the void? After all similar to TNCs, international law seems to have a transnational scope and reach.

Chapter four argues that, with respect to effective governance of the TNC, international legal regimes are at least as limited as domestic regimes. International law is constructed mainly by states, and is housed in the ideology that the state is a unified body of power and authority in the global arena. Politically, the global arena is comprised of states interacting with other states to advance their interests, but economically this isn't the case. As chapter three illustrates, the TNC has compromised the sovereign authority of the state. The state is therefore a weakened actor in many aspects of international politics. The TNC sits in the background, while keeping a heavy hand on the actions of the state as it participates in the international arena.

The inherent weaknesses of state and international arenas as vehicles for effective governance of the environmentally destructive forces of the TNC lies in the fact that both mechanisms of governance do not adopt a truly global scope; a scope necessary to match the globality of the TNC. State sovereignty and territoriality are at the forefront of traditional models of governance, both state and international. How do we begin to develop a new paradigm of governance, one that is able to embrace the issues of

globalization? As chapter five examines, a new era of governance is beginning to take hold.

This new paradigm has been termed 'global governance', although what constitutes the notion of global governance is subject to wide interpretation. The first analytical step is to understand how the concept of global differs from the concept of international. Chapter five begins by fleshing out the differences between the 'international' and 'global spheres'. The international arena is state centered, while the global arena is centered on economic, social, and natural forces that transcend the boundaries of the state. The global forces of the TNC compromise the international arena as an effective model of governance.

An effective and feasible model of global governance is comprised mainly of two governing tools; the state and civil society. Civil society represents the realm in which individual citizens and groups of citizens can come together to voice common interests outside the governing apparatus of the state. Environmental movements, although diverse in many respects, have come together as a common grassroots voice advocating social change with respect to environmental issues. The environmental movement stems from actors of civil society. Non Governmental Organizations such as Greenpeace are illustrations of institutions of civil society. Civil society has proven in the past to be a powerful proponent of social change and regulatory reform. It exists alongside the mechanisms of the state, being a watchdog of sorts to state authority and processes. The forces of globalization have also in some respects globalized civil society as technological advancements have enabled information to move across the globe to help

unite common interests of change. Global civil society has the potential to empower the local citizen with a voice that is global in reach.

It is important to acknowledge that the state, although weakened in the era of globalization, is still a powerful force of governance. Civil society alone cannot possibly become an effective and autonomous governing body. Civil society lacks the structure and power inherent in the state. The effective regulation of the TNC will thus partially stem from the empowerment of civil society within domestic and international mechanisms of governance.

Is this a utopian task? The very notion of 'global forces' can make the individual citizen feel powerless to foster change. But what every citizen must remember is that it is ultimately society that has built the destructive forces of globalization, such as the TNC. It is the same society therefore that has the power to deconstruct them. The citizen can be empowered through the political arenas that are in existence ultimately to represent the well being of society. A harmonious relationship with the environment can be achieved if the voice of the citizen is heard. Civil society has a global scope and potentially a global reach. This thesis concludes with the argument that the globality of civil society has the potential to globalize state and international mechanisms of rule. Global governance then stems from the existing governing apparatus of the state, and the empowerment of the voice of the local citizen through civil society. This is how the citizen can once again have a voice in the future and this is how the TNC can be governed.

Preceding a discussion of where traditional mechanisms of governance went wrong, the first step is to understand what a traditional notion of governance entails. Chapter one discusses the conception of the state, and its governance.

CHAPTER 1

CONCEPTIONS OF THE STATE

...[T]he nature of the state is hard to grasp. This may seem peculiar for something so pervasive in public and private life, but it is precisely this pervasiveness which makes it difficult to understand. There is nothing more central to political and social theory than the nature of the state and nothing more contested.¹¹

The state is an ambiguous concept that embraces notions of control, power, and organization within society. A political map of the world depicts the status quo of human organization. Sovereignty has arranged itself into these colorful configurations of varying shapes and sizes, partitioned from each other by jagged lines representing territorial boundaries. The state defines a spatial political entity, an abstract contrivance that embodies a sense of social order - although its purpose, status, and function within a society are subject to widespread interpretations.

The state is fundamentally comprised of a bundle of institutions that hold powers of governance. Citizens give up inclinations of self governance to these institutions of the state, who in turn are responsible for maintaining order and control within the bounded community. A contentious area of state theory often revolves around the question of which institutions comprise governance power within the state. Many scholars have attempted to define the impact of non-state actors in the process of governance. These actors often constitute organizations of the liberal free market, such as TNCs (further

discussed in chapter two), or also as organizations of civil society. *Our Global Neighbourhood, The Report of the Commission on Global Governance*¹² puts forth this definition of civil society organizations (CSOs). This report says that the term CSO:

...covers a multitude of institutions, voluntary associations, and networks- women's groups, trade unions, chambers of commerce, farming or housing cooperatives, neighborhood watch associations, religion-based organizations and so on. Such groups channel the interests and energies of many communities outside the government, from business and the professions to individuals working for the welfare of children or [a] healthier planet.¹³

Contested Conceptions Sovereignty

As discussed above, the state comprises a complex set of structures and processes legitimated through the notion of sovereignty. The term sovereignty in its traditional sense was derived from the French word *souverain*, which denotes a supreme ruler, not accountable to anyone outside the state itself except to god.¹⁴ It is a legal and political expression that defines the autonomous and undisputed decision-making authority among subjects. The sovereign authority has the duty to maintain social order within the state and thus is vested with political autonomy and powers of coercion. Sovereignty therefore, legitimizes governance powers and the sovereign is thus mandated with the authority to govern the state, (although as this thesis will illustrate non-sovereign actors, such as TNCs, can impede the traditional assumption that the sovereign is the sole holder of governance powers).

There exists a disjuncture in state theory discourse as to where sovereign authority is derived from. The dichotomy lies between realist and pluralist approaches to sovereignty. Both realist and pluralist perspectives implicate non-state actors in domestic

governance. Traditional, realist schools of thought argue that governance powers cannot exist above the dominant and overbearing sovereign authority of the state. According to this line of thought then, the TNC as a non-state actor would not wrest governance powers from the state. Their economic powers could not undermine the authority of the sovereign.

The pluralistic approach to state theory is based upon the premise that sovereignty rests with a multitude of actors that all serve to define the loose, ambiguous concept called the state. This debate brings to light the issue of whether the state is really one unified sovereign body, interacting competitively with other states in the international arena (as suggested by realists), or whether it consists of a multitude of state and non-state actors who all serve to define notions of power and governance. The next section synthesizes the multiple meanings surrounding the concept of sovereignty and the contested conceptions of where the locus of governance power lies.

Traditional Conceptions of Sovereignty and the Realist Approach

Spatiality, unity, and power relations between states underlie the realist approach to sovereignty. Theorists who take this approach construct sovereignty around the notions of unified state power and politically bounded territoriality. Timothy Dunne elaborates on the concept of realism as it pertains to the state:

The key core elements of realism are: the state is the key actor and **statism** is the term given to the idea of the state as the legitimate representative of the collective will; the first priority for state leaders is to ensure the **survival** of their state; **self-help** is the principal action in an anarchical system where there is no global government. These 'three Ss' constitute the corners of the realist triangle.¹⁵ (emphasis in original)

Central to the traditional conceptions of sovereignty then, is the notion that the state is the almighty and sole source of governing power, both in the domestic and international arenas. Governed subjects willingly give up their inherent powers of self-governance to the sovereign who is vested with the authority of maintaining order within the given community. Consequently, the power to govern is the exclusive preserve of the sovereign. The legitimation of power and coercion provides a sense of cohesion within the state.¹⁶ Power is used to enforce a state's monopolistic claim over its territory and through the use of this power the sovereign governs its territory in a comprehensive way.¹⁷ This is how the sovereign exercises dominion throughout the realm of governance.

Authority in a traditional interpretation of sovereignty is tied to the idea of spatiality. The concept of territoriality is an integral component to the realist's construction of the state. Territoriality defines the political boundaries in which the state functions and the sovereign rules. External political actors cannot transcend the territorial boundaries set by territoriality. Territorial autonomy amongst states is maintained by military force, and thus a guarantee of security is reinforced by the threat of violence. In this way, the state is protected from external forces. Ringmar illustrates this traditional interpretation of territoriality in the international arena, "...the borders of the state separate one kind of politics from another – participation, democracy and the rule of law on the inside, and ever-threatening conflict and war on the outside."¹⁸ Realist conceptions of sovereignty are thus intimately tied to the notion of a territorially bound state.

Homogeneity and unity amongst citizens of the state are important aspects of the realist approach. Hobbes, a classical realist, argues that “[a] multitude of men [sic] are made one person, when they are by one man [sic], or one person, represented. Through the sovereign, a plurality of voices and interests can become one will...”¹⁹ Thus the state is a utilitarian construct - its purpose is to unify the interests of the subjects. The sovereign is vested with coercive power and authority to legitimate the supposedly homogeneous voice of the given society. Only after a state has been organized through the sovereign authority, can the subject within it develop and prosper.²⁰ The community of subjects can participate in international relations only through the organized state. Prior to participating in the international arena, the state is a fully formed and developed political entity.²¹ Dunne illustrates the realist construction of power distribution within the state:

We have our liberty in return for a guarantee of security. Once security has been established, civil society can begin. But in the absence of security, there can be no art, no culture, no society. All these finer aspects of social life are secondary in importance. The first move, then, for the realist is to organize power domestically.²²

According to the realist premise then, the state is a territorially bound, unified body of power. The accumulation of power is central to the state, and thus once power is accumulated at the domestic level, the sovereign moves the state into the international arena as a means of furthering its powers.²³ The realist does acknowledge that relations exist external to the state, and recognizes the reality of state interdependence, but each state is viewed as interacting with its peers in ways that promote its national interests and relative power.²⁴

If the sole mandate of every state is the advancement of its power, then it follows that interactions among states occur in ways that do not permit inter-state trust and friendships to develop. Each state is looking to wrest powers away from each other, thus constituting the underlying theme of international relations. States coexist cooperatively through the maintenance of a balance of power, and interstate relationships are successful only if each state stands to gain in power.²⁵ International relationships prosper due to a power equilibrium in which states interact to maintain an international power balance.

Traditional Notions of Sovereignty and the Role of Non-State Actors

A traditional conception of sovereignty denotes that the political institutions of the state are the sole source of authority and with that authority comes the sovereign right to make and enforce laws within the given territory.²⁶ Max Weber conceptualizes sovereignty as "...the monopoly of the legitimate use of force within a given territory."²⁷ The sovereign authority monopolizes power and the sovereign is thus the primary mechanism of governance. Sovereignty also has a spatial dimension - there is no absolute authority above and beyond the sovereign within the defined territory.²⁸ Sovereignty is thus attributed to the supreme decision making authority within the given state. It does not rest elsewhere within or external to the state's political boundaries.

The rapid and unprecedented increase of non-state actors in the international arena, due in many respects to the phenomenon of globalization, has forced realists to address their impacts on domestic governance processes.²⁹ Realists call this phenomenon "...a very limited fraying around the edges of traditional doctrine."³⁰ Realists do acknowledge that non-state actors have a role in international relations, but are quick to clarify that states are the only entities who ultimately possess the powers of sovereignty and

governance. Although non-state actors, such as TNCs, can transcend territorial boundaries, their powers cannot. As John Mearsheimer suggests, they do not play any significant role in the political processes of states, “[t]he bottom line on institutions [entities such as the TNC] seems clear: despite all the rhetoric about their virtues, there is little evidence that they can alter state behaviour...”³¹ They do not impede the state’s overarching mandate of maximizing power in the international arena.

Are TNCs borderless entities that can move around the globe at will? The realist maintains that the state has a central role to play in global economic relations. Hirst and Thompson, although not wholly subscribing to the realist premise, do suggest that non-state actors such as TNCs require the stability and legal framework offered by states for their effective functioning.³² The stability and comfort offered by the state is only possible if the state is a unified entity with a single sovereign authority. TNCs desire a home base and benefit from the nationality of the state. The TNC also needs the economic stability of a wealthy state that in turn promotes national systems of skill formation and labor motivation.³³ According to this traditional perspective of the state, TNCs flourish in international markets driven and regulated by states. States therefore possess important powers of governance that ultimately serve to define the actors that fall within this ambiguous term called ‘non-state’. From a hierarchical viewpoint, states can be said to have the power to govern upwards, because of their territorial delineation, and downwards because of the legitimate constitutional powers over the territory.³⁴ Markets depend on these national hierarchies and thus depend upon domestic regulation backed up by powers of coercion³⁵

If sovereignty in its traditional sense denotes that TNCs, and other non-state actors depend on state authority and power for their survival, what autonomous role do they have in the national and international arena? According to the realist premise, non-state actors are important components of inter-state relationships. Mearsheimer argues that, “I believe institutions sometimes matter, After all, great powers use these institutions to further their interests.”³⁶ TNCs are thus used as tools for the state to increase state’s share of the global power grid.³⁷ States utilize these actors to increase their reach into the global arena, as is evidenced by north/south unequal economic relationships. Global alliances such as the North American Free Trade Agreement, and the World Trade Organization are seen by realists as a reflection of state power interests, and these institutions are used to advance the power of already powerful western states.

In accordance with the realist premise, irrespective of sub or supra state economic and social trends, sovereignty ultimately rests with the state. Any notion of international law is not really “true law”, but merely a “body of ethical distillation.”³⁸ Realists argue that the state’s mandate of survival, security, and the maximization of power will dominate all external relations. Non-state actors will not have the power to undermine the supremacy of domestic sovereign authority.

Wider Conceptions of Sovereignty: Towards a Pluralistic Perception of the State

The pluralistic conception of sovereignty can be considered antithetical to that of realists. Pluralistic definitions of sovereignty paint a different picture of the construction of the state and the implications of non-state actors in the process of governance.

Pluralism acknowledges that state and non-state actors all influence the dynamic process of governance.

John Locke, a devout subscriber to broader definitions of sovereignty argued that the state is comprised solely from the sum of its subjects. The subject is regarded as a self-governing unit that exists prior to the formation of the state. Self-governance is maintained through the forces of natural law or in other words, the forces of a common morality defined by spiritual law. Each subject contributes to the framework of governance within the state. The state is established for the purpose of 'refereeing' in the case of conflict between subjects. Otherwise, the state is comprised of its citizens, all enjoying their natural rights of governing their own affairs.³⁹ The formation of the state does not involve a total transfer of governing power to the sovereign. The sovereign is given supreme authority over law making and enforcement, but only within the context of securing the life and liberty of its subjects. Locke argued that "[s]overeignty must be restricted in scope and constrained in practice in order to ensure the maximum possible freedom of every citizen."⁴⁰ In this pluralistic sense, the state is viewed, not as a unifying homogeneous body of power, but instead as a loosely defined framework of its citizens and is designed as such to maximize the self-governance of these citizens. David Hume makes a comparison between the construction of the subject and the construction of the state. The subject, like the state is comprised of a set of terms and perceptions, bundled together to form a unit.⁴¹ A multitude of sub-units define the individual. These terms and perceptions are in a continuous flux that serves to define and redefine the subject. The state, according to Hume is derived in a similar fashion. The state, consisting of the sum of its subjects is nothing more than a set of loosely defined

structures. Sovereign governance authority is diluted throughout the variety of structures that serve to define the state.

Territoriality, one of the pillars of sovereignty in a traditional realist sense, is not an important component of the state according to the pluralist perception. State boundaries are very malleable and easily impregnated. John Ruggie argues that sovereignty does not have to be related to any notion of spatiality, and that in fact sovereignty is a mobile and dynamic phenomenon.⁴² There are a plethora of 'trans-, supra-, and sub-national actors who exist in politics that all serve to undermine the territoriality of the state by forming transnational linkages, increasing the fluidity of state boundaries. These sub-units are bounded not by the politically defined territorial borders of the state, but instead are often defined within the logic of late capitalism, (as is examined later in this thesis).⁴³ Ringmar argues that "...states have become increasingly interdependent and in the process the very distinction between domestic and foreign policy has become blurred." ⁴⁴

Territoriality is thus a fluid concept, compromised through relations and processes that can exist external to and alongside the state. Environmental issues are a compelling illustration of the permeability of political territoriality. The atmosphere, oceans, and mountains do not respect political boundaries. Neither do the issues surrounding their degradation. The pluralist asks whether a realist state can adequately deal with such transnational phenomenon as they transcend and compromises the territoriality of states.

As discussed above, traditional conceptions of sovereignty is based on the premise that territoriality bounds power within the state and thus a notion of spatiality is essential to the legitimation of domestic power. If territoriality is instead malleable and permeable, as is suggested by a pluralist perspective, where does the locus of power rest?

According to the pluralist, power rests not with a single sovereign authority, but instead with the multitude of sub-units that serve to define governance within and external to the state.

The Role of Non-state Actors in a Pluralistic Conception of the State

A broader conception of sovereignty entrenches the notion that non-state actors can possess powers of governance in the state and international arenas. It recognizes that domestic and international governance also consists of non-state actors and not just autonomous, sovereign states interacting with each other. This premise fundamentally alters the traditional definitions of sovereignty.

Pluralistic perceptions of sovereignty, although a theme of many classical theorists' writings, began to popularize during the 1960's. The international sphere underwent intense transformations throughout the next 40 years as advances in technology increased the interdependence of global relations. Pluralists argued that a realist approach to international relations lacked the necessary vocabulary to engage in an analytical discourse about the globalizing process.⁴⁵ Territorially mandated sovereignty, the state as a unifying body of power in the international arena, and the almost non-existent role of non-state actors in domestic governance, are important premises of a realist approach to the state. According to the pluralist, these realist ideologies are at least inadequate in explaining current trends in international relations. Wider conceptions of sovereignty provide the tools with which to examine its relevance independent of the state. With this broader definition of sovereignty comes a different interpretation of territoriality, power, and governance, and thus contributes to a different interpretation of the state and its role in the international arena. Governance, according to the pluralist, is formally facilitated

by the state, however state and non-state entities influence its process. The pluralist suggests that the actors in the process of governance do not always conform to, or abide by, domestic territoriality.

The implications of a pluralist approach to governance and the subsequent process of law-making differs significantly from the realist. The laws of the state are not regarded as stemming from a supreme sovereign authority, but instead are a product, albeit indirectly, of many actors who have the potential to have a role in law making. Actors, such as the TNC, can use economic clout as a means to influence the process of governance. Actors, such as those stemming from civil society (the social realm comprising groups of citizens advocating social change), can also influence governance. The analysis of regulation, in a pluralistic sense therefore involves an examination of all actors potentially involved in its formation in order to gain a comprehensive understanding of its mandate.

Does the pluralistic perception of the state have merit? Do non-state actors influence domestic governance? Is the territoriality of the state as malleable as pluralism perceives it to be? The following chapter examines the process of globalization and the subsequent empowerment of the TNC. Over the past few decades the globalizing process has heightened the influence of non-state actors into the process of domestic governance. It is crucial to acknowledge that in the era of globalization, powerful non-state actors can influence the process of governance, and some (such as TNCs) do not have the well being of the citizen as their mandates.

CHAPTER 2

THE CORPORATION, THE ENVIRONMENT, AND THE PROCESS OF GLOBALIZATION

The preceding chapter has set up two distinct interpretations of the state and its governance. This chapter examines the process of globalization and the rise of the TNC as contributing to the metamorphosis of state governance. The globalizing process has propelled the power and impacts of the corporation into the global realm. In many cases, corporations have become transnational in scope and reach. TNCs have a large hand in the globalized economy and as such, have become a formidable locus of power. The state is increasingly hamstrung to the powers of global forces, such as of the TNC and the result has been the erosion of domestic sovereignty as it is traditionally constructed.

The process of domestic governance is founded upon the supremacy of sovereignty. The phenomenon of globalization and the trends associated with it (mainly economic), have undermined the sovereign authority of the state. The governance process will inevitably be compromised. The danger with this premise is that while the state ought to have the 'well-being' of the citizen as its mandate, the TNCs overarching goal is the attainment of its own economic growth and profit making. The TNC has increasingly influenced governance processes so as to advance its objectives. One consequence will be the potential of widespread environmental devastation. The next section examines the

phenomenon of globalization, a process admittedly difficult to conceptualize due to its complex and dynamic nature.

Globalization

“Globalization involves a growing interpenetration of the global human condition...”⁴⁶

Globalization is a loose, all encompassing concept that has come to embrace a plethora of social phenomenon taking place around the world today. The concept is hotly debated, and a vast amount of literature has focused on the concept and its implications on society across the globe. The debate is trans-disciplinary in scope comprising the works of litterateurs, philosophers, historians, sociologists, political and business economists, geographers, and environmentalists.⁴⁷

Globalization can be regarded as embracing two interrelated dimensions: scope and intensity. Held elaborates:

The concept of globalization defines a universal process or set of processes which generate a multiplicity of linkages and interconnections which transcend the states and societies which make up the modern world system: the concept therefore has a spatial connotation. Social, political and economic activities are becoming stretched across the globe such that events, decisions and activities in one part of the world can come to have immediate significance for individuals and communities in quite distant parts of the global system. On the other hand, globalization also implies an intensification in the levels of interaction, interconnectedness or interdependence between the states and societies which constitute the modern world community.⁴⁸

Globalization is thus a multidimensional process that embraces a global reordering of time and space. The advent of technology and the powers of capitalism have shrunk space and time across the globe removing once significant political barriers to social interactions.⁴⁹ Many theorists argue that globalization is not a new phenomenon, that

international integration has existed throughout history.⁵⁰ But what is unprecedented in recent trends are the technological advancements that have facilitated an interconnectedness that is virtually instantaneous. Technology has thereby increased the reach and scope of economic and social interaction. One has to look no further than the blinking 'connect' icon on most personal computers that gives the user Internet access to a vast amount of information from all around the world. The Internet is one clear illustration of the globalization of society, (although it must be recognized that the Internet is more a tool of the tiny proportion of humanity who comprise the 'elite').

The architecture of international relations has also undergone an unprecedented metamorphosis due to globalization. The dawn and explosion of the technological revolution has increased the spatial reach of systems of production, distribution and exchange. Prior to this era these systems were premised in national economic policies.⁵¹ Advancements in communication, transportation, and production are eroding territorial boundaries of the state. Economic systems, driven by state and non-state actors, such as the TNC, have become transnational in scope, thereby blurring the boundaries between the domestic and international arenas. These systems have in fact formed integrated institutional webs that inject themselves into markets all over the globe.⁵²

Globalization is not just a linear, one-dimensional trend of social change. It is instead a consequence of a growing international interconnectedness over issues of trade, finance, the environment, culture, communication, law and security, and corporate powers that are transnational in scope.⁵³ All of these factors serve to reinforce the globalizing process.

Social, political, and economic processes have traditionally had a territorial delineation, (although historically, none of these processes have been completely constrained by territoriality). In the era of globalization, these processes increasingly are losing their connection to domestic boundaries. The globalized scope of the social and economic realms has increased the porosity of state territoriality. The phenomenon has the potential to impact positively on humanity's current destructive impacts on the natural environment. Environmental issues, once treated as national in scope, are increasingly recognized as constituting global problems.

The globalizing process also has the potential to exacerbate problems of the social and environmental condition. Globalization is often misconstrued as being a universal phenomenon occurring harmoniously across the world. The trend is said to embrace a 'common good' for all of humanity. But the globalizing process has in fact further intensified social inequalities across the world. There are dominant, hierarchical structures involved in globalization that serve to represent particular local interests.

Vandana Shiva conceives this trend as embracing a 'globalized localism'. She illustrates:

The life of all people, including the poor or the third world, of the life of the planet are not at the center of concern in international negotiations about global environmental issues. In dominant discourses, the 'global' is the political space in which the dominant local seeks global control and frees itself from local, national, and global control. The 'global' does not represent any universal human interest; it represents a particular local and parochial interest that has been globalized through its reach and control.⁵⁴

Globalization has the potential to broaden social and environmental concerns to encompass the global community and it has been touted by many as a process whose benefits will trickle down to all citizens across the globe. But as Shiva points out, globalization has not broadened global issues, but has in fact narrowed them. The forces

of the global economy have marginalized many global problems such as the environment and human rights. Unequal global economic power relations have suppressed these other dialogues. The dominant conceptions of globalization put a blanket over the issue of environmental degradation, constructing it as 'a global problem'. This masks the responsibility of the north, and its global economy in creating these problems.⁵⁵ Globalization is thus an essentialist concept that has the potential to hide inequalities across the globe.

As eluded to above, the global economy is a dominant global force, propelling the process of globalization. Economic growth is now housed in the ideology of the global arena. Trade around the world has reached five trillion dollars a year.⁵⁶ One trillion dollars of global financial flows are exchanged every day.⁵⁷ The global economy has evolved to become a dangerous and destructive global force. As Mander points out:

...the deep ideological principles underlying the global economy are...the very principles that have brought us to the social, economic, and environmental impasse we are in. They include the primacy of economic growth; the need for free trade to stimulate growth; the unrestricted 'free market'; the absence of government regulation; and voracious consumerism combined with an aggressive advocacy of a uniform worldwide development of a model that faithfully reflects the Western corporate vision and serves corporate interests.⁵⁸

Today we live in an increasingly interconnected and interdependent world, especially with respect to finance and trade. Technological advancements have aided in making many classes of goods now tradable. A consequence of this has been the globalization of financial flows over the last few decades.⁵⁹ Finances are increasingly being driven by the liberalization of capital markets to the global level. This increased fluidity of trade and finance has resulted in a northern driven global arena based mainly on economics and profitability.

Will the trends of globalization lead to the total dissolution of the state? Most theorists argue that, although undergoing intense metamorphosis, the state is not ceasing to exist as an important and powerful political entity. The fact that globalization is a northern driven process supports this premise. Held argues that authors who purport the demise of the state fail to acknowledge the prevailing powers of governance still residing within its borders. This premise:

...tends to exaggerate the erosion of state power in the face of globalizing pressures and fails to recognize the enduring capacity of the modern nation state apparatus, especially in regional contexts, to control the direction of domestic and international politics⁶⁰

The state is still the foundation and focal point of the majority of economic activity that occurs today. This renders it as a key site for which both political legitimacy and considerable enduring powers are sourced.⁶¹ As Held and Mcrew illustrate:

The actions of nation-states remain central determinants of economic performance, in part because only they can initiate and coordinate the technological, infrastructural, and training policies that ensure that a national economy remains internationally competitive and attractive to capital⁶²

There is insufficient empirical evidence at this point to accept the premise that the state's status has significantly diminished in the global arena. Hyper-globalization literature is often passionate, highly prescriptive, and without illustration. On the other hand, the process of globalization and its impact on state governance processes must be acknowledged and addressed. It is a dangerous matter to ignore the impact that globalization is having on the state. Globalization is eroding the concepts of territoriality and state sovereignty, important premises to effective domestic governance. The economically driven process has exacerbated social and environmental issues and has

undermined the traditional methods of how these issues are managed. I now turn to the TNC, an agent of globalization and a perpetrator of global environmental degradation.

The Transnational Corporation

The concept of a corporation is historically founded upon the economic need for people to invest finances without the risk of personal liability for losses. Once a company becomes incorporated, its owners are spared the risk of personal loss if it goes away. Corporate structure has evolved from this historical conception to act in ways that degrade the environment. Many corporations have seemingly no regard for the consequences that are a result of their environmentally destructive behavior. What causes many corporations to act in such socially and environmentally devastating manners? Are all senior corporate managers amoral, money hungry people whose only concern rests with the bottom line of the company? The answer to this question lies within very structure of a corporation, and how it guides the behavior of all those caught inside. The corporation is framed around the need to maximize profits, to produce new products and technologies, and to expand its reach and powers.⁶³ Mander argues that increasingly the corporation is self-guided by its own structure. The people that work inside the corporation really have a very minimal influence on how it ultimately functions. It is not managers, but corporate structure and law that in the end drive the decision-making process of a corporation.⁶⁴

Corporate law dictates that companies must act in the best economic interests of their shareholders. Managers are therefore legally bound to step over issues that impede the corporation's ability to turn a profit.⁶⁵ The corporation thus behaves in such a way as

to protect its profit margin. A large corporate profit margin is not solely the result of a strong profit every year. The corporation's success depends on how it fares on the stock markets, which is based solely on growth. Not only must the corporation turn a big profit every year, it must also show that its profit margin is greater than the year before. It therefore goes against corporate culture to introduce measures that might limit the potential of the company to grow and prosper.

The globalization process encourages an increased flow of goods and capital that transcends the boundaries of the state. The corporation has taken advantage of all of these trends in the drive to increase profits. As discussed above, the dominant conception of globalization masks the reality that it is not a neutral phenomenon occurring universally across the globe. In the globalizing era, the corporate mandate can now be transnational in scope. The interests of the TNC, with their formidable global economic reach, have in many respects dictated the process of globalization.⁶⁶ The United Nations describes TNCs as "...the productive core of the globalizing world economy."⁶⁷ TNCs are giant commercial organizations with immense assets, often with sales of hundreds of millions, or billions of dollars.⁶⁸ For a corporation to be considered truly transnational it must be multi-locational. It has subsidiary branches in more than two locations across the globe.

Although diverse in size and definition, TNCs represent 50 of the top 100 economic entities in the world today, the other 50 being states.⁶⁹ According to the now defunct United Nations Center on TNCs (UNCTC), activities of TNCs, "...affect at least one quarter of the world's productive assets; 70% of the products in international trade; 80% of the world's land cultivated for crops, and the major share of the world's technological

innovations.”⁷⁰ Clearly TNCs represent an unprecedented and formidable global force. In 1995, TNCs comprised 400 000 parent companies with over 250 000 foreign affiliates.⁷¹ In the 1980’s TNCs were primarily established and headquartered in industrialized countries. During the 1990’s however, foreign direct investment by the TNC in developing countries rose by more than 25%, and in 1993 foreign direct investment exceeded official development aid.⁷² The global reach of TNCs are really beyond comprehension.

TNCs have evolved to embrace the economic potentials of globalization and as Murray Dobbin points out in his book: *The Myth of the Good Corporate Citizen*, this differentiates them from their predecessors, Multinational Corporations (MNCs).⁷³ Multinational corporations historically established national identities; although their business might have spanned two or more countries, they became integrated into local communities. Operations stayed inside the country that the MNC chose to do business in. They were subject to government regulation, and were obliged by the rules of the given country. A local identity was thus established between the MNC and the host country.

The TNC and its operations differ substantially from the MNC. TNCs are integrated, not around the identity of the state, but instead around global networks of suppliers and buyers. The goal of the TNC is to create global markets and as such has no desire to identify with local host societies. The TNC has harnessed the economic advantages of maintaining production in one state, financing them in another, and finally even coordinating the whole operation in yet another state. In this way, the TNC has minimal connections to the state.⁷⁴ The impacts of TNCs are greater than that of MNCs. Whereas MNCs conduct their operations in one country (and export their products),

TNCs have operations spread out over several states. The state has more regulatory control over the MNC because there isn't the continued threat of mobility. The TNC has the potential to move operations to the country with the best regulations to suit their needs. The state therefore must weigh the implications of their regulations against the possibility of losing foreign investment. David Korten lists the key global scenarios that the TNC would love to create:

- The world's money, technology, and markets are controlled and managed by gigantic global corporations;
- A common consumer culture unifies all people in a shared quest for material gratification;
- There is a perfect global competition among workers and localities to offer their services to investors at the most advantages terms;
- Corporations are free to act solely on the basis of profitability without regard to national or local consequences;
- There are no loyalties to place and community.⁷⁵

Transnational Corporations and the Environment

Many TNCs are contributing significantly to widespread environmental degradation. The global forces of the TNC allows them to move across the world, maximizing profit and inflicting environmental destruction in their wake. Paul Hawken, in his book: *The Ecology of Commerce*,⁷⁶ elaborates on the destructive dynamics of the TNC as it dictates the world economy, (although it is important to note that governments themselves often have a direct hand in environmental degradation):

Given current corporate practices, not one wildlife reserve, wilderness, or indigenous culture will survive the global economy. We know that every natural system on the planet is disintegrating. The land, water, air, and sea have been functionally transformed from life-supporting systems into repositories for waste. There is no polite way to say that business is destroying the world⁷⁷

Are TNCs really such an ominous and environmentally destructive force? There are compelling statistics to support this claim. Dupont, Imperial Chemical Industries, and Hoescht dominate the production of chlorofluorocarbons.⁷⁸ Chlorofluorocarbons continue to deplete the ozone layer, contributing to ozone holes in the northern and southern hemispheres. Carbon dioxide emissions are contributing to the phenomenon of global warming. TNCs account for approximately 50% of all greenhouse gas emissions.⁷⁹ It is estimated that by the turn of the century, TNCs will produce more than 1 billion tons of synthetic organic chemicals every year, leading to potential increases in cancer rates.⁸⁰ Dow Chemical, Imperial Chemical industries, Solvay, and Asahi Glass dominate chlorine production.⁸¹ Chlorine produces a dangerous byproduct dioxin called organochlorine. This dioxin accumulates in the fatty tissue of organisms and potentially contributes to breast cancer, immunological deficiencies, and birth defects. TNCs directly control 50% of the global oil business.⁸² Environmental impacts associated with oil production are extensive. Land degradation, freshwater and seawater pollution, and air pollution are just a sample of the known environmental impacts of the oil industry.⁸³ Six TNCs dominate the aluminum industry: Alcoa, Alcan, Reynolds, Hydro Aluminum, Pechiney and Kaiser.⁸⁴ Aluminum production and smelting take place at an extremely high environmental cost. Examples of environmental impacts include greenhouse gas emissions, deforestation, soil erosion, and inadequate storage of waste. There are also significant environmental impacts associated with the large-scale factories, and production that are commonalities to most TNCs. TNCs have a significant hand in hazardous waste production, pesticide use in agriculture, global deforestation, and fish

stock depletion.⁸⁵ These environmentally devastating statistics are by no means exhaustive.

The above analysis of TNCs paints a clear picture of why they behave in ways that prove detrimental to environmental sustainability. Profit and growth are the sole mandate of the TNC. Environmentally sustainable actions do not advance the short-term goals associated with profit.

Economic globalization and the advent of the TNC has altered the traditional processes of domestic regulation. Globalization has not absolved the state of its sovereign authority of governance. The state still holds supreme authority to implement regulations deemed fit, but in the era of globalization, the consequences of domestic regulation could prove deleterious on the economic and social well being of the state.

Held elaborates on the implications of economic globalization on domestic governance. First he argues that states are increasingly dependent on international trade and hindering this relationship with domestic regulation is a risky venture. He suggests that domestic regulation that leans towards protectionism could lead the state into a volatile market situation. Second, Held suggests that globalization weakens the general framework that served to propel progressive regulatory formation and reform. He argues that:

...economic globalization undermines the domestic political coalitions that have traditionally underpinned progressive social and economic policies. It does this by profoundly altering the economic and political interests and relative economic and social power of social groups and classes. The dependence of an increasing number of firms on overseas markets and investments may diminish the pool of powerful supporters for protectionist policies.⁸⁶

So it is not that the state is dissolving in the globalizing process. Indeed, as Held argues “[n]ation states remain immensely powerful; indeed, they may be more powerful than ever before in some respects.”⁸⁷ The state is still a significant actor in the global arena, if not the most significant actor. But one cannot ignore the impacts that the global economy is having on domestic governance. States are now part of a complex and dynamic global system. Held elaborates:

...it is reasonable to assert that states today do face a more complex array of international or global problems than hitherto; in addition, they must face a wider range of international actors. They are more deeply enmeshed in global networks of interaction; crucially, they have seen their own expansion in size and absolute power diminished by the relatively greater increases in the direct power, exit options, and collective structural power available to foreign actors and global networks.⁸⁸

Regulation of the TNC and its impacts on the environment should be a primary concern of the state. After all, environmental law has traditionally fallen into the hands of those in the domestic arena. However, as the following chapter illustrates, the mobility, flexibility, and economic powers of the TNC have compromised the effectiveness of state level environmental regulation. Whereas the current systems of domestic governance follow a realist interpretation of the state, the formidable powers of the TNC warrant a discussion of models of governance that are more pluralistic in scope. The next chapter provides evidence that the traditional methods of environmental regulation are being undermined and thus demonstrates that new models of governance of will need to be invented, examined, and if appropriate, accepted.

CHAPTER 3

THE EFFECTS OF THE TRANSNATIONAL CORPORATION ON ENVIRONMENTAL REGULATION IN CANADA

Canada has nurtured an intimate relationship with the TNC. Canada desires the financial influx and employment opportunities often facilitated by these corporations, and as this chapter illustrates, Canada's governing authorities often heed their mandates. Technological advancements during the 1970's increased the mobility of capital and further empowered TNCs to move to countries whose policies fit their needs.⁸⁹ The corporation was beginning to loosen its ties to the territoriality of the state and tread beyond the jurisdiction of domestic policy. TNCs have become more mobile and flexible as states compete with each other to provide the ideal economic and social conditions for the corporation to prosper. As this chapter demonstrates, this trend is leading to a downward standardization of federal policy. The erosion of domestic regulation is especially prevalent throughout Canada's environmental policy, a regulatory regime with the potential capacity to retard the growth of TNCs located in the country. This chapter empirically illustrates the influence TNCs can have over the domestic governance process by examining their impact on Canada's regulatory capabilities with respect to environmental issues.

This chapter addresses the manner in which TNCs have impeded Canada's environmental policies by examining the reforms to the Canadian Environmental Protection Act. The original Act was assented on June 28th 1988 as "[a]n Act respecting the protection of the environment and of human life and health."⁹⁰ It is a sweeping piece of environmental legislation, embracing many areas of Canada's environment. This chapter will illustrate the impacts of TNCs on the act throughout its eleven year history. These impacts have resulted in the dilution of the Act's mandate of effectively managing environmental problems. In essence, this chapter will show how the TNC has helped to guide the reforms that have been made to the Act by compromising its reform process. In other words, TNCs as non-state actors of the global economy contribute indirectly to the governance of environmental issues in Canada. The loosening of the sovereign governance powers of Canada's elected parliament due to TNCs, whose narrow-minded focus is on profit, is an extremely dangerous practice. The notions of profit and economic growth are the motivating factors that drive the decision-making process of the TNC, and their influence can put progressive environmental legislation on the back burner.

The transnational reach of many corporations in Canada has helped erode the notions of sovereignty and territoriality as they apply to the Canadian state. Canada's ability to effectively protect its natural environment is being corroded by the forces of economic globalization. This trend will potentially result in increased environmental degradation. With a GDP of 888 Billion in 1998, Canada is one of the wealthiest countries in the world.⁹¹ If the TNC can impede on the legal system of such a strong and economically sound country, one can only guess as to its impact on less powerful

countries. If TNCs can erode the legal framework for environmental regulation in Canada, how are they affecting the legal frameworks of weaker states?

Environmental Regulation in Canada

The regulatory jurisdiction between the federal and provincial governments with respect to the environment is entrenched in Canada's constitution. The constitution does not explicitly refer to the environment, but federal and provincial governments hold respective jurisdictional powers it.⁹² Legislative jurisdiction between the federal government and the provinces falls under section 91 and 92.⁹³ With respect to the environment, jurisdiction is allocated to the federal government over areas such as navigation and shipping, sea coast and inland fisheries, and interprovincial and international transportation. Section 91 mandates authority to the federal government over all matters that fall under the Peace, Order, and Good Government of Canada (POGG), so long as the laws don't fall under the exclusive jurisdiction of the provinces. Included under the POGG clause is the doctrine of national dimensions. This doctrine states that the federal government is to be given jurisdiction over matters that affect the nation as a whole. The Canadian Environmental Protection Act (CEPA), was born out of the federal government's right to manage and control issues that constitute a matter of national concern.⁹⁴

In the early 1970's, the Federal Department of the Environment initially exercised regulatory control over the environment using three legislative mandates: The Fisheries Act, The Clean Water Act, and the Clean Air Act.⁹⁵ But as scientific advancements shed more light on the impacts that pollution, in the form of toxic chemicals, was having on

the environment, it became clear that the existing legislative framework was inadequate. What followed throughout the next decade was a valiant attempt by the federal government to control the release of pollution into the environment rather than to overcome the problems of regulating it once it has already entered into the environment. This was the first sign that the government wanted to take a proactive approach to pollution management.⁹⁶ The Environmental Contaminants Act (ECA) was proclaimed on December 2nd, 1975, representing a federal attempt to regulate toxic chemicals. The purpose of the act was to manage existing toxic chemicals and prevent new ones entering the natural environment.⁹⁷ Lack of financial resources, organizational problems and disputes over jurisdiction, as well as its failure to adequately address the environmental problems facing the country and a heightened public concern over the environment during the late 70's and early 80's led to the virtual dissolution of the ECA.

CEPA was passed, primarily as a reaction to the increased public awareness of the adverse affects that pollution was having on the environment and human health. This concern became more desperate due to several high profile toxic chemical disasters, such as the Dow Chemical plant toxic blob, and the Union Carbide pesticide-plant leak in Bhopal, India, killing more than 2000 people.⁹⁸ As pressure to act on environmental issues increased, it became evident that the federal government had minimal legislative jurisdiction over environmental issues. There was also a growing realization that environmental issues were of national concern. Federal jurisdiction over pollution is represented in CEPA's preamble with states that "[w]hereas the Government of Canada recognizes that the risk of toxic substances in the environment is a matter of national concern and that toxic substances, once introduced into the environment, cannot always

be contained within geographic boundaries...”⁹⁹ CEPA was proclaimed in June 1988, mainly as a response to increasing public concern about the adverse affects of pollution.¹⁰⁰ CEPA was passed as an Act “respecting pollution prevention and the protection of the environment and human health in order to contribute to sustainable development.”¹⁰¹ CEPA’s mandate is clear in its declaration which states that “It is hereby declared that the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention.”¹⁰²

CEPA is a sweeping act, consolidating a diverse array of environmental legislation at the federal level. It deals with many areas of Canada’s environment and gives the federal government jurisdictional powers over these areas. CEPA is divided into 7 main parts:

Table 1: Breakdown of CEPA

Part of CEPA	Provisions
I. Environmental Quality Objectives, Guidelines and Codes of Practice	Deals with the creation of non-mandatory objectives, guidelines and codes of practice. It also gives the minister power to conduct monitoring, research, and data collection and publication on environmental quality in Canada.
II. Toxic Substances	Deals exclusively with toxic substances. It establishes the Domestic Substances List (DSL) which lists all chemicals known to have been in use in Canada between 1984 and 1986. Substances not on the DSL need to be assessed under CEPA before used in Canada. This part also establishes the Priority Substance List (PSL). Substances are placed on this list for priority assessment to determine toxicity and hence be subject to regulation.

Table 1: Breakdown of CEPA (Continued)

Part of CEPA	Provisions
III. Nutrients	Regulates the nutrient content of cleaning agents and water conditioners.
IV. Federal Departments, Agencies, Crown Corporations, Works, Undertakings and Lands	Deals with the application of CEPA to federal lands, works and undertakings.
V. International Air Pollution	Gives the minister authority to regulate air pollution that is dispersed to other countries or violate international agreements.
VI. Ocean Dumping	Regulates the disposal of material at sea
VII. General	Contains several provisions relating to the establishment of boards of review, inspections, offences, and penalties.

Report of the House of Commons Standing Committee on Environment and Sustainable Development, "It's About Our Health! Towards Pollution Prevention" (June 1995), 23-28.

CEPA's eleven year history has been rocky and complex. Its effectiveness in preventing pollution has been subject to widespread and impassioned debate. Section 139 of the Act stipulates that 5 years following the enactment of the legislation, a committee must undertake a comprehensive review the act's provisions and operations, and submit a report with its findings and suggested reforms.¹⁰³ On June 10, 1994, the Federal Standing Committee on Environment and Sustainable Development was assigned this job. The committee took the act through an exhaustive twelve-month review process. This included the assessment of thousands of pages of testimony from witnesses from all walks of life and reading through tens of thousands of pages of submitted briefs. The resulting report from the committees review was titled "It's About Our Health! Towards Pollution Prevention". The report includes 141 recommendations that together call for a virtual rewrite of the existing act. It was submitted to the House of Commons on June 13, 1995 for consideration. The federal government tabled a response that in

essence paid only lip service to the review. Its report was titled: “Environmental Protection Legislation Designed for the Future – A Renewed CEPA”.¹⁰⁴ It was touted by many as a weak response, brushing over many of the concerns espoused by the Standing Committee. On December 10th, 1996 Bill C-74, a renewed CEPA, was tabled in Parliament, but died when the federal election was called. In March of 1998, a reformed CEPA, Bill C-32, was tabled in the House of Commons. In April 1999 the house met and voted on the act. It went to a senate committee in the summer of 1999. The bill was passed by the senate with Royal Assent (chapter 33) on September 14, 1999.¹⁰⁵ (Hereinafter referred to as CEPA 1999.)

Corporate lobbying efforts have been intense throughout CEPA’s reform history. Lobbying has taken the form of position papers, letters, and witness statements submitted during reviews. As is illustrated below, these efforts have paid off. CEPA 1999 is a reformed piece of environmental legislation that in reality will not contribute much towards the protection of Canada’s environment. TNCs have impaired the legislative process throughout the history of CEPA and their intense lobbying efforts have impacted the latest CEPA reforms as represented in CEPA 1999. One of the most influential lobbyists has been the Canadian Chemical Producers Association.

The Canadian Chemical Producers Association

The Canadian Chemical Producers Association (CCPA) is a lobbying group located in Ottawa and is vested with the responsibility of advocating the interests of chemical producing corporations in Canada. The CCPA was chartered in 1962 with the following objectives:

- To promote the interests and development of chemical producers in Canada;
- To provide a forum of exchange of views and recommendations on any problems and needs of large and small chemical producers in Canada;
- To promote and maintain good relations between members of the association and government authorities, other segments of the economy, and the public.¹⁰⁶

The CCPA has a membership of over 70 companies with sales totaling 15 billion annually. Its constituents account for over 90% of the industrial chemicals manufactured into Canada.¹⁰⁷ Many of its members are also TNCs. Table 2 illustrates a few CCPA member corporations who are transnational.¹⁰⁸

Table 2: Examples of members of the CCPA who are transnational in scope

Corporation	Corporate Operations
DuPont ¹⁰⁹	<ul style="list-style-type: none"> • Operates in over 35 countries • Annual Sales of approximately 1.7 billion • Employs approximately 3700 people
Nova Chemicals ¹¹⁰	<ul style="list-style-type: none"> • Operates 18 plants in Canada, the U.S. and Europe
Celanese Canada (Subsidiary of Hoechst Group) ¹¹¹	<ul style="list-style-type: none"> • The Hoechst Group operates in more than 120 countries
Bayer Inc. ¹¹²	<ul style="list-style-type: none"> • Operates 100 plants in 5 continents • Annual Sales of approximately 1.3 billion • Employs approximately 144 000 people
Dow Chemical Company ¹¹³	<ul style="list-style-type: none"> • Operates 114 manufacturing sites in 33 countries • Annual Sales of more than 20 billion • Employs more than 42 900 people

Impacts of the CCPA Lobbying on CEPA Reforms

The CCPA is an influential association, representing some of the most powerful corporations in the world. The association has harshly criticized CEPA as undermining the competitiveness of chemical producing industries in Canada, especially on the international field. The association has attended almost all CEPA reform debates and has

made its opinion heard through witness statements, position papers, and various other lobbying methods.¹¹⁴ The legislative reforms in CEPA 1999 illustrates that the federal government has heeded the CCPA's fear mongering techniques. The CCPA has succeeded in placing a veil over the suggested reforms of the Standing Committee and has also managed to advance the interests of its members in CEPA 1999. The federal government has listened closely to the mandates of TNCs in Canada.

The next section pinpoints some specific areas in CEPA that have been compromised by the CCPA. These areas include: the definition of toxicity, the process of sunseting toxic chemicals, the interpretation of the precautionary principle, the use of chemicals in the environment, and the role of the international arena in toxic regulation.

1. The definition of Toxicity

The definition of toxicity is founded primarily on the use of the principle of risk.

The concept of toxic is defined in part II, section 11 of CEPA.¹¹⁵

II. For the purposes of this Part, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions

- a. having or that may have an immediate or long-term harmful effect on the environment;**
- b. constituting or that may constitute a danger to the environment on which human life depends; or**
- c. constituting or may constitute a danger in Canada to human life or health.**

The risk based approach to toxic substances presupposes that toxicity is linked to exposure.¹¹⁶ Environment Canada elaborates on the risk based definition of toxicity under CEPA:

For a substance to be classified as toxic under CEPA as it is currently written, there must be a possibility that the substance will enter the environment, that living organisms will be exposed to the substance, and that there will be an actual or probable effect resulting from that exposure.

These three components of toxic are know as the '3 E's of CEPA toxic'"¹¹⁷

The definition of toxicity is therefore based on a quantity of a substance entering the environment, and the harm caused in the environmental media.¹¹⁸ It is mandated under CEPA that an exposure assessment be carried out when determining the toxicity of a substance.

The standing committee, in its review of CEPA argues that the assessment procedures are insufficient, resulting in the regulation of only 25 substances since the inception of the Act. Further, 13 substances were removed from the priority substance list when it became clear that the 5 year assessment deadline would not be met.¹¹⁹ In its review, the committee felt that the weaknesses inherent in the assessment process are due to the risk/exposure criterion.¹²⁰ The existing procedure often requires extensive amounts of data, collected over an extended period of time. The report cites The Environmental Law section of the Canadian Bar Association as stating:

The definition requires that for a substance to be found toxic, it must be emitted into the environment in a quantity or concentration causing harm to the environment and human health. In many cases, there is insufficient data to determine what quantities or concentrations are harmful. Under this system, in effect, chemicals are deemed not harmful and can be widely used until proven harmful...¹²¹

The committee recommends that a hazard approach to substance assessment be incorporated when determining toxicity. The committee elaborates on the principle differences between the risk and hazard assessment approach:

The principle difference between a risk assessment and a hazard assessment is the exposure criterion. If the exposure criterion is removed, the regulatory process will have to rely on the 'inherent hazard' or 'inherent toxicity' of the substance under review, without regard to whether it is released, or may be released, into the environment in

sufficient amounts, in the course of normal use to exert a deleterious effect¹²²

The committee goes on to say:

Removing the exposure criterion from section 11 and using 'inherent toxicity' as the criterion for a new schedule of toxic substances under CEPA could mean that as many as several hundred to a thousand or more, of approximately 28,000 substances now on the Domestic Substances List (DSL) may be classed as toxic...¹²³

Incorporating the notion of hazard thus removes the exposure criterion and incorporates a notion of 'inherent toxicity'. Substances would be reviewed irrespective of their release into the environment in sufficient amounts. The assessment process would consequently examine potential effects to the environment and human health, irrespective of actual exposure type effects. This would result in a reduction of the waiting period for data.

The committee recommends a rewrite of section 11 to read:

11.1 For the purposes of this part, and subject to s. 11.2, a substance is toxic if it:

- a. has or may have an immediate or long-term harmful effect on the environment;**
- b. constitutes or may constitute a danger to the environment on which human life depends or;**
- c. constitutes or may constitute a danger in Canada to human life or health.**

11.2 The Governor in Council shall promulgate regulations prescribing the standard of assessment to be followed to determine whether a substance:

- a. has or may have an immediate or long-term harmful effect on the environment;**
- b. constitutes or may constitute a danger to the environment on which human life depends or;**
- c. constitutes or may constitute a danger in Canada to human life or health.**

The important differences to note between section 11 of the Act and the standing committees recommended revisions are that for a substance to be declared toxic, it does not have to enter the environment, or may enter the environment. The exposure criterion is removed and a concept of inherent toxicity is incorporated. The standing committee also gives more power to the Governor in Council to decide on the most appropriate method of assessment.

The CCPA submitted an extensive position paper criticizing the hazard assessment/inherent toxicity approach to toxic regulation. As this passage illustrates, the association vehemently opposes the inherent toxicity approach to assessment:

...there is no policy, scientific, or environmental justification for using inherent toxicity in hazardous assessment (under Section 11). Such a definition ignores science and the role of dose or exposure. It also would lead to regulations for a great number of substances in commerce (potentially thousands) where there is no risk warranting regulatory action. Such unnecessary regulatory action would put Canadian industry at a competitive disadvantage (as substances in other OECD countries are generally regulated on a risk assessment basis) and would lead to expenditure of government resources in regulating substances unnecessarily.¹²⁴

The CCPA thus argues that the risk assessment approach should remain unchanged, and thus the concept of hazard assessment or inherent toxicity not be incorporated into the act. According to the CCPA, risk assessment based on exposure is an effective means to assess chemicals. Exposure rates can often show that toxic chemicals can still remain in use if there is a minimal release.

The government response to the Standing Committee's position on inherent toxicity in hazard assessment indicated that there would be no amendments to section 11, and that assessments will continue to be based on risk. The response argues that current assessment methods are adequate:

The Government of Canada believes that the existing structure of Section 11 of CEPA supports risk-based decisions including those, for a relatively small number of substances, as per TSMP Track 1, based on persistence, and bioaccumulation, and laboratory studies (i.e. inherent toxicity) and using expert scientific judgement. If following consultation with the Canadian public, there is a need to strengthen the legal basis for proposing decisions in this way, the Government of Canada will consider amendments to s.11.¹²⁵

This response attests that the government will not amend section 11 and will thus continue to assess substances primarily based on risk. Inherent toxicity does factor in to their response, but can be used only in conjunction with persistence and bioaccumulation of the substance, which requires a risk assessment based on exposure. Further, the response states that inherent toxicity could only be incorporated for a relatively small number of predominantly anthropogenic substances.¹²⁶ It is interesting to note that the government response says that amendments to section 11 will only take place following consultation with the Canadian Public. This is a contradictory statement given the fact that the standing committees' review took place after extensive consultation with the Canadian public.

CEPA 1999 makes no mention of the use of a hazard assessment approach to controlling toxic substances. Section 65 maintains that toxicity will continue to be based on risk. Toxicity will be established based on exposure and harm to the environment and human health. CEPA 1999 therefore pays no heed to the recommendations set forth in the Standing Committee's review with respect to incorporating a hazard approach to toxic substances.

2. The Sunsetting of Toxic Substances

A substance deemed toxic under CEPA assessment procedures are subject to be sunsetted (or phased out) to a level where the substance has been virtually eliminated.

Virtual elimination of a substance is achieved if the substance is reduced to a level below quantification. Section 65.1 of CEPA 1999 defines the level of quantification as "...the lowest concentration that can be accurately measured using sensitive but routine sampling and analytical methods."

The standing committee review recommended that any substance deemed toxic under current CEPA assessment methods should be sunsetted:

The Committee further recommends that CEPA be amended to provide that any substance on the Domestic Substances List that meets or exceeds the prescribed regulatory criteria shall be deemed sunsetted under the Act.¹²⁷

Further, the committee argued that the generation and not just the release of persistent, bioaccumulative, and inherently toxic substance be phased out.¹²⁸ The committee recognized that there are economic and social costs associated with the phasing out of chemicals in use. For this reason, the committee recommended that users of the substance in question be given the opportunity to provide extraordinary reasons why the chemical should remain in use. This is outlined in recommendation 16 of the review:

The Committee recommends that CEPA be amended to provide that, for those substances on the Domestic Substances List that are deemed to be sunsetted under CEPA for reasons described above, the proponent shall be granted an opportunity to appeal to the Ministers of the Environment and Health and state extraordinary reasons why the substance in question should not be sunsetted under the Act and should instead be used for specific purposes.¹²⁹

This recommendation can be interpreted to mean that any substance deemed toxic under current assessment regulations be sunsetted. The onus is on the users of the substance to demonstrate extraordinary reasons why the chemical should remain in use for specific reasons. The term 'extraordinary' used by the committee posits that the

reasons must go beyond the normal reasons for use of the chemical. If the user cannot prove that the reasons are extraordinary, the chemical should be sunsetted.

The CCPA did not support this wide-sweeping phase out manner of banning toxic chemicals and they argue against the committee's position on sunseting of substances: "CCPA disagrees with sunseting concept other than that a substance should be phased out only if it presents an unreasonable risk not otherwise manageable."¹³⁰ Further they argue that the government not waste resources by "chasing every last molecule."¹³¹ The onus is therefore on the government to explore every other opportunity for management before the chemical is mandated to be phased out. A substance is not automatically sunsetted even if deemed toxic.

CEPA 1999, section 65 outlines the regulations with respect to the sunseting of toxic substances

65(1) In the Part, "Virtual Elimination" means in respect of a toxic substance released into the environment as a result of human activity, the ultimate reduction of the quantity or concentration of the substance in the release below the level of quantification specified by the Ministers in the List referred to in subsection (2)

(2) The Ministers shall compile a list to be known as the virtual elimination list, and the List shall specify the level of quantification for each substance on the list.

(3) When the level of quantification for a substance has been specified on the list referred to in subsection (2), the Ministers shall prescribe the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source, and, in doing so, shall take into account any factor or information provided for in section 91, including, but not limited to environmental or health risks and any other relevant social, economic or technical matters.¹³²

Therefore, as opposed to the automatic virtual elimination of a substance deemed toxic, the minister has discretion as to the level of release into the environment. The onus is not on the user of the chemical, to show that there are extraordinary circumstances in

which the chemical should remain in specific use. In fact, as outlined in section three, the onus is on the minister to take account economic factors in deciding the level of elimination for the substance. This means that a chemical deemed toxic and hence dangerous to the environment and human health can still be used in industry due to economic considerations. Economic growth is on an equal footing with human health.

3. *Precautionary Principle*

The precautionary principle stipulates that regulatory measures are to be taken with regard to a substance even if there is lack of full scientific certainty with respect to its toxicity.¹³³ The standing committee defines the precautionary principle as follows:

The Committee recommends that the precautionary principle be incorporated in CEPA as a guiding principle and that it be included in the Preamble. The Committee further recommends that an interpretive provision be included in the Act stating that all parts of CEPA shall be interpreted in accordance with the precautionary principle. *CEPA should define the precautionary principle to mean that, in respect of all substances suspected of posing a serious threat to the environment or to human health on the basis of weight of evidence, lack of full scientific certainty shall not be sufficient reason for postponing preventative or remedial measures.*¹³⁴ (emphasis added)

The precautionary principle would therefore allow for the regulation of substances before a full scientific, risk based assessment is carried out. This approach errs on the side of human health and protection of the environment, rather than the side of economics.¹³⁵ The chairman of the Canadian Section of the International Joint Commission interprets the precautionary approach in this way:

This approach...means taking into account a variety of studies across a range of circumstances and, then, if there is a strong tendency or probability of linkages between the substance(s) and injury, taking action to stop the input of those substances to the environment without waiting for absolute proof that a specific chemical has caused injury to humans. It can be contrasted to, but can also subsume the more demanding 'cause-effect' model which requires a rigorous proof of the specific cause or

source of a pollution which is leading to a specific injury by a specific chemical, an approach that in the case of human health, may mean that human illness must necessarily precede action¹³⁶

The CCPA argues that the definition of the precautionary principle should follow the same definition as outlined in Agenda 21 at the 1992 earth summit which states: “[w]hen there are threats of serious of irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹³⁷ The CCPA position papers strongly criticized the committee’s interpretation of the meaning of the precautionary principle in its report. as illustrated by this statement:

The Report goes on to recommend it’s own definition of precautionary principle (page 56) which is different in a number of important respects (“weight of evidence” wording is introduced and no definition of what this means is provided. Measures to be taken under the precautionary principle are no longer described as “cost effective measures”. The risk basis of the definition is removed. The purpose of measures is no longer defined as “to prevent environmental degradation”. Also the “threat of serious or irreversible damage” condition is omitted in order to promote more sweeping use of the principle. Nor is there any analysis in the Report as to why the wording agreed to by the World in Agenda 21 is unacceptable to the Parliamentary Committee. the (sic) report’s definition should be rejected as not supportable and impractical.¹³⁸

The CCPA thus virtually rejects every segment of the standing committee’s interpretation of the precautionary principle. The CCPA mandates that if the precautionary principle is incorporated into the CEPA, it must focus on risk, cost effectiveness, control, and be only used for substances in which there is a risk of serious or irreversible harm.

The federal government incorporates the precautionary principle into CEPA 1999’s preamble, but the definition aligns itself with the CCPA’s interpretation of the principle. The preamble of CEPA 1999 states that “[w]hereas the Government of Canada is

committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”

Clearly the government continues to rely on the notions of; threats of serious or irreversible damage, cost-effective, and environmental degradation, when implementing the precautionary principle. In essence, this takes the regulatory teeth out of the precautionary principle, and subjects it ambiguity. In retrospect, the government could only phase out a toxic chemical under the precautionary principle if it is cost effective for industry to do so. This could mean that a Band-Aid approach to pollution management could be incorporated by industry if it is more cost effective than dealing with pollution pro-actively. The conservative and reactive approach to the precautionary principle leaves the door wide open for the continuous influx of toxic chemicals into Canada’s environment.

4. Chemical Use in Canada

CEPA 1988’s interpretation of pollution prevention depicts a management and control approach to toxic chemicals at the ‘end of the pipe’. The chemical is managed only after its manufacture or use. This reactive approach to pollution prevention continues to apply to chemicals that have already entered the environment, and focuses on controlling their deleterious effects. The Standing Committee’s 1995 report argues that, “The main emphasis in the Act is on finding acceptable levels of pollution on a substance by substance basis, leading to adoption of control technologies to collect and treat waste at the end of the pipe.”¹³⁹ The Standing committee in its review argued that pollution prevention should be focused on the manufacture and use of the chemical, and

not just at the stage where it is released into the environment. On page 46 of the Report, the committee states:

It is the view of the committee that because pollution prevention focuses on preventing pollution in the first place, rather than on managing pollution after it has been created, it is the most sensible approach to environmental protection.¹⁴⁰

The committee further argued that this pro-active approach to environmental regulation would lead to cleaner technologies and production practices.¹⁴¹ The objective of the standing committee is to regulate the use of the chemical, not just the control of its release. The committee argued that the existing definition of pollution prevention would lead to a continuing of managing toxic chemicals which focus on “limiting or cleaning up releases”.¹⁴² The committee’s recommendation on the concept of pollution prevention is as follows:

The Committee recommends that pollution prevention be a guiding principle of the Act. We also recommend that a strong statement be included in the Declaration of the Act, to the effect that the purpose of CEPA is to contribute to the goal of sustainable development through pollution prevention. In addition, we recommend that the Preamble clearly establish pollution prevention as the priority approach to environmental protection. For the purposes of the Act, pollution prevention shall mean the use of processes, practices, materials, products or energy that avoid or minimize the generation and use of pollutants and waste. This should be done without shifting or creating equal or greater risks to human health or the environment.¹⁴³

The committee further criticizes the federal government’s position on pollution prevention inherent in the Toxic Substances Management Policy, launched in June 1995.¹⁴⁴ The committee argues that the policy permits the use of toxic substances if it can be shown that the substance will not be released. This goes against the committee’s position that the legislation should eliminate the generation, use and release of such substances, thereby incorporating a pro-active approach to pollution prevention.

The CCPA, in some respects accepts the concept of pollution prevention, but interprets prevention to take place mainly through control measures, not proactive measures. This is illustrated in this statement:

The Report calls for the elimination of the generation, use, and release of persistent, bioaccumulative toxic (PBTs) substances (what is commonly referred to as a TUR or Toxic Use Reduction Approach); whereas the TSMP [Toxic Substances Management Policy] recognizes the importance of the release of substances into the environment as a cause for concern.¹⁴⁵

They go on to say:

We disagree however, with the Report's definition of pollution prevention and in particular how the Committee seemingly wants to see that definition, "focused on preventing the generation and use of substances" (page 47) which, we believe, would be inappropriately interpreted to exclude in-plant and out-of plant recycling. As we have discussed above, such a TUR approach is inconsistent with the TSMP focus of substances to adequately control releases.¹⁴⁶

The CCPA is thus critical of a pro-active approach to toxic chemical regulation, and aligns itself with the reactive measures as outlined in the TSMP. In their position paper against the standing committee's recommended amendments to Bill C-32, the association argued that the focus should be on managing the release of toxic substances, not their uses. A risk based assessment of the chemical would be the necessary pre-condition for this reactive approach to regulating toxic substances.

CEPA 1999 embraces a risk based/reactive approach that focuses on the release of toxic substances into the environment.¹⁴⁷ This notion of pollution prevention continues to focus on the management of the toxic substances on a substance by substance basis and be based on the release of the substance into the environment. Toxic substance assessment will therefore not examine the generation of the substance. The assessment will take place after the substances have been manufactured, thereby

continuing to incorporate a reactive approach to toxic substance management. Pollution management, and not pollution prevention is the mandate of the federal government.

5. *CEPA and International Law*

The committee recommends that greater efficiency could be incorporated into the regulatory process by automatically banning substances that have been banned by any member nation of the OECD, or any Canadian Province. This would ultimately contribute to an increase of toxic substances being phased out. The committee summarizes its stance in this recommendation:

...CEPA be amended to authorize the Ministers of the Environment and Health to declare a deemed ban on any new substance that is banned in any Canadian province, or any member nation of the Organization for Economic Cooperation and Development, unless the proponent can demonstrate extraordinary reasons to the satisfaction of the Ministers that the new substance in question should not be banned.¹⁴⁸

The CCPA's position is that Canada should not ban, phase out, or declare toxic a substance when such a decision has been taken by another OECD country or by a Canadian Province. In their July 1995 position paper, the CCPA states that:

Canadian traditions of consultation should be maintained such that decisions under CEPA to ban, phase-out or otherwise restrict substances should be taken on the bases of stakeholder consultation in Canada, and should not be based on automatically following decisions that have been taken by other governments (foreign or provincial).¹⁴⁹

It is ironic that the CCPA takes such a position with Canadian Provinces given that in their July 1995 submission to the Standing Committee Review, they argued that pollution prevention lies within provincial jurisdiction.¹⁵⁰

CEPA 1999 makes no mention of banning substances declared toxic by other OECD countries or by Canadian Provinces. This will lead to the duplication of assessments that will in all probability yield similar results. The duplication of

assessments will also inevitably lead to inefficiency in the regulation, resulting in a greater time lapse in the assessment process. Consequently fewer chemicals will probably be declared toxic under CEPA.

Conclusion

Throughout every stage of CEPA's 11 year history, the CCPA has been inundating the federal government with witness statements, position papers, briefs, and long harshly worded letters pushing for a CEPA that suits the needs of its members. The standing committee on Environment and Sustainable Development has made several attempts to sway the act away from the visions of industry and realign it with the mandate of pollution prevention. The government has continuously responded in an irresolute manner, heeding the fear-mongering tactics of industry lobbying groups such as the CCPA.¹⁵¹

CEPA 1999 is the fruition of approximately 5 years of negotiations that have stemmed from the 1994 CEPA review by the Standing Committee on Environment and Sustainable Development. The current Act is diluted and weak. Its originally stated goal as being, "[a]n Act respecting the protection of the environment and of human life and health" are now merely words on paper, reduced to such a state by the relentless lobbying efforts of industry. The above assessment of the Act illustrates how the CCPA, representing some of the most powerful TNCs in Canada, has aided in impeding the CEPA reform process.

The resulting Act continues to assess substances based on exposure and risk, an ineffective and time consuming process. The notion of 'cost-effective' continues to be

injected throughout pollution prevention and management strategies of the Act. If a substance is deemed to be toxic under CEPA, the government must take into consideration economic impacts of its virtual elimination. If control and clean up of the substance is more economically feasible than preventing the substance from entering the environment in the first place, the former method will be advocated. Toxic chemicals will thus continue to pass through Canada's environment impacting on it with unknown consequences. Similar methods of pollution management will be implemented under the precautionary principle. The government will err on the side of caution when it comes to the management of potential more serious substances only when it is 'cost-effective' to do so. Dangerous substances will thus continue to be manufactured and used because it is not cost-effective for them to be phased out.

Pollution prevention strategies will continue to be based on the management and control of the release of the substance into the environment, and not on preventing the manufacture and use of the substance in the first place. Among other issues, this approach advocates the inefficient use of natural resources. Toxic substances will continue to be manufactured and used in Canada, bypassing CEPA's regulatory apparatus until the substance is released into the environment. CEPA 1999 will also continue to ignore OECD country and provincial bans on toxic substances, preferring instead to rely on its own assessment process to determine whether a substance is declared toxic.

This chapter has drawn from only a few areas where CEPA 1999 has been weakened as pollution prevention legislation. Industries, many of which are transnational in scope, have influenced the Act to the detriment of the environment, all in the name of

industrial profit and growth. TNCs are impeding the progress of environmental regulation in Canada.

CEPA 1999 helps advance the interests of industry, while rendering Canada a virtual cesspool for toxic substances. Industry can continue to use and produce a plethora of toxic substances, irrespective of their impact on the environment and human health. The ambiguity inherent in the bill, with concepts such as 'cost-effective', and 'economic considerations', gives the minister of the environment wide sweeping powers in which to limit the actual number of substances banned under the Act. It is clear in the text of the legislation that the interests of industry take precedence over the interests of Canadian citizens. Economic growth and profit will continue to undermine any attempt to clean up the toxic substances in Canada's environment. Through CEPA 1999 Canada has thus contributed to the downward harmonization of environmental regulation and has subsequently put itself in an ideal position in which to host TNCs whose production and manufacturing processes have dire environmental impacts.¹⁵²

The success of CEPA was dependent upon a realist approach to the state. It is assumed that the Canadian government has supreme sovereign authority over the law making process. However the globalized powers of the TNC undermines the Canadian methods of governance. The assumption that there must be an all-powerful ruler, governing a territorially bound Canada, has been compromised. Unfortunately, as this chapter has illustrated, there can be several actors influencing Canada's environmental policy making process. And the result has been that CEPA has evolved to become an ambiguous piece of environmental legislation, containing many loopholes that industry can jump through. Governing authority in Canada has been compromised by TNCs. As

powerful and destructive non-state actors, TNCs are hindering Canadian environmental regulation. Canada's environmental laws advance the mandate of industry and not the welfare of the environment.

The era of globalization, and the subsequent advance of the TNC, warrants that a more pluralistic definition of the state must be embraced. The state is no longer a closed, sovereign entity, operating in competition with other sovereign states. Its territorially defined boundaries are not high, solid walls that keep outside actors away from the political processes. The state has instead undergone an immense transformation during the globalizing process. Outside actors, such as the TNC increasingly have the capability to impede Canada's law making processes. This chapter has illustrated that globalization has thus worked to the detriment of environmental regulation in Canada. Unfortunately the scope of this project makes it impossible to delve into issues of how TNCs have influenced human rights and labor, but there exists a vast amount of literature that examines this relationship, many with similar conclusions to this thesis. The state's ability to effectively regulate the environment has been eroded. The era of globalization calls for new methods of governance over issues that tread beyond the regulatory capacities of the state.

CHAPTER 4

INTERNATIONAL LAW AND THE TRANSNATIONAL CORPORATION

The preceding chapter has provided evidence of how the traditional governance processes of the state have been eroded due to the forces of TNCs. The result has been a reduction in the effectiveness of environmental regulation and the probable consequence of increased environmental degradation. It can therefore be argued that the state does not have the appropriate governance mechanisms in which to effectively regulate the TNC. The state and its governance function around the assumption of sovereignty and territoriality. The globalizing process and the relative weakening of state systems of rule almost everywhere posits that other models of governance be addressed with respect to environmental regulation. This chapter explores the realm of international law as a possible arena in which to govern the environment, impartial to the forces of globalization and the influence of TNCs. Can international governance rise above the limitations of state sovereignty and territoriality in the era of globalization?

This chapter argues that international law is as limited as domestic law a mechanism of governance in which to manage global, economically driven forces such as the TNC. International law is produced and legitimized by states. This arena of law is ultimately produced with the same weaknesses as is found in state law. It is not

constructed to acknowledge power structures other than the state, and therefore does not have the capacity to be an effective model of governance of the TNC.

Similar to the state, international law has traditionally been constructed around a realist ideology of politics and power. According to realism, the international arena exists in a condition of anarchy. International law does not have a 'leviathan' type of sovereign leader, handing down the laws in a coercive manner. Without the stability of a supra-state governing authority, states grapple with each other in an attempt to advance their respective powers in the international arena. International law is founded upon the myriad of agreements, organizations, and regimes that guide and stabilize relations between states.¹⁵³ The state both constructs and legitimizes the international legal system, through its pursuit of international political power, yet the international legal order serves to constrain state action and to legitimize state conduct.

The international legal system is founded upon the traditional assumption that the state possesses supreme sovereign authority over its citizens and within its territory, and thus it is considered the fundamental unit of order and power across the globe. But as chapter three has illustrated, state sovereignty is compromised in the era of globalization by TNCs, and therefore are states somewhat weakened actors in international relations. As this chapter will show, TNCs are indirectly using the state as a tool by which to influence governance in the international arena.

In many respects, states are actually participating in the international arena with the mandate of securing foreign investment. Accordingly, one of the underlying themes of international institutions and agreements is to construct domestic arenas that are attractive to the investment dollars of TNCs. Economic growth has veiled environmental issues in

international relations. Orin Kirshner puts forth various reasons why most international institutions do not have the necessary governance tools in which to manage TNCs and other aspects of the global economy; some of which I draw on for the purposes of this paper:

- The gradual loss of governmental control over a wide range of domestic policies due to international economic integration and the concomitant intensification of global competitive pressures on national economies;
- The explosive growth of multinational corporations, which now account for a larger share of global production than ever before but remain unregulated at the international level;
- The globalization of currency and private capital markets, which are increasingly beyond the control of governments and central bankers¹⁵⁴

It must be understood that TNCs are not directly involved in the production of international law, but are instead a gray eminence, indirectly shaping many aspects of the international arena, as states grapple with each other with the mandate of securing the economic benefits of TNCs. The structure of the international arena is thus its limiting factor because although it is governed by states, it does not acknowledge the global forces that are transcending the sovereignty and territoriality of the state, weakening the state's ability to be an objective player in international negotiations.¹⁵⁵ Constructed around the assumption of global anarchy, the international legal system does not acknowledge the hierarchical forces entrenched through the global economy and dominated by TNCs.

As alluded to in previous chapters, TNCs have undermined the states ability to participate in the production of international law in two manners: their ease of mobility, and the growing importance of foreign investment in the global economy. Ruggie argues that:

...the reconfiguration of global structures of production and exchange - via markets, hierarchies, and networks - increasingly has rendered problematical core assumptions on the basis of which governments throughout the capitalist world had pursued the domestic objectives of economic growth, full employment, and social stability.¹⁵⁶

Global markets, perpetuated by TNCs, are impeding the potential of international law to manage global problems of environmental degradation. The state simply no longer has the defenses to uphold domestic policy against the enormous pressures brought forth by the TNC as it transforms the international arena into a single global economy. The threat of potential mobility by the TNC is resulting in the downward harmonization of environmental regulation in the variety of agreements that serve to govern the international arena. William Greider discusses the influence of the global economy on the United States:

As a political system, the global economy is running downhill - a system that searches the world for the lowest common denominator in terms of national standards for wages, taxes and corporate obligations to health, the environment and stable communities. Left unchallenged, the global system will continue to undermine America's widely shared prosperity, but it also subverts the nation's ability to set its own political standards, the laws that uphold the shared values of society.¹⁵⁷

The downward trend of social expenditures in the United States illustrates the impact of the global economy on domestic policy. In the 1960's social expenditures were on the rise in OECD countries. In the case of the United States, they nearly doubled between 1960 and 1975. They peaked in 1975 and by 1985 social expenditures were in a downfall to a lower level than they were a decade before, probably due to the impacts of the global economy on domestic governance.¹⁵⁸ The following section outlines the history of international law, and illustrates its weaknesses as a model of governance in

which to effectively regulate TNCs by examining the implications of some of the significant institutions that govern the international arena.

The Evolution of International Law

Traditionally, international law has in many respects been conceptualized around the 'Westphalian' model of politics after the Peace of Westphalia of 1648.¹⁵⁹ It entrenched the notion of state sovereignty in international politics.¹⁶⁰ Held summarized the model of Westphalia into the following 7 points:¹⁶¹

1. The world consists of, and is divided by, sovereign states that recognize no superior authority.
2. The processes of law-making, the settlement of disputes and law enforcement are largely in the hands of individual states.
3. International law is oriented to the establishment of minimal rules of coexistence; the creation of enduring relationships among states and people is an aim, but only to the extent that it allows national political objectives to be met.
4. Responsibility for cross-border wrongful acts is a 'private matter' concerning only those affected.
5. All states are regarded as equal before the law: legal rules do not take account of asymmetries of power.
6. Differences among states are ultimately settled by force; the principle of effective power holds sway. Virtually no legal fetters exist to curb the resort to force; international legal standards afford minimal protection.
7. The minimization of impediments to state freedom is the 'collective' priority.

The Westphalian model of international politics established a framework for international relations. The model depicted a world consisting of consisting of separate political powers all competing with each other to advance their interests. The model did not recognize the role non state actors had in international politics. It reinforced the assumption that state governments were regarded as the supreme authorities within their boundaries. After World War II, and the advent of the Cold War, relations between east and west were entrenched further into a Westphalian model of politics. The constant

threat of war reinforced the need for autonomous states, based on military capacity and national level forms of economic and social regulation.¹⁶² As is discussed below, the Bretton Woods instruments legitimized the fundamental rules of trade among states in the global economy.

The Bretton Woods Instruments

Many of the institutions prevalent in the international arena serve to regulate trade amongst states. The depression during the 1930's led states to implement extreme forms of protectionism in an attempt to stir domestic economies. International trade virtually ground to a halt.¹⁶³ State leaders saw a need to peacefully free international trade from the entanglement of domestic protectionist policies. The Bretton Woods conference subsequently held in 1944, was the consequence of the realization that part of the reason for WWII was the choking of international trade due to domestic trade restrictions. The Bretton Woods system was established during the conference as a means to foster the development of a global economy. But as Mander suggests, one of the underlying premises of the Bretton Woods conference was the expansion of corporate power:

The vast expansion of corporate power had actually been predicted and planned-for...at the notorious Bretton Woods meetings...held after the Second World War. Already at that time there was a vision of centralized worldwide economic management including huge new international institutions for banking and trade, with multinational corporations as the glue that held them all together, and guided their activities.¹⁶⁴

The neo-liberalist agenda of the Bretton Woods system is grounded in the three institutions that comprise its structure: The International Monetary Fund (IMF), the World Bank, and the General Agreement on Tariffs and Trade (GATT) . The IMF was established to promote a global economy by "...encouraging monetary cooperation,

currency convertibility, international liquidity and the elimination of exchange restriction, all of which are vital to the expansion of foreign trade and investment.”¹⁶⁵ The idea behind the World Bank was to provide loans to countries and private investors to foster economic growth.

In 1948, the General Agreement on Tariffs and Trade (GATT) came into force with the mandate of loosening domestic trade restrictions between states. Together, these three institutions were designed to prevent the international economic situation prevalent before and during the war. Kirshner elaborates:

...the overriding goals of the IMF, the World Bank, and the GATT were to prevent a recurrence of the nightmare of the interwar period...They were designed to do so by promoting global economic growth and international economic cooperation through the creation of an open world economy, no more and no less.¹⁶⁶

Beginning in the 1950's and throughout the next 40 years, discussions ensued about enhancing the GATT into a major governing institution of global trade. The draft for the World Trade Organization (WTO) was signed in Morocco in 1995, establishing an international governing body that would dictate trade rules for all signatories. The WTO drew from several characteristics of the GATT, but was considered to be a new organization with new rules, new text, subsequently replacing the GATT. The GATT regulations overlapped those of the WTO for a period of one year, and officially absolved at the end of 1995.

The IMF, The World Bank, and the WTO constitute the fundamental structures of the international monetary and economic system. The next section briefly discusses these institutions and then goes on to examine how they have served to perpetrate the mandates

of TNCs. TNCs have used them as mechanisms in which to develop the global markets necessary for their continued prosperity.

The World Bank and the International Monetary Fund

The World Bank and the IMF were established as part of the Bretton Woods system in 1944 with the mandate of financially aiding countries during the post war period. The IMF's primary function was to maintain exchange rate stability and aid countries with balance of payment issues. The intent was to present countries in financial crisis with an alternative solution to imposing trade restrictions.¹⁶⁷ Kirshner elaborates on the mandate of the IMF:

The IMF was designed to promote an open world economy by encouraging monetary cooperation, currency convertibility, international liquidity, and the elimination of exchange restrictions, all of which are vital to the expansion of foreign trade and investment.¹⁶⁸

The World Bank was designed to operate as an institution that would extend credit to countries suffering financial problems. It was soon discovered that many of the European countries that were supposed to make use of the World Bank did not need the Bank's money. The Bank instead began supplying capital to developing countries.¹⁶⁹ It's low interest rates during the 70's prompted developing nations to borrow extensively, leading to overwhelming burdens of debt.¹⁷⁰ The debts of these developing nations empowered World Bank officials to implement structural adjustment programs (SAPs). SAPs were devastating initiatives in which World Bank and IMF officials dictated social policies within the indebted countries so that the policies were for the most part geared towards the repaying of the debts. Dobbin calls SAPs, "...a euphemism for the elimination of the sovereignty of indebted nations."¹⁷¹

Dobbin argues that the underlying goal of the IMF and the World Bank was to increase the market potential for TNCs, by providing capital to developing nations that could be used to purchase their products.¹⁷² He cites instances in which the United States changed its stance on the construction of the World Bank and the IMF after consultations with TNCs.¹⁷³ The economic prosperity that was supposed to result from relationships with these institutions, instead weakened the political clout of developing nations as they became more susceptible to the powers of TNCs.

A striking illustration of the destructive influences that TNCs have had on the policies of the World Bank can be found in its Tropical Forestry Action Plan (TFAP). The TFAP is organized in conjunction with the United Nations Food and Agriculture Organization, the World Resources Institute, and the World Bank. The plan focuses on the relationship between deforestation and poverty, claiming that it is the, "rural poor themselves who are the primary agents of destruction as they clear the land for agricultural land, fuel wood, and other necessities."¹⁷⁴ The plan contends that the management of forests should lie with the forestry industry as it will treat forests as resources with the potential for export, and hence be more inclined towards effective management. Putting industry at the forefront of forest management will advance the well being of the developing countries and foster the global economy.¹⁷⁵ The notion that the world's forests would be better managed by industry is indicative of the short sightedness of the World Bank's policies. One must question how TNCs could sustainably manage forests, while keeping a close eye on their bottom line. Profit and industrial growth are not compatible with managing the world's forests in an environmentally sustainable manner.

GATT/WTO

As discussed above, the GATT deals with the reduction of domestic barriers to trade in the international arena. The purpose of the GATT was not to be an international institution as such, but an agreement that regulated trade between signatory states. The GATT policies did not come into force until 2 member states began trading. The decisions on tariff reductions and other trade imposing restrictions were to be negotiated by the parties entering into the particular trade agreement.

The WTO was established during the Uruguay round of the GATT negotiations, taking place between 1986 and 1994. It crystallized due in part to the realization that an international organization needed to be developed to harmonize trade relations between all member countries. The WTO also facilitated trade in services and intellectual property, two areas not included in the GATT. The WTO consists of 132 member Countries as of September 1997 and has an operating budget of 93 million dollars. It is structured around 4 general annexes: multilateral agreements, dispute settlement, trade policy review mechanisms, and plurilateral agreements.¹⁷⁶

Although the WTO was established as a result of the negotiations of 132 states, it is impossible to ignore the impacts that the TNC had on the process. Nader provides an illustration of how TNCs have influenced the formulation and direction of the WTO:

The business coalition calling itself the Intellectual Property Committee (IPC)-its members include IBM, Du Pont, General Electric, Merck and Pfizer-has bragged in its own literature that its 'close association with the U.S. Trade Representative and (the Department of) Commerce has permitted the IPC to shape the U.S. proposals and negotiating positions during the course of the (GATT) negotiations'.¹⁷⁷

The WTO has subsequently served as a tool in which the TNC is able to further globalize its reach. Dobbin illustrates how the WTO has broadened the global powers of

the TNC. First, it heightened the importance of trade in international relations, putting the global economy at the forefront. Second, trade has moved beyond the exchange of goods and into the regulation of investment. The WTO restricts member states as it pertains to their domestic powers over foreign investment. Member states have less control over which foreign corporations operate within their borders. Third, the WTO has much stronger enforcement mechanisms than the GATT. GATT sanctions were imposed only with the consensus of its 120 members, whereas the WTO automatically imposes sanctions unless there is a consensus among its members not to do so.¹⁷⁸ In addition, the WTO requires that each member state's existing and future domestic laws conform to its policies. Due to the WTO, the state is increasingly becoming subservient to the dynamics of the global economy.

Many of the policies inherent in the GATT were streamlined into the framework of the WTO. The vested interests of TNCs are advanced through 2 specific policies: The Most Favoured Nation (MFN) clause, and the National Treatment clause. The MFN concept is entrenched through Article 1 of the GATT. Jackson discusses what the MFN entails:

...the concept is one of equal treatment, but to that other party which is most favoured. In the GATT the MFN obligation calls for each contracting party to grant to every other contracting party the most favorable treatment that it grants to any country with respect to imports and exports of products."¹⁷⁹

This clause can be interpreted to imply that one member state cannot discriminate against the 'like' domestic products of another. The definition of 'Like' product, under the WTO is limited to the consideration of the products characteristics, and not by the process in which the product was created or manufactured.¹⁸⁰ Consequently, a state

cannot ban the import of a product that has been manufactured in an environmentally deleterious manner. Because of the MFN clause, a TNC is in effect given the right to manufacture its products in a state with minimum environmental standards and export the product to any member WTO country without fear of repercussion. This inevitably leads to a lowest common denominator approach to environmental regulation as states compete for the foreign investment of TNCs. Various trade disputes based on domestic environmental regulation have been brought before the GATT dispute resolution bodies. Historically, the regulations have been found to contravene GATT trade regulations, leading to a rollback of environmental regulation so as to comply with world trade bodies.¹⁸¹

The National Treatment clause is described in Article III of the GATT, which mandates that the treatment of imported goods are to be no worse than the treatment of domestic goods.¹⁸² Thus, a member country cannot impose tariffs, taxes, quotas, or import limits that put a foreign product at a competitive disadvantage to a domestic product. The mandate of the WTO increased the impact of the National Treatment clause on domestic sovereignty. Whereas the GATT policies only came into force if two or more contracting parties entered into a trade agreement, the WTO regulations extend to all 132 member countries. In essence, a member country cannot impose any trade restrictions on any other member country that would give their domestic products a market advantage. Thus, a product that is manufactured in a member state with lower environmental standards is afforded the same selling rights as a domestic product that is manufactured in a more environmentally sustainable manner.¹⁸³

The WTO has mechanisms that allow for basic levels of protection based on environmental standards, but as Lori Wallach points out, the tests that allow such protection mechanisms are very constrictive.¹⁸⁴ Even if it is proven that domestic protection measures are solely do to environmental reasons, actions taken must be least restrictive to trade and, more importantly, must not based on manufacturing or harvesting procedures.¹⁸⁵ Therefore, under the WTO, the manner in which the product is produced cannot factor into environmental protection mechanisms.

Policies such as the MFN and National Treatment in the WTO have propelled a race to the bottom approach to environmental regulation across its member states. Due to the structure and power of the WTO, TNCs can externalize the costs of environmental degradation by moving its manufacturing sectors to the country with the least restrictive environmental policies. The WTO has thus proven to be an effective tool in which to globalize the reach of the TNC at the expense of the environment.

Free Trade Agreements

Article XXIV of the GATT outlines an important exception to the MFN principle, authorizing the formulation of customs unions and free trade areas.¹⁸⁶ Bilateral and Plurilateral agreements are authorized under the GATT provided the trade restrictions between the member states are eliminated with respect to virtually all trade between the states, and that the customs duties are not higher than the prevailing duties prior to the formation of the trade agreement. The North American Free Trade Agreement (NAFTA), illustrates the implications of Article XXIV on TNCs. NAFTA was formalized between Canada, the United States, and Mexico on August 12, 1992, establishing a free trade zone centered on goods, services, and investment. NAFTA

reaffirms the National Treatment and the MFN principles, with the stated goal of eliminating tariffs between the three countries over a period of 10 years. Article 1106, for example, rules out national policies that would favor domestic industry.

NAFTA is just one of many examples of free trade zones that have been established around the globe.¹⁸⁷ It also serves to illustrate how inter-state relations often perpetuate the reach of TNCs. Five of twenty-two chapters of the NAFTA are devoted to investment, increasing the feasibility of transnational corporate mobility. Under NAFTA, corporations can locate in the country whose domestic policies are best suited for profit maximization, and export their products to other member countries without restriction. As with the WTO, free trade bodies such as NAFTA further the downward spiral of environmental regulation as each member country faces the potential of losing foreign and domestic investment if its environmental standards are too stringent.

The United Nations: A Model of Global Governance?

It has been argued by many theorists that the United Nations possesses the potential to effectively manage issues that are global in scope. The UN charter was formalized during the San Francisco Conference between April 25th and June 26th 1945, coming into force on October 24, 1945. The underlying premise of the United Nations stemmed from the realization that a Westphalian model of international relations acknowledges only inter-state interactions, and not the variety of other forces taking place in the international arena. The goal of the United Nations was to tread beyond the 'state is supreme' model of international relations and enter into a governance realm where the welfare of all actors in global politics was taken into consideration.¹⁸⁸ The UN was thus designed to

overcome the limitations of the Westphalian model of international law. Its charter outlines the importance of governance at a global level. Held outlines several key provisions of the United Nations charter, some of which are relevant to the scope of this thesis.¹⁸⁹

- Individuals and groups are regarded as legitimate actors in international relations.
- Oppressed peoples are assigned rights in order to play a role in determining their futures.
- Peace and human rights and the establishment of a greater social justice are the priorities.
- New rules are established to govern the globe so that 'systematic inequalities' among peoples are eliminated.

The ambitious principles of the UN charter have the potential to reform international relations by establishing a model of governance that is global in scope. The espoused globality of the United Nations could potentially be an effective model of governance in which to manage global issues such as the TNC. However, its structure impairs its global scope. The United Nations is ultimately grounded in a Westphalian ideology of international affairs.¹⁹⁰ As Held argues, "The division of the globe into powerful nation states, with distinctive sets of geopolitical interests, was built into the charter conception. As a result, the UN was virtually immobilized as an autonomous actor on many pressing issues."¹⁹¹ The most important mechanism that undermines the UN as a global institution is the veto power accorded to permanent members of the UN security council, thereby attributing governing authority to the world's major political powers.¹⁹² Another limiting factor of the United Nations is its reliance on the financial contributions from its members.¹⁹³ Held argues that this dependence on the state, underscores any legal status that might be conferred on non-state actors with an interest on international affairs.¹⁹⁴

Although not directly advancing the interests of the TNC, the United Nations would not be an appropriate institution in which to impose regulation on them. If the United Nations were to implement a policy that dealt with environmental sustainability, or human rights, and it conflicted with the policies of the WTO, which institution would prevail? One must surmise that the institution that dictates the global economy would take precedence. If the state is chipping away at its own domestic social policies in order to attract foreign investment, as this chapter suggests, would the same state attempt to uphold environmental and social standards through the United Nations? Unfortunately although not inherent in the policies of the United Nation, the global economy will indirectly dictate its mandates.

The United Nations then is ultimately housed in the ideology that has historically governed the international arena to date. Although an attempt is made through the UN charter to break away from Westphalian politics, the traditional ideologies of international relations still comprise its framework. The institution is still ultimately governed by the state. Moreover, the institution is primarily governed by the most powerful states, further weakening it as a potential model for global governance. Its charter entrenches its supposed global scope, but its dependence on the state limits this institution in the same manner as other international institutions discussed above. As a result, it must be argued that the United Nations would not prove to be an effective governing body in which to manage TNCs and other issues of the globalized economy.

Conclusion

In today's globalizing economy, nations are increasingly competing with each other for created assets and markets. In the nineteenth and first half

of the twentieth century, they primarily bought and sold different goods from each other, and engaged in complementary, rather than competing economic activities. This is no longer the case. Most developed nations trade with other developed nations, who produce and sell similar goods and services. More-over most of this trade is intra-industry trade. In a very real sense, and especially in times of global unemployment, states compete with each other for employment creating and competitively enhancing mobile assets.¹⁹⁵

As discussed throughout this thesis, realist notions of sovereignty denote a level of political authority and autonomy attributed to the state. This chapter has argued that the plethora of institutions and agreements comprising the framework of international law are limited as effective mechanisms of governance due in part to the dominant political misconception that the state is an autonomous and sovereign politic. In reality, states are among many actors who influence international governance processes in the global economy. As Held argues, states are increasingly vulnerable to the global forces that are housed in transnational economic networks.¹⁹⁶ TNCs, perpetrators of the global economy are located in states, but operate with global visions of maximizing their international competitiveness and profitability.¹⁹⁷ Held elaborates on the implications of this trend:

...government economic policy must to a large degree be compatible with the regional and global movements of capital, unless a national government wishes to risk serious dislocation between its policy objectives and the flows of the wider international economy.¹⁹⁸

The reciprocal relationship between the state and its citizens has transformed into one between the state and the TNC, suppressing the citizen in the process of governance. Dobbin argues, “[t]he social and psychological distance between the citizen and government has become so great that the notion of government as an expression of community is now weaker than at any time in the post war period.”¹⁹⁹ Consequently, whereas international law is founded on the premise of state sovereignty and autonomy, it

must be argued that it operates under the influence of the global economy and is thus not anarchic in character. Lipschutz elaborates on this point:

...anarchy, as the organizing principle of the international system is withering away. This is the result not so much of sudden changes in the global political scene-a shift from bipolarity to multipolarity or unipolarity - as the long term acceptance of liberalism as the 'global operating system' with all the short and long term contradictions that such a shift may entail.²⁰⁰

It is ironic that although the foreign investment that accompanies TNCs is supposed to increase employment rates in the host state, thereby increasing the prosperity of its citizens, this has not actually been the trend. Dobbin's book has some dire employment statistics in Canada between 1988 and 1994:

- Between 1988 and 1995, as many as 334,000 manufacturing jobs were lost Canada
- Between 1988 and 1996, 33 Business Council on National Issues member corporations laid off 216 004 employees.
- By the end of 1994 the clothing industry had lost 32.8% of its jobs, electronics 24%, paper 22.5%, food and primary metals both 16.5%.²⁰¹

The Bretton Woods system institutionalized the necessary tools for the corporate takeover of the international arena. The establishment of the World Bank and the IMF gave the TNC the means in which to establish a global market to sell their products. The GATT policies only served to enrich a global corporate arena. With the entrenchment of the MFN and the National Treatment clauses, the TNC was able to enter into any member state and sell their products without fear of reprimand for how the product was manufactured. Under the GATT, member states are not allowed to raise tariffs on a TNC who produce their products in an environmentally destructive manner. The WTO heightens corporate power by incorporating GATT principles into the realm of investment, and banning the use of non-tariff barriers such as environmental standards.

Through these institutions, the international arena has helped legitimize the global economy, to the detriment of the environment.

In the era of globalization, TNCs are able to run rampant across the globe looking for the lowest social and environmental standards in which to operate in the most cost-efficient way. This prompts the race to the bottom approach to social and environmental regulation as states compete with each other for corporate investment. Citizens of the state are steadily becoming citizens of the TNC. As the following case study illustrates, the consequences of the current international legal system as it pertains to TNCs, can have deleterious environmental and social consequences.

The Maquiladora System in Mexico

The maquiladora system in Mexico illustrates the dangers of the downward harmonization of environmental regulation as states compete to be attractive to TNCs. Due to the policies of the GATT and the NAFTA, hundreds of United States corporations have set up factories known as maquiladoras, located just south of the US/Mexican border. TNCs migrate to Mexico for several reasons that all have to do with cost efficiency and maximization of profit. As Dobbin points out:

The attraction is simple: a workforce that earns as little as four to five dollars a day and does not have the means in which to defend itself against employer aggression because it is effectively denied the right to organize, and environmental and workplace standards are either lax or largely unenforced.²⁰²

The influx of foreign investment to Northern Mexico prompted an economic boom. In 1965, there were 12 maquiladoras employing 3,087 workers. By 1971 there were 209 maquiladoras employing 29,000 workers. In 1974, there were more than double the

amount of maquiladoras. Currently, there are approximately 1,750 factories, employing over 450,000 workers. 75% of all factories are American owned.²⁰³

The short term benefits of this increase in employment for Mexico comes at the cost of social, environmental and health hardship. US companies are dumping xylene at levels of up to 50,000 times what is allowed in the US. Methylene chloride is being dumped at levels of up to 215,000 times the US standards.²⁰⁴ In 1993, a random examination was conducted of twelve US owned factories and not one was complying with Mexican environmental laws.²⁰⁵ The deplorable environmental conditions of the maquiladora system have been linked to increases in miscarriages, birth defects, and high rates of muscle skeletal disorders.²⁰⁶ In Brownsville, Texas, just north of the US/Mexican border, studies have linked environmental contaminants due to toxic chemicals being dumped from maquiladoras, to the record increases of anencephaly, a birth defect stemming from babies being born without brains.²⁰⁷

Mexico's maquiladora system can be used as a window as to what the future looks like if TNCs and their global economy continue to dominate international dialogue. If international trends continue in the same regard, TNCs will persevere with their mandate of global exploitation, and subsequently undermining any prospect of environmental sustainability.

The forces of the global economy have compromised the well being of people and the environment all over the world, and the domestic and international mechanisms of governance have failed to effectively manage these issues. Two prospects now lay ahead. In one, the citizen remains silent as TNCs continue to harness increasing amounts of power, heightening their already destructive capabilities. The other prospect can

already be seen in the rumblings of social unrest, as citizens mobilize to suppress the forces of the global economy. The next chapter argues that the latter prospect will prevail as citizens harness their own inherent powers of governance, really the most powerful form of governance, to foster social change.

CHAPTER 5

GLOBAL GOVERNANCE AND THE TRANSNATIONAL CORPORATION

This thesis has argued thus far that traditional models of governance have not effectively managed the economically driven phenomenon of globalization. Domestic regulation is dependent on the supremacy of the state within a given geo-political space. International governance has historically been constructed according to the Westphalian model of politics, depicting international relations as consisting exclusively of states interacting with each other in a struggle of global political power politics. Chapter three has provided evidence for the argument that the forces of economic globalization, and the subsequent empowerment of the TNC have contributed to the erosion of state sovereignty thus undermining the potential of international law to be an effective model of democratic governance.²⁰⁸ The neo-liberalist agenda of the Bretton Woods institutions have only served to advance and legitimize a global economy in which the TNC can prosper.

The crux of the problem lies in the fact that much of the dominant traditional models of governance are housed in the ideology of realism. State sovereignty, autonomy, and territoriality are heralded as supreme facets of government. These classical legal assumptions have proven incompatible with the exploitative forces of globalization, allowing for the TNC to undermine the regulatory processes of state and

international laws. Traditional models have thus far not acknowledged the governing powers of non-state actors such as the TNC. These models need to be re-examined and reformed so that the plurality of governance in the era of globalization is recognized and effectively managed.

It is a misconception to argue that in an era of 'hyper-globalization' (as the trend is sometimes called), the state permanently dissolves. The state is indeed undergoing a process of metamorphoses, yet it still constitutes a very powerful force in both domestic and international arenas. Its prestige as a governing power is not matched by other entities. The state governs a territory and a population and is thus given legitimacy in the global arena above any other actor.²⁰⁹ The global reach and power of the United States is an obvious example.

The liberal, free market structure of the western state has left it susceptible to hostile forces such as the TNC. The first step to effective governance of the TNC will be to revisit the notion of democracy. Mannin outlines the characteristics of a true democratic process of governance:

First, democracy is taken to be a process by which the people exercise a command over decision-making machinery. In its purest form that command should be based on the right of individuals to gain equal access to decision making. Second, access should be available at any stage in the decision process and should result in unlimited control over the output of government. Third, inalienable rights of speech, assembly, movement and association are guaranteed by collective agreement.²¹⁰

Reverting the state back to representative democracy, in which the well-being of the citizen is heeded, involves empowering the voice of the citizen through the organizational structures of civil society. Civil society is a mechanism of governance that exists alongside the state. It is composed of associations of otherwise dissimilar citizens in

pursuit of common interests.²¹¹ It has risen to become an important force of global governance. This chapter examines the realm of civil society and its globalization as a powerful tool of governance. It argues that effective governance of the TNC can stem from a combination of the existing governing powers of the state and the re-legitimation of the voice of the ordinary citizen. These tools can help traditional legal structures acknowledge the new plurality of governance and understand the true 'globality' of globalization.

In harnessing the existing structures of governance in the state, civil society has the potential to become a powerful and global mechanism of governance. Although historically civil society has been a powerful force of social change, as of yet the mandates of the global economy continue to dominate governance processes. One avenue towards reforming the traditional ways that the TNC is governed is to empower civil society so that it becomes a cohesive enough force that it can further contribute to the effective management of the global issues. The existing international structures in place, such as the WTO and the United Nations, can provide the mechanisms in which to empower civil society. The interests of the local citizen can be better advocated if civil society is empowered through existing domestic and international structures of governance. Civil society harnesses the potential to reform the scope of domestic and international law so that existing governance mechanisms move beyond the international arena and embrace mandates that are more global in scope. As the section below discusses, a model of governance that is global in scope, differs substantially from the traditional domestic and international scope of existing governance mechanisms. The

effective management of the new world order will only stem from models of governance that acknowledge its globality.

The True Meaning of 'Global'

The concept of the 'global' and the 'international' are often misconstrued. The two concepts in fact portray distinct phenomena occurring across the globe. Economies have globalized, thereby harnessing the ability to transcend the territoriality of the state, but the political response of the state has been international in scope. The economy and the polity have thus taken different paths.

Internationalization signifies the trend of the increasing social relations taking place among states. It holds a territorial delineation, endorsing the relationship among politically sovereign states. The regulatory tools of the state have been externally transposed into the international arena in an attempt to manage the forces of globalization. As Scholte Argues, "...the nationality principle is often reproduced in global space...Global governance institutions are still build around national memberships."²¹²

Unlike internationalization, the phenomenon of globalization denotes a level of interaction that transcends the polity of the state. Where internationalization addresses the changing relationships between states, globalization advocates those trends that are trans-national in scope. Global forces transcend the boundaries of the state. These same forces can transcend the international arena as well, because it functions under the assumption of domestic sovereignty and territoriality. Scholte reiterates the difference between internationalization and globalization:

...globalization is not the same thing as internationalization. (ignoring the questions of time-space relations, many have equated the two.) International exchanges involve passing across territorial borders, usually while covering considerable distance between places in time intervals whose length generally becomes longer as the distance becomes greater. However, globalization takes social relations beyond this territorialist spatiality. In the global domain, territorial boundaries present no particular impediment and distance is covered in effectively no time. Global relations are trans-border rather than cross-border relations.²¹³

International law as it is currently functioning has been constructed and re-constructed in such a manner that it does not have the appropriate mechanisms in which to manage issues that are global in scope. The voice of the citizen has been lost in the process. The next section examines the globalization of civil society, and how it can be coupled with domestic and international mechanisms of law to form a true model of global governance, one that empowers the politic over the forces of the TNC.

Global Civil Society

The evolution of the state as the dominant form of social organization has circumscribed the globe into a series of fragmented political entities. A map of the world is composed of a plethora of colors and jagged lines snaking across the physical environment and gives off an impression that the globe is composed of a variety of different pieces, that we call countries. But as has been argued throughout this thesis, governance can exist outside the sovereign authority of the state. Non state actors do harness powers of governance. These actors take the form of structures such as the TNC, but also take the form of non-state actors existing in the realm of civil society.

As examined in chapter one, realist and pluralist perspectives of the state have differing interpretations of the role of the citizen in the process of governance. A realist

perspective of state theory argues that the citizen as a governing entity does not come into existence unless the citizen is a member of the state. The state is thus a pre-condition to the existence and empowerment of the citizen. However a pluralist perspective legitimizes the citizen as a self-governing autonomous unit that can function external to the state. The empowerment of civil society is premised around this pluralist interpretation of the state.

By illustrating the influence that TNCs can have on state governance, chapter three has suggested that non-state aspects of society can indeed exist and in fact flourish apart from the legal apparatus of the state. Actors in the non-state realm of can take the form of destructive agents of governance, such as the TNC, or moral agents of governance, such as civil society. Civil society is a legitimate and powerful force of governance that can foster the effective regulation of the TNC.

A pluralistic perspective argues that the process of governance embraces much more than the laws handed down by the state that coercively serve to mould the behavior of the citizen. The citizen is also a member of civil society, which is a form of governance that exists outside of the apparatus of the state. Civil society represents the social realm that exists alongside the dominant political, economic, and social structures that define the state and international arenas. Lipschutz argues that civil society is, "...those forms of associations among individuals that are explicitly not part of the state apparatus, the private, household realm or the atomistic market."²¹⁴ It can thus be considered a force that exists at the sub and supra state level.

The production and dissemination of knowledge, and the social change that can result does not always follow the same tracks that dictate dominant domestic political and

economic structures. In fact, the production of knowledge can sometimes serve to restructure existing systems. Knowledge can be effectively disseminated and empowered through the organizational structures of civil society, potentially fostering social change that can lead to institutional reform. It must be recognized that it is the citizen that has constructed the state and its political apparatus in the first place, and it is the citizen who retains powers of governance in a democratic state through the vote. The local citizen ultimately holds the power of governance. Of course, the individual citizen has minimal influence on the functionings of the state, but empowered through the structure of civil society, the voice of the citizen can be magnified. One person staging a lone protest in front of a government building is hardly noticed, but a large group of citizens banded together through civil society has the potential to convey powerful messages and is such, a force to be reckoned with. The citizen can thus become empowered through civil society and thus gains the potential of fostering institutional reform in this manner.

Civil society structures the agency of the individual citizen.²¹⁵ Agency denotes a notion of self-governance of the individual and the sense of power that individual has in advancing his/her interests. Structure is framed around self-governing individuals associating with each other with the mandate of fostering change. Civil society provides the foundation in which these individuals are able to associate. These foundations take the form of such institutions as churches, social movements, associations, clubs etc. Civil society can provide a sense of cohesion to individual citizens with similar agencies.²¹⁶ Civil society is the sum of all forms of social interactions and associations, not governed by state apparatus. It exists apart from the regulatory structures of the state and thus it is not limited by traditional political boundaries. In many respects, civil society can be

regarded as not state-centered, but instead as societal centered.²¹⁷ Because this realm of interaction and dialogue is not totally bound by territoriality, it has the potential to be a mechanism of governance that is global in scope and reach.

Because civil society transcends state boundaries, it can also transcend the territorial delineations that frame the international arena. Lipschutz argues that the current dominant state of global politics housed in state ideology does not mean that civil society is committed to the rules and norms as is argued by a neo-realist interpretation of international relations. New global social constructions can exist independent of the dominant rules and norms.²¹⁸ As is discussed below, civil society has begun to organize itself around the structures of globalization instead of the traditional structures of the state.

The Globalization of Civil Society

Is it possible for civil society to become empowered in the dominant and complex web that constitutes the current state of the global economy and the international polity? Lipschutz argues that in a well functioning society, the dominant social institutions mesh smoothly, and thus the subjects within the society are content with the social and political structures that govern them.²¹⁹ In these cases, civil society is dormant, as there is no need to rock the political boat. The dominant political structures of the state remain unchallenged. If the social foundations of the society are threatened, and the state begins to lose its ability to meet the needs of its citizens and unrest begins to occur as citizens push for a reconstruction of the system.²²⁰

The deterioration of the environment has prompted a social movement that is resisting the global forces that are driving its destruction. The social movement is a

function of civil society, primarily seeking to reconstruct the political systems that are currently mandated with the authority to manage the environment. Lipschutz suggests that global civil society as it pertains to environmental issues...

...is better understood as a transnational system of rules, principles, norms, and practices, oriented around a very large number of often dissimilar actors focused on environmental protection, sustainability, and governance...The environmentally oriented sector of global civil society is, whether consciously or not, engaged in a longer-term project to modify what can be regarded as the underlying constitutive rule basis of modern civilization and to develop new modes of local as well as transnational governance. In doing so, global civil society is laying the basis for broad institutional, social, and political change...²²¹

Lipschutz is quick to point out that global civil society is not one unified body of governance, but is composed of a series of often dissimilar actors involved in advancing social change. These actors come together to advance collective social actions.

The trends that have perpetuated the globalization of economies have also propelled civil society into the global arena. Where these global structures have resulted in a metamorphosis of the way states interact with other states, the same structures have also altered the traditional interactions of civil society. Globalization has changed the traditional reciprocal relationship between civil society and the state. In the globalizing process, civil society is loosening its territorial ties to the state.²²² This has been caused primarily by the astounding technological advancements in global communication systems. These systems have enabled civil society to form ties of national solidarity that transcend the traditional boundaries of the state.²²³ Scholte reiterates this point, "[a]cross a wide range of collective solidarities...globalization has encouraged an expansion of the supraterritorial dimensions of identity politics, and a relative shift of emphasis from territorial to qualitative boundaries between peoples."²²⁴

Global civil society has harnessed some of the same technological advancements that have fostered the globalization of the economy. One of the most significant tools of globalization for civil society has been the Internet. Information can now be instantly transmitted across the globe with the press of a button. What's more, this information is available to increasing portions of society. The social networks that link civil society, can now be formed electronically, transcending state boundaries.²²⁵ Civil society is thus able to organize in ways that go beyond the traditional boundaries associated with community.

Non Governmental Organizations: Agents of Global Civil Society

Non governmental organizations (NGOs) are the confluence of individual citizens with similar interests and constitute the organizational platform of civil society. As agents of civil society, NGOs exist alongside the political apparatus of states. Stephan Hobe reiterates, "Non governmental organizations are not founded by states through interstate agreements, but are instead founded by private individuals from different states for the pursuit of common aims."²²⁶ NGOs are the platform that structures the social unsettling that has resulted from the failure of the dominant structures of governance to respond to the needs of its citizens. Hobe puts forth these requirements for collective organizations to be considered NGOs:

...they must be founded by private individuals; be independent of states; be oriented towards the rule of law; pursue public rather than private interests as an objective; demonstrate a transnational scope of activities; and possess a minimal organizational structure.²²⁷

NGOs have provided civil society with the essential collective voice in which the calls for social change may be heard. Hobe suggests that NGOs are becoming increasingly important in international relations, and have significantly advanced the

interests of civil society. Technology has furthered the powers of civil society by providing an effective means of global communication. It is estimated that there are currently approximately 20,000 NGOs in existence.²²⁸ Many, such as Greenpeace, have formed to give voice to the issues surrounding environmental degradation.

Civil Society and the State: Tools of Global Environmental Governance

Transnational collective identities that constitute global civil society can work within the current dominant international political structures to foster social change. But as Lipschutz argues, global civil society alone does not have the necessary power and structure to handle the forces that currently are driving environmental degradation in the timeframe necessary for such change.²²⁹ A more timely method of global governance will embrace the powers of global civil society and the existing structures of the state, and harnesses them into a mechanism for effective global decision making. The international political process, composed primarily of state governments, will inevitably evolve to become a process of governance that has a more global scope. It is necessary to make the transition from the dominant processes associated with 'government' to the more pluralistic process of 'governance' in the international arena. Lipschutz differentiates between the two processes:

Governance...is a more encompassing phenomenon than government. It embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby those persons and organizations within its purview more ahead, satisfy their needs, and fulfill their wants...Governance is thus a system of rule that is dependent on intersubjective meanings as on formally sanctioned constitutions and charters...²³⁰

An effective model of global governance therefore uses the current institutionalized regulatory structures in place at the state level and in the international arena, and also uses the less formal behaviors of the global civil society, together as a model for effective social change.

States are the central actors in world affairs, and thus will be the essential building blocks of a global model of governance.²³¹ These building blocks have an element of structure. The state has an established and time-honored system in place in which to enact laws and to coercively enforce them. Wapner argues that "...states are the main actors in world affairs and as such can most easily reach into and influence the lives of citizens. States, in other words, represent the quickest, and most efficient means for establishing effective institutions."²³² His position has merit. Given the current web of global power relations, the state will ultimately be the most effective mechanism in which to channel social change. Civil society comes into play as an important check and balance on state actions in the domestic and international arenas. The auspices of civil society are reinforced through the structures of the state, increasing in importance when the state fails to represent the universal interests of the citizen. Civil society can thus be enlisted to shake the foundations of the state in a "counterhegemonic" effort in an attempt to alter the behavior of the state.²³³ The state/civil society tango works well at the domestic level, and the duo also has the potential to work well at the global level. As Wapner argues:

The global polity has a sense of order constituted not simply by the state system, but also by global civil society. In the same way that domestic civil society is always enacting order within a national polity, under both hegemonic and nonhegemonic settings, global civil society is always influencing the institutions of global life.²³⁴

Civil society has the potential to be a global voice of morality. Further incorporating global civil society into governance processes can help to globalize the scope of law. The international arena could thus be empowered beyond a model of governance that is comprised solely of inter-state relationships, to a model of governance that represents the interests of civil society. In the era of globalization, law making could revert back to being a democratic process, whereby the state heeds to voice of its citizens, and not the mandate of the TNC. As the case studies outlined below illustrate, civil society and the state can work together to foster relatively quick and effective social change. This type of governance model can rise above the power structures associated with economic globalization and the TNC.

Global Governance in Action: Two Case Studies

Civil society is challenging the traditional structures of government and thus is altering the traditional processes of governance in the domestic and international arenas.

Deibert argues that:

...by moving around and through political boundaries to influence populations, they not only undermine the connection between sovereignty and a territorially defined populace over which the sovereign authority has ultimate jurisdiction, but also challenge the idea central to the modern world order paradigm that the international states system is the legitimate arena where politics across borders takes place.²³⁵

Civil society is moulding these traditional governance structures into new mechanisms for global governance. Coupled with the regulatory structures of the state, civil society can be empowered to form an effective model of governance that is truly global in scope. The Ban the Landmines movement and the shelving of the Multilateral Agreement on Investment (MAI) illustrates the governing powers of the state/civil

society tango, and the potential of using these tools to construct a global model of governance.

Caste Study #1: The Movement to Ban Antipersonnel Landmines

The global movement to ban antipersonnel landmines illustrates the power of civil society, working within traditional domestic and international governance structures to foster social change. Although not immediately relevant to the issue of TNCs and the environment, the campaign speaks to the viability of a model of governance that can potentially regulate TNCs. The landmines movement is especially pertinent to this thesis because it illustrates how global civil society used the political apparatus of the state to foster relatively quick, and globally diffused social change; a similar process necessary for the issue of TNCs. Civil society alone is not a powerful enough entity of governance, but through the state, it has the potential to have a significant impact on the establishment and legitimation of new global norms.

Approximately 110 million landmines are deployed across the world.²³⁶ Efforts have been underway to remove the mines but estimates indicate that for every 100 000 mines removed, two million more are being planted.²³⁷ The human, social and economic implications of landmines are high. Approximately 500 people are killed or maimed by landmines, most of them civilians.²³⁸ Large tracts of land are rendered useless and human casualties place further social and economic burdens on often already impoverished states.²³⁹ Ban proponents have argued that landmines kill and maim more people than nuclear, chemical and biological weapons combined.²⁴⁰ The devastation caused by landmines is clearly significant and is in many respects immeasurable.

Civil society was a large factor in engaging the policy process in the international arena over the landmine issue. Approximately one thousand NGOs from over sixty countries heightened international social pressure towards delegitimizing landmines.²⁴¹ Organizations began to form, the confluence of NGOs banding together to become common and increasingly powerful voices. Many NGOs aggregated under the umbrella organization, 'The International Campaign to Ban Landmines' (ICBL).²⁴²

Through information dissemination, NGOs were able to turn the campaign into a high profile public issue. Information about the deleterious impacts of landmines was channeled through the media and the Internet, and thus illustrates how civil society can become empowered through many technologies associated with globalization. Price reiterates, "...contemporary technological changes involving the Internet and telecommunications carry potentially far-reaching effects by creating environments in which transnational social movements flourish."²⁴³ The Internet and various other telecommunications media provided civil society with a medium in which members could create dialogue with each other, and provide information to the public. The movement was so effective that states began to take heed. As Price suggests:

The most basic effect of civil society, then, has been the transnational dissemination of information about the scope of landmine use and its effects, thereby helping to define the use of AP landmines as not only a problem, but as a global crisis.²⁴⁴

Civil society also began to network with states and international organizations, thereby gaining access to the political agenda.²⁴⁵ In various instances, NGOs were allowed to participate in conferences, and thus be part of official international negotiations. Soon a core group of states emerged with the mandate of working with civil society towards a comprehensive ban. In 1996 the government of Canada and

Mines Action Canada hosted an international conference bringing NGOs and states together in support of a ban.²⁴⁶ More and more states began to call for a ban, resulting in a comprehensive ban treaty signed by 122 states in December of 1997.²⁴⁷

Price argues that civil society had a crucial role in the successful campaign to ban landmines

Without an understanding of the catalytic role of transnational civil society teaching states a new norm, it is impossible to understand the rapid, coordinated, and widespread commitment to prohibiting the use of AP land mines by over 120 states.²⁴⁸

The Ban the landmines movement thus illustrates how the pressures of civil society can serve to influence states and generate new international norms. Civil society organized through NGOs, and used global communication methods to persuade states to call for a ban. The global ban on landmines in many respects resulted from the global voice of civil society, and the regulatory apparatus of the state. The same process could be used in the global governance of TNCs.

Case Study #2: The Multilateral Agreement on Investment

The Multilateral Agreement on Investment (MAI) had the potential to be one of the most comprehensive and dangerous agreements in the history of international trade law. The last decade has prompted an unprecedented growth of foreign direct investment. By the mid 1990's there was a consensus among Western Nations that there was a need for a global governing framework that replaced roughly 1600 investment treaties in existence.²⁴⁹ The Organization for Economic Cooperation and development (OECD) began negotiations in May 1995 with the mandate of protecting investment. Once again, the National Treatment Clause and the Most Favoured Nation Clause are at the forefront of the MAI.

The MAI is potentially far more dangerous than even the WTO and NAFTA. It goes so far as to extend legal status to corporations equal to that of states.²⁵⁰ The consequences could be devastating. This agreement would in effect extend the MFN clause so that benefits given to foreign investors in a country would have to be extended to all other foreign investors. The MAI also contains a ban on performance requirements. Signatory states would not be able to require that foreign companies meet performance standards in relation to economic, social and environmental issues.²⁵¹ The expropriation clause of the MAI bans any measures that nationalize assets, or have the equivalent effect. This clause has been interpreted to mean that the MAI would in effect ban any regulation that bars a corporation's right to make a profit. Thus, an environmental law that impedes corporate profit could come under fire under the MAI. The expropriation clause in the MAI gives corporations the right to sue governments if national policy impedes profit.²⁵² The MAI thus in effect attributes laws that favour corporate powers and the right of the corporation to make a profit, over laws that deal with the protection of the environment. Under the MAI, the corporation would undermine domestic policies. As Clarke and Barlow argue, states would in effect become servants to TNCs:

The prime objective of the MAI is to facilitate the movement of capital – both money and productive facilities – across international borders by setting rules to restrict countries from using legislation, policies, and programs to impede such movement. Thus any country that signs on to the MAI would be forbidden to require any transnational corporation to meet certain economic, social, environmental, or cultural standards considered important for the well being of its citizens.²⁵³

The MAI had the potential to entrench a global corporate constitution. It is not possible to predict the environmental and social catastrophes that the agreement would

have created across the globe. However, the story of the MAI illustrates the power that global civil society can have on the current dominant global power structures.

As the negotiations took place amongst the OECD nations more than 600 NGOs from 70 countries opposed the treaty.²⁵⁴ A draft of the treaty was leaked and placed on the web and thus was made available to a vast amount of people. Global grassroots opposition to the treaty quickly formed. Social unrest grew and public outcry was a partial reason that caused the three years of MAI negotiations to halt, pending further consultation.²⁵⁵ The NGOs lobbying for the halt of the MAI provided global civil society with the necessary voice to make an impact. Further, the impact of the NGOs caused unrest at the state level as is illustrated in the actions of several states:

French parliamentarians heeded the cry of intellectuals who claimed that the MAI would permit crude foreign culture to permeate their country. The government of New Zealand pledged not to sign the treaty, as anti-MAI protesters held a mock auction, selling off the country to McDonald's, Pepsi, and shell outside the Foreign Affairs and Trade building.²⁵⁶

What the MAI scenario also illustrates is that global civil society can be effective, as long as it fosters institutional change through the existing powers and structures of the state. It must be reiterated that although global civil society can truly be global in scope, it is operating within the current dominant structures of international law. The international system is still comprised of state interaction housed in an international liberal economy. Although the MAI was lobbied intensely by NGOs, their influences were indirect. It was ultimately the state who could have ratified or defeated the MAI. The state had the final say. It is the state who retains the power of governance in the international arena and thus the state is an important component of governance for global civil society.

Cosmopolitan Democracy: Globalizing International Governance

The case studies discussed above illustrate that civil society is influencing governance processes and as a result, has successfully fostered social change. But the question that remains is: is this enough? Can we rely on this current method of governance to quell the global TNC crisis? Given the fact that TNCs continue to be very influential in the global economy, the answer must be no. TNCs are powerful actors in the governance process, more so than civil society. Supra-state governance is still dominated by traditional international political processes. As argued previously, these two models of governance (the international and the global) are at variance with each other. TNCs continue to wield formidable global governing powers, destroying the environment as a result. International law needs to be re-imagined in such a manner that the forces of global civil society and the regulatory structures of the state are further harnessed into a reformed and legitimized model of democratic international governance. This relationship has been conceptualized by many, including prominent political theorist David Held as depicting a cosmopolitan model of democracy. Although a diverse and complex theory of governance, the underlying premise of cosmopolitan democracy is that a democratic model of governance should be established with a global scope, overcoming the limitations of international law. The democratization of international law through the empowerment of civil society is the best means in which to achieve an effective model of cosmopolitan democracy.

An effective model of cosmopolitan democracy would entail strengthening the democratic mechanisms of the international arena. The voice of global civil society has

the potential to be rendered more powerful as part of cosmopolitan democratic governance. Ulrich Beck suggests that cosmopolitan parties are already beginning to develop in the form of movements within the global civil society. The environmental movement provides one such illustration. According to Beck, these movements have the beginnings of world parties because they have global values and goals, they place globality at the heart of politics, and they are developing transnationally.²⁵⁷ What is now needed is the organization of these transnational voices through the democratization of a cosmopolitan polity.

David Held, defines cosmopolitan democracy as: "A system of governance which arises from and is adapted to the diverse conditions and interconnections of peoples and nations."²⁵⁸ He says that:

...it is based on the recognition that democracy within a particular community and democratic relations among communities are interlocked, absolutely inseparable, and that new organizational and binding mechanisms must be created if democracy is to survive and develop in the decades ahead."²⁵⁹

Held's model of cosmopolitan democracy would entail a system of governance that transcends the claims of states and extend to all in the universal community.²⁶⁰ He elaborates on this concept:

The term cosmopolitan is used to indicate a model of political organization in which citizens, wherever they are located in the world, have a voice, input, and political representation in international affairs, in parallel with and independently of their own governments. The concept of democracy deployed here is one that entails a substantive process rather than merely a set of guiding rules.²⁶¹

The Establishment of a World Government?

Held entrenches cosmopolitan democracy in an institution of a global government. He accordingly argues that a reformed United Nations would be the most appropriate

institution in which this global government could function. His model ultimately comprises three levels of government; the state, regional, and a global government. The state deals with national issues; regional governments (such as the European Economic Community), would govern issues that fall within its regional jurisdiction; and the global government would deal with issues that are transnational and trans-regional in scope.²⁶² Within the United Nations a global parliament would be created that would connect regions, nations, and localities. The voice of civil society would be legitimized through the entrenchment of a cluster of rights so that the citizen would be guaranteed participation in the global governing process.²⁶³ This new global parliament would establish a global legal system, maintained by global courts. The enforcement capabilities of this parliament would come from a global police force that consists of a portion of each state's military. Held suggests that over time a greater proportion of the world's military force would be handed over to the global parliament thereby stripping states of their coercive powers.²⁶⁴ Held's global parliament would thus simply be a recreation of a democratic legal system at the state level, with all sovereignty and coercive powers that existed in the pre-globalization state.

For Held's model to work, the sovereignty of the state would be dissolved when it comes to any issues that transcend its borders. State sovereignty and the coercive apparatus to enforce that sovereignty would permanently shift to the global parliament.²⁶⁵ Held theorizes that this global parliament provides the mechanism in which to manage issues that are transnational in scope. Hence the TNC would fall under the realm of the global parliament, and would be regulated at a global level as such.²⁶⁶

Held seems to have transformed the concept of global governance into a model of global government, a notion that is wrought with problems. Given our current state of political, social, and economic affairs, a global government would actually exacerbate many of the issues that are prevalent in governments at the state level, leading to a rash of problems at the global level. Furthermore, it must be argued that the processes would lead to the establishment and legitimation of a global government would not develop at near the pace necessary to deal with TNCs in a timely manner. The global issues currently on hand are much too serious to be left to a theoretical model that would require a long period of time to develop and come into existence.

The idea of a global government presumes that there is a possibility of some sort of cohesion of values around the world that could constitute the fundamentals of a global legal system. This in turn presupposes that there is cohesion of ideas as to what constitutes global issues. Is it possible to melt the plurality of humanity into one global voice? Is it possible to reach a level of global interdependence so as to develop a consensus on what would constitute a common good?²⁶⁷ Baxi argues that, “[t]he interdependence of the world masks the plurality and multiplicity of worlds within this world.”²⁶⁸ Our world is indeed a plural arena. Global governance models often wrongly assume that there can be a global social cohesion that a global government could use to enact world laws. Global ideologies would inevitably stem from northern interests.

Who would be the actors in a global government? Would each state get to appoint one member? Would each state get one vote? Either way a global parliament, as is currently conceptualized, would not differ much from international governance processes in which relations are dictated by states with compromised sovereignty. Also, would

those in the southern nations get the same representations as their northern neighbors? In theory of course the answer is yes, but history dictates that the either the north or some other new hegemonic geo-political force, would probably continue to dominate global dialogues, and a global government would further legitimize this hierarchy. A global government would not be built upon a foundation of global social equality, but instead upon a hierarchical structure of northern domination. Held argues for a cluster of rights that would overcome any notion of domination, but who would decide on what these rights would be? Who would decide on the regulatory mechanisms to enforce the rights?

Finally, the reality of establishing any notion of a world government is somewhat utopian in the near future. Will states readily give up their powers of governance to a global governing body, and transfer their coercive capabilities as such? The state is still a dominant political cornerstone and cannot be thrown by the wayside.

The paradigm of a world government is only going to lead to dialogue that rests primarily with academia. A world model of government is premature given current international and global trends. Global issues, such as the environmentally destructive behaviors of TNCs, necessitate more immediate social action. The most feasible means of governing the TNC will be to further empower civil society in existing state and international regulatory mechanisms. This is a more realistic projection of what could happen in the future, given the governance tools currently available. Global governance must stem from these existing tools so as to foster change as quickly, efficiently, and effectively as possible.

Conclusion

Global civil society must be further empowered in governance processes. This will only happen if its voice is heeded by the state. The state needs to restructure existing international institutions so that civil society becomes more than just mainly a critic of world affairs. As Falk argues, what we have witnessed so far has been mainly a globalization from above. We need to now foster a globalization from below. We need to identify the transnational forces that bring civil society into the global realm, and strengthen these forces to improve governance at the global level.²⁶⁹ Civil society needs to look to the existing instruments of law in order to exert its political influence.²⁷⁰ It is imperative that these instruments be reformed.

Where do we start? As previously discussed, the international arena has the means to structure a model of global governance. The Universal Declaration of Human Rights, The Treaty on the Non-Proliferation of Nuclear Weapons, and the very Preamble of the UN charter has the potential to legitimize global democratic models of governance.²⁷¹ Currently though, they are just paying lip service to their stated goals.

Stopping short of arguing for a retooling of the United Nations into a new world parliament, the progressive nature of this institution could provide the means in which to begin to advance a global governance premise. Greater weight needs to be given to the perspectives of global civil society in the UN, and all other international institutions. Mechanisms for greater participation needs to be incorporated so that NGOs are given some regulatory teeth as opposed to mainly sitting as observers in international negotiations (as is currently their primary status).

The relationship between civil society and international institutions has already taken root. As Scholte argues, there has been a notable growth in relations between civil society and the international governance institutions:²⁷²

Almost all organs of the United Nations System have acquired expanded external relations departments, and many UN agencies have instituted liaison committees with participants from civil society. Proposals have furthermore circulated for the creation of a UN People's assembly of state delegates. Already, civic groups have in the 1990s convened global meetings with fair regularity, for example, alongside the Group of Seven Summits, the Annual meetings of the International Monetary Fund (IMF) and the World Bank and ad hoc UN conferences on various global issues. A broad consensus has by now emerged that civil society and global governance institutions should have relations with each other.²⁷³

Will the trend continue? The state is ultimately accountable to its citizens. It also must be acknowledge that it is ultimately the citizen who has constructed these oppressive forces of globalization. The state, the TNC, and the international arena are not governing bodies that function apart from the individual citizen. These paradigms would not exist if it weren't for the governance powers of the citizen. We have created the mechanisms that are serving to undermine the well being of society, and we hold the power to restructure them. The first step is to mandate the state to listen to the voice of the individual as represented through civil society. Only when the voice of the citizen is heeded through the state, can it be further represented on the international front, transforming international law into a potentially democratic and global model of governance. Civil society thus needs to be given structure in the international arena, in which to evolve from being just a passive voice. It would require a whole other research project to dissect the international arena to show how it can become more democratic to the citizens of the world, but advocating states to reform the international arena to promote a democratic notion of global governance is an important first step.

CONCLUSION

When it comes to addressing the destructive forces of the TNC, the citizen at the onset may feel extremely small and powerless. TNCs are formidable global powerhouses whose continued growth seems virtually unstoppable. They wield increasing amounts of global governing power, translating into dire environmental degradation. Our planet is in a crisis. However the only entity more powerful than even the most powerful TNC is the individual citizen. It is the citizen who creates and reproduces these destructive institutions, and it is the citizen who also harnesses the power to reform them.

If we attempt to look upwards into this 'mythical' global arena to solve the problem, it is easy to get lost in hopelessness and despair. It is imperative to understand that global governance is founded upon local action. The combination of local actions across the world is what will ultimately constitute this notion of global governance. The age-old environmental phrase 'think globally by acting locally' still rings true during this crisis. Localized grassroots social movements hold the key to effective governance of the TNC.

The notion of global civil society comes into play when the grassroots movements transcend the territoriality of the state and enter into the global realm. It is still comprised of local action, but its voice has now become global in scope. The locality of

the voice of global civil society can empower the citizen. We can take action through civil society.

Civil society must first harness the existing powers of the state. This thesis has not intended to be harsh on the state as an effective mechanism for governance. As Dobbin points out, "...it is still the only human organization ultimately powerful enough to challenge corporate rule, whether alone, or as part of international institutions for world governance."²⁷⁴

The mechanisms that govern the state have just fallen into the wrong hands. Domestic governance processes are currently undermined by the TNC. Civil society needs to repossess those mechanisms so that the state is again accountable to its citizenry. It is important for the citizen to realize that democracy isn't just about the notion of accountability through the power of the vote and then sitting back and letting the mechanisms of the government govern at will. Democracy entails that all state actions are held accountable to its citizens. We must always be watching our governments, and taking action if necessary. In many instances in the past, the voice of civil society has made our political leaders remember whom they are really accountable to. Instances of civil disobedience such as the 1997 teachers strike in Ontario in which 126 000 teachers protested cuts to education, or the American UPS strike in 1997 in which 185 000 ups workers called for reform, causes our political leaders to remember where their powers of governance really stems from.²⁷⁵ The individual citizen can therefore have a voice within civil society. The task does not look so ominous if viewed this way.

Dobbin has compiled some short-term reforms that civil society should press on the governments of the state:²⁷⁶

- Corporations must be prevented from funding political parties
- Political lobbying by corporations must be further restricted
- All contracts between corporate representatives and government must be made available to public scrutiny.

These actions are just to name a few. Another interesting point Dobbin brings up is to put a face on faceless corporations.²⁷⁷ This is an interesting and very important point. How many citizens really know about the destructive powers of the corporation? How many understand the potential impacts that these corporations might have on their lives? I certainly didn't understand the extent of the problem until I began to research it for this thesis. Educating the individual citizen will be an important component towards empowering civil society. For civil society to be powerful, it does require a strong foundation of citizens. People need to be educated about the impacts of the TNC on the environment, and be able to make informed decisions about what actions they can take. Even if this action means that people will choose environmentally friendly products over ones that have contributed to environmental degradation. This is civil society participating in social reform. If civil society can continue to organize in such a way so that its elected representatives can hear its voice, reform will inevitably happen. Democracy will begin to fall back in the hands of those who rightfully should have the power of governance in the first place.

The same process will affect governance in the international arena. As I have argued in chapter four, the international arena is currently fraught with undemocratic institutions that have served to advance the interests of the TNC. I have also showed how the international arena is governed by the state. If the state heeds the voice of civil society, the international arena has the potential to embrace a more democratic notion of governance.

A precursor to the democratization of global governance is to acknowledge that in reality, the domestic and international arenas are not governed under the umbrella of realism. The process of governance comprises the structures of the state, and a plethora of non-state actors. In this sense, civil society can thus be recognized as a legitimate actor in governance.

Global governance can only truly come from structures that are global in scope. Currently our world is, in many respects, indirectly governed by the global economy, which in turn is heavily influenced by TNCs. These institutions have evolved to exploit domestic and international governance processes. We are witnessing unprecedented environmental and social destruction as a consequence. The international arena is being played as a puppet in which TNCs are able to further their reach. We have already witnessed this through the establishment of the GATT/WTO, the World Bank, the IMF, and the variety of free trade agreements that span across the globe. Using the organizing potential of state and international law, civil society does possess the power to have a global voice. The process is already underway. Civil society is harnessing state, international, and global mechanisms of power in which to foster social change. The globality of the TNC is coming face to face with the globality of civil society, and in the long run, the latter will inevitably prove to be more powerful. After all, it is civil society that built this construction called a TNC and it is civil society that can tear it down. How can we accomplish such a formidable task? Protest, write letters, stop supporting TNCs with poor environmental records, discuss the issues with friends and neighbors. This is how the process of change can be fostered.

In the face of the formidable forces of economic globalization, it is easy for the citizen to feel a sense of hopelessness. This is the feeling that I had upon witnessing the destructive impact of deforestation in the Canadian Rockies. But instead of thinking “what have we done?” (as was my initial reaction), it is essential instead to begin to think about “what can we do?”. The citizen must act quickly to move towards a more sustainable relationship with the natural environment. Any other relationship might put our future as a species on this planet to test.

¹ J. Passmore, "Environmentalism" in R. Goodin & P. Petit, eds., *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell Publishers, 1993) at 472.

² *Ibid.* at 24.

³ For a compilation of these statistics, please see G. Miller *Environmental Science* (Belmont: Wadsworth Publishing Company, 1991) at 10-11.

⁴ M. Dobbin, *The Myth of the Good Corporate Citizen* (Toronto: Stoddart Publishing Company Ltd., 1998) at 22-23.

⁵ J. Karliner, *The Corporate Planet* (San Francisco: Sierra Club Books, 1997) at 15.

⁶ A. Gore, *Earth in the Balance: Ecology and the Human Spirit* (New York: Houghton Mifflin, 1992) 148 in *Ibid.* at 15.

⁷ For a bibliography on the effects of TNCs on the environment, please see: "Multinational Corporations and the Environment: A Bibliography" *Contemporary Social Issues* (Reference and Research Services, 511 Lincoln Street, Santa Cruz, CA., 95060, USA)

⁸ The concepts of sovereignty and territoriality and how they pertain to the construction of the state is a point of contention. For further reading on these concepts, please see: Mearsheimer, *infra* note 31, Ringmar, *infra* note 18, and Held et al., *infra* note 11.

⁹ *Canadian Environmental Protection Act*, R.S.C. 1985, C.16 (4th Supp.)

¹⁰ *Canadian Environmental Protection Act*, R.S.C. 1985, C.16 (4th Supp.) at Declaration

¹¹ D. Held, "Introduction: Central Perspectives on the Modern State" in D. Held et al., eds., *States and Societies*, (Oxford: Martin Robertson & Company Ltd., 1983) at 1.

¹² *Our Global Neighborhood*: report published in New York by Oxford University Press, 1995. Available online: <http://www.cgg.ch/foreward.htm> (accessed 11 March, 1999)

¹³ *Ibid.* at 32.

¹⁴ M. Fowler, & J. Bunh, *Law, Power and the Sovereign State* (Pennsylvania: Pennsylvania State University, 1995) at 4.

¹⁵ T. Dunne, "Realism" in J. Baylis & S. Smith, *The Globalization of World Politics* (New York: Oxford University Press, 1997) at 110.

¹⁶ P. Lewis, "Introduction" in Held et al., eds., *supra* note 11 at 413.

¹⁷ P. Hirst, & G. Thompson, "Globalization and the future of the nation state" (1995) 24(3) *Economy and Society*, at 412.

¹⁸ E. Ringmar, "On the Ontological Status of the State" (1996) 2(4) *European Journal of International Relations*, at 442.

¹⁹ Hobbes, T. "Leviathan" in B. Macpherson ed., (Harmondsworth: Penguin, 1968) at 220. Cited in Held, *supra* note 11 at 7.

²⁰ Dunne, *supra* note 15 at 115.

²¹ Ringmar, *supra* note 18 at 447.

²² Dunne, *supra* note 15 at 114.

²³ Dunne, *supra* note 15 at 115.

²⁴ Ringmar, *supra* note 18 at 441.

²⁵ Dunne, *supra* note 15 at 119.

²⁶ Dunne, *supra* note 15 at 114.

²⁷ Lewis, "Introduction" in Held et al, eds., *supra* note 11 at 413.

²⁸ D. Held, *Political Theory and the Modern State* (Cambridge: Polity Press, 1995) at 100.

²⁹ The number of international NGOs rose from 176 in 1909 to 28, 900 in 1993, one indication of the increase of non-state actors that are serving to redefine the concept of domestic governance. This statistic can be found in the *Our Global Neighborhood*, *supra* note 12 at 33.

³⁰ D. Armstrong, "Law, justice and the idea of a world society" (1999) 75:3 *International Affairs*, at 555.

³¹ J. Mearsheimer, "A Realist Reply" (Summer, 1995) 19:3 *International Security* at 93.

³² Hirst and Thompson, *supra* note 17 at 425.

³³ Hirst and Thompson, *supra* note 17 at 426.

³⁴ Hirst and Thompson, *supra* note 17 at 432.

³⁵ Hirst and Thompson, *supra* note 17 at 427.

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- ³⁶ Mearsheimer, *supra* note 31 at 86.
- ³⁷ Mearsheimer, *supra* note 31 at 82.
- ³⁸ Armstrong, *supra* note 30 at 555.
- ³⁹ Held, *supra* note 11 at 11.
- ⁴⁰ Held, *supra* note 11 at 13.
- ⁴¹ D. Hume, *A Treatise of Human Nature* (Harmondsworth: Penguin, 1969) at 1739-1740. In Ringmar, *supra* note 18 at 448.
- ⁴² J. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations" (1993) 7(1) *International Organization* at 143.
- ⁴³ *Ibid.* at 147.
- ⁴⁴ Ringmar, *supra* note 18 at 42.
- ⁴⁵ Ruggie, *supra* note 24 at 143.
- ⁴⁶ D. Held & A. McGrew, "Globalization and the Liberal Democratic State" (Spr, 1993) 28(2) *Government and Opposition* at 252
- ⁴⁷ M. Mann, "Neither nation state nor globalism" (1996) 28 *Environment and Planning* at 473
- ⁴⁸ Held and McGrew, *supra* note 46 at 262.
- ⁴⁹ Held and McGrew, *supra* note 46 at 262.
- ⁵⁰ D. Held, "Democracy and Globalization" (1997) 3(3) *Global Governance* at 272.
- ⁵¹ Held and McGrew, *supra* note 46 at 268.
- ⁵² J. Ruggie, "At Home Abroad, Abroad at Home: International liberalization and Domestic Stability in the New World Economy" (1994) 24(3) *Millennium: Journal of International Studies* 516.
- ⁵³ Held, *supra* note 40 at 255.
- ⁵⁴ V. Shiva, "Conflicts of Global Ecology: Environmental Activism in a Period of Global Reach" (1994) 19 *Alternatives* at 196.
- ⁵⁵ *Ibid.* at 197.
- ⁵⁶ WTO *International Trade Statistics Yearbook* (Geneva: WTO, 1995). In D Held. et. al. "Economic Globalization and the Nation-State: Shifting Balances of Power 22 *Alternatives* (1997) at 273.
- ⁵⁷ Held and McGrew, *supra* note 46 at 276.
- ⁵⁸ J. Mander, "Facing the Rising Tide" in J. Mander, & E. Goldsmith, eds., *The Case Against the Global Economy, and a Turn Toward the Local* (San Fransisco: Sierra Club Books, 1996) at 4.
- ⁵⁹ Held, *supra* note 11 at 7.
- ⁶⁰ Held and McGrew, *supra* note 46 at 280.
- ⁶¹ Held and McGrew, *supra* note 56 at 270.
- ⁶² Held and McGrew, *supra* note 46 at 270.
- ⁶³ J. Mander, "The Rules of Corporate Behavior" in Mander and Gloldsmith eds., *supra* note 58 at 310.
- ⁶⁴ *Ibid.*
- ⁶⁵ *Ibid.* at 312.
- ⁶⁶ Dobbin puts forth some compelling statistics to illustrate the powers of the TNC: in Dobbin, *supra* note 4 at 8.
- ⁶⁷ UNCTAD, *World Investment Report 1995: Transnational Corporations and Competitiveness* (New York: United Nations Conference on Trade and Development, Division on Transnational Corporations and Investment, 1995) at xix-xx.
- ⁶⁸ P. Hermann, "Human Environmental Crisis and the Transnational Corporation: A Question of Culpability" (1995) 23(2) *Human Ecology* at 285.
- ⁶⁹ P. Dicken, "Transnational Corporations and Nation States" (1997) 49(1) *International Social Science Journal* at 77.
- ⁷⁰ A Rappaport, & M. Flaherty, *Corporate Responses to Environmental Challenges* (CITY Quorum Books, 1992) at 3.
- ⁷¹ J. Karliner, *The Corporate Planet: Ecology and Politics in the Age of Globalization*, (San Fransisco: Sierra Club Books, 1997) at 5.
- ⁷² M. Mason, "A look behind trend date in industrialization" (1997) 7(2) *Global Environmental Change* at 115.
- ⁷³ Dobbin, *supra* note 4
- ⁷⁴ Dobbin, *supra* note 4 at 17-19.

⁷⁵ D. Korten, *When Corporations Rule the World*, (West Hartford, Conn: Kumarian Press, 1995) 225. in Dobbin, *supra* note 4 at 19.

⁷⁶ P. Hawken, *The Ecology of Commerce* (New York: Harper Business, 1993) at 92. Cited in Karliner, *supra* note 71 at 13.

⁷⁷ *Ibid.*

⁷⁸ Karliner, *supra* note 71 at 14-15.

⁷⁹ Karliner, *supra* note 71 at 15.

⁸⁰ Karliner, *supra* note 71 at 16.

⁸¹ Karliner, *supra* note 71 at 16.

⁸² Mason, *supra* note 72 at 116.

⁸³ Mason, *supra* note 72 at 117.

⁸⁴ Mason, *supra* note 72 at 117.

⁸⁵ for a brief summary of the role of the TNC in these and other environmental issues please see Karliner, *supra* note 71 at 16-19.

⁸⁶ Held and McGrew, *supra* note 46 at 283.

⁸⁷ Held and McGrew, *supra* note 46 at 283.

⁸⁸ Held and McGrew, *supra* note 46 at 283.

⁸⁹ Dobbin, *supra* note 4 at 40.

⁹⁰ *Canadian Environmental Protection Act*, R.S.C. 1985, C.16 (4th Supp.), at Stated Purpose.

⁹¹ *Canada: A Portrait* (Statistics Canada. Catalogue No. 11-403-XPE) at 126.

⁹² B. Doern, & T. Conway, *The Greening of Canada* (Toronto: University of Toronto Press, 1994) at 83.

⁹³ The constitution Act, 1867, 30 & 31 Victoria, c.3. (U.K), s. 91, 92

⁹⁴ Report of the House of Commons Standing Committee of Environment and Sustainable Development, "It's About our Health! Towards Pollution Prevention", (June, 1995) 3. [hereinafter Standing Committee Review]

⁹⁵ Doern and Conway, *supra* note 92 at 213.

⁹⁶ Doern and Conway, *supra* note 92 at 217.

⁹⁷ Doern and Conway, *supra* note 92 at 217.

⁹⁸ Doern and Conway, *supra* note 92 at 221.

⁹⁹ *Canadian Environmental Protection Act*, R.S.C. 1985, C.16 (4th Supp.), at Preamble.

¹⁰⁰ Doern and Conway, *supra* note 92 at 222.

¹⁰¹ *Canadian Environmental Protection Act*, R.S.C. 1985, C.16 (4th Supp.) at Stated Purpose.

¹⁰² *Canadian Environmental Protection Act*, R.S.C. 1985, C.16 (4th Supp.) at Declaration.

¹⁰³ *Canadian Environmental Protection Act*, R.S.C. 1985, C.16 (4th Supp.) at s139.

States that:

(1) The administration of this Act shall, within five years after the enactment of this Act, be reviewed by such committee of the House of Commons, or of both Houses of Parliament, as may be designated or established by Parliament for that Purpose.

(2) The committee designated or established by Parliament for the purpose of subsection (1) shall undertake a comprehensive review of the provisions and operation of this Act and shall, within a year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes to this Act or its administration that the Committee would recommend.

¹⁰⁴ CEPA Review: The Government Response, (Minister of Supply and Services Canada, 1995), *Environmental Protection Legislation Designed for the Future – A Renewed CEPA*. Response to the Recommendations of the Standing Committee on Environment and Sustainable Development outlined in its Fifth Report: *Its About Our Health! Towards Pollution Prevention*. [hereinafter referred to as The Government Response]

¹⁰⁵ Title for the New Act: *Canadian Environmental Protection Act*, R.S.C 1999, c. 33. The status of bills can be checked online at <www.parl.gc.ca/36/1/parlbus/chambus/house/status/status1-e.html>

¹⁰⁶ CCPA Website, online: <http://www.ccpa.ca/english/whoweare/background/html> (date accessed, 14 March, 1999). [hereinafter referred as the CCPA Website]

¹⁰⁷ *Ibid.*

¹⁰⁸ The websites of the corporations in this table, listed in *infra* note 109, 110, 111, 112, 113, provide evidence that they are transnational as opposed to multinational, according to Dobbins' definition of transnational corporations, *supra* note 4 at 16-18.

¹⁰⁹ Dupont Website, online: <<http://www.dupont.com>> (date accessed: 14 March, 1999).

¹¹⁰ Nova Chemicals Website, online: <<http://www.novachem.com/AboutChemicals/main.cfh>> (date accessed: 14 March, 1999).

¹¹¹ Celanese Canada Website, online: <<http://www.celanese.ca/celanese/fs/e/partners/hoechst/>> (date accessed: 14 March, 1999).

¹¹² Bayer Inc. Website, online: <<http://www.bayer.ca/English/o5-facts/History/>> (date accessed: 14 March, 1999).

¹¹³ Dow Chemical Website, online: <<http://www.dow.com/about/about.html>> (date accessed: 14 March, 1999).

¹¹⁴ CCPA sources are at *supra* note 106, and *infra* note 124 and 151. Although not expressly examined in this thesis, the CCPA position paper of Bill C-74, submitted to the federal government in February 1997 also illustrates the position of the CCPA with respect to CEPA reforms. There are similarities in this position paper and CEPA 1999. The paper is available on the CCPA website at *supra* note 106.

¹¹⁵ *Canadian Environmental Protection Act*, R.S.C. 1985, C.16 (4th Supp.) at s 11.

¹¹⁶ Standing Committee Review, *supra* note 94 at 61.

¹¹⁷ Environment Canada, *Guidelines for Conducting Environmental Assessments for Priority Substances Under the Canadian Environmental Protection Act*, Final Report, April 1992, p1. In Standing Committee Review, *supra* note 94 at 61.

¹¹⁸ Standing Committee Review, *supra* note 94 at 61.

¹¹⁹ Standing Committee Review, *supra* note 94 at 64.

¹²⁰ Standing Committee Review, *supra* note 94 at p67.

¹²¹ The environmental Law Section of the Canadian Bar Association, Brief to the Committee, December 1994, p23. Cited in the Standing Committee Review, *supra* note 94 at 66.

¹²² Standing Committee Review, *supra* note 94 at 67.

¹²³ Standing Committee Review, *supra* note 94 at 67.

¹²⁴ Preliminary CCPA Submission and Analysis on Standing Committee Review (Submitted July 17th 1995), p15. Available online at CCPA Website, *supra* note 106. [hereinafter referred to as CCPA 1995 Position Paper]

¹²⁵ Government Response, *supra* note 104 at 70.

¹²⁶ Government Response, *supra* note 104 at 70.

¹²⁷ Standing Committee Review, *supra* note 94 at 70.

¹²⁸ Standing Committee Review, *supra* note 94 at 73.

¹²⁹ Standing Committee Review, *supra* note 94 at 74.

¹³⁰ CCPA 1995 Position Paper, *supra* note 124 at 16.

¹³¹ CCPA 1995 Position Paper, *supra* note 124 at 15.

¹³² *Canadian Environmental Protection Act*, R.S.C 1999, c. 33.

¹³³ Standing Committee Review, *supra* note 94 at 54.

¹³⁴ Standing Committee Review, *supra* note 94 at 56.

¹³⁵ Standing Committee Review, *supra* note 94 at 54.

¹³⁶ Claude Lanthier, Chairman, Canadian Section of the International Joint Commission, Statement to the Committee, November 22, 1994, p10, in Standing Committee Review, *supra* note 94 at 55.

¹³⁷ Rio Declaration on Environment and Development, Agenda 21: Programme of Action for Sustainable Development, UNCED, 3-14 June 1992, Rio de Janeiro, Brazil.

¹³⁸ CCPA 1995 Position Paper *supra* note 124 at 9.

¹³⁹ Standing Committee Review, *supra* note 94 at 49

¹⁴⁰ Standing Committee Review, *supra* note 94 at 46

¹⁴¹ Standing Committee Review, *supra* note 94 at 49.

¹⁴² Standing Committee Review, *supra* note 94 at 47.

¹⁴³ Standing Committee Review, *supra* note 94 at 48.

¹⁴⁴ Government of Canada, Environment Canada, *Toxic Substances Management Policy*, June 1995 available online: http://www.ec.gc.ca/toxics/toxic1_e.html (date accessed: 20 January, 2000).

¹⁴⁵ CCPA 1995 Position Paper, *supra* note 124 at 8.

¹⁴⁶ CCPA 1995 Position Paper, *supra* note 124 at 9.

¹⁴⁷ The control/management approach to pollution prevention is a theme that is threaded throughout the whole act. Direct illustrations can be found in s68., s80., s46., and in the Act's Preamble.

¹⁴⁸ Standing Committee Review, *supra* note 94 at 80.

¹⁴⁹ CCPA 1995 Position Paper, *supra* note 106 at 11.

¹⁵⁰ CCPA 1995 Position Paper, *supra* note 106 at 5.

¹⁵¹ There is a letter available on the CCPA Website for its member companies to download and send to their respective Members of Parliament. The letter is an example of the fear mongering tactics employed by the CCPA in an effort to sway the CEPA reforms so as not to impede on the production and profits of their members. Available online: <<http://www.ccpa.ca>> (date accessed: 14 March, 1999)

¹⁵² The downward harmonization of environmental regulation is an international trend where the scope and power of domestic environmental laws are being rolled back as states compete with each other to become the most hospitable arena in which to attract TNCs.

¹⁵³ D. Held, *Democracy and the Global Order*, (Stanford: Stanford University Press, 1995) at 76

¹⁵⁴ O. Kirshner, "Introduction" in O. Kirshner et al., eds., *The Bretton Woods – GATT System, Retrospect and Prospect after 50 Years* (London: M.E. Sharpe, 1996) at xi. Kirshner's interpretation of the MNC can be used interchangeably here with my interpretation of the TNC.

¹⁵⁵ Held, *supra* note 153 at 67.

¹⁵⁶ Ruggie, *supra* note 52 at 522.

¹⁵⁷ W. Greider, "The Global Market Place: A Closet Dictator", in R. Nader et al., eds., *The Case Against Free Trade: GATT, NAFTA, and the Globalization of Corporate Power* (San Francisco: Earth Island Press, 1993) at 195.

¹⁵⁸ Ruggie, *supra* note 52 at 523.

¹⁵⁹ The notion of what traditionally constitutes international law may be contested.

¹⁶⁰ Held, *supra* note 153 at 77.

¹⁶¹ Held, *supra* note 153 at 78.

¹⁶² Hirst and Thompson, *supra* note 17 at 412.

¹⁶³ M. Trebilcock, & R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 20.

¹⁶⁴ J. Mander, Megatechnology, Trade, and the New World Order" in Nader et al., eds., *supra* note 157 at 14. Mander's interpretation of MNCs can be used interchangeably with my interpretation of TNCs here.

¹⁶⁵ Kirshner, *supra* note 154 at x.

¹⁶⁶ Kirshner, *supra* note 154 at x.

¹⁶⁷ Dobbin, *supra* note 4 at 89.

¹⁶⁸ Kirshner, *supra* note 154 at x

¹⁶⁹ Dobbin, *supra* note 4 at 89.

¹⁷⁰ Dobbin, *supra* note 4 at 90.

¹⁷¹ Dobbin, *supra* note 4 at 90.

¹⁷² Dobbin, *supra* note 4 at 89.

¹⁷³ Dobbin *supra* note 4 at 89.

¹⁷⁴ V. Shiva, "Forestry Myths and the World Bank," 17(4-5) *The Ecologist*, 1987, 142, cited in: T. Kuehls, "Between Sovereignty and Environment: An Exploration of the Discourse of Government" in K. Litfin, ed., *The Greening of Sovereignty in World Politics* (London: The MIT Press, 1998) at 57.

¹⁷⁵ T. Kuehls, "Between Sovereignty and Environment: An Exploration of the Discourse of Government" in K. Litfin ed., *The Greening of Sovereignty in World Politics* (London: The MIT Press, 1998) at 47.

¹⁷⁶ J. Jackson, *The World Trading System: Law and Policy of International Economic Relations, 2nd Edition* (London: The MIT Press, 1997) at 48.

¹⁷⁷ R. Nader, "Introduction: Free Trade and the Decline of Democracy" in R. Nader et al., eds., *supra* note 157 at 4.

¹⁷⁸ Dobbin, *supra* note 4 at 10.

¹⁷⁹ Jackson, *supra* note 176 at 157.

¹⁸⁰ L. Wallach, "Hidden Dangers of GATT and NAFTA" in Nader, et al., eds., *supra* note 157 at 31.

¹⁸¹ For some examples of domestic environmental regulations and trade embargo's that have been successfully challenged under the GATT, please see L. Wallach, *supra* note 180 at 25.

¹⁸² Jackson, *supra* note 176 at 213.

- ¹⁸³ S. Hudnall, "Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization" (1996) 29(2) *Columbia Journal of Law and Social Problems* at 194-197. Hudnall puts forth an interesting example of how the National Treatment clause contributes to the rollback of environmental regulation. She cites A GATT dispute panel decision with respect to the United States Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027. The purpose of the MMPA was to reduce the number of dolphins killed through tuna fishing. The Act was aimed at a tuna fishing technique called 'purse-seine'. This technique often resulted in a high number of incidental dolphin kill rates. The United States imposed a trade embargo on all imports of yellowfin tuna caught with the purse seine method. Mexico disputed the Act as violating the National Treatment clause. In *United States Restrictions on Imports of Tuna* 30 I.L.M 1594 (1991), the GATT panel ruled that countries cannot prejudice against differing production and harvesting methods of tuna and dolphins. This case illustrates how the National Treatment clause can overrule domestic legislation designed to protect the environment.
- ¹⁸⁴ L. Wallach, *supra* note 180 at 37. Wallach cites many weaknesses inherent in the tests that provide for allowing trade protection mechanisms because of environmental degradation. Some of these are that the test is based on vague science, and that there is not conflicting scientific evidence (ie. Scientific studies funded by TNCs). The test is vague and could easily be undermined by the affected country or TNCs.
- ¹⁸⁵ Wallach, *supra* note 180 at 37.
- ¹⁸⁶ Trebilcock and House, *supra* note 163 at 76.
- ¹⁸⁷ The Asian Pacific Economic Corporation (APEC), is another example of a free trade zone. APEC has 18 member countries, all committed to 'trade liberalization' as cited in Dobbin, *supra* note 4 at 115.
- ¹⁸⁸ Held, *supra* note 153 at 83.
- ¹⁸⁹ Held, *supra* note 153 at 86.
- ¹⁹⁰ Held, *supra* note 153 at 85.
- ¹⁹¹ Held, *supra* note 153 at 87.
- ¹⁹² Held, *supra* note 153 at 87.
- ¹⁹³ Held, *supra* note 153 at 88.
- ¹⁹⁴ Held, *supra* note 153 at 88.
- ¹⁹⁵ J. Dunning, "The Global Economy and Regimes of National and Supranational Governance" (1995) 7(1) *Business & the Contemporary World* at 131.
- ¹⁹⁶ Held, *supra* note 153 at 134.
- ¹⁹⁷ Held, *supra* note 153 at 128.
- ¹⁹⁸ Held, *supra* note 153 at 128.
- ¹⁹⁹ Dobbin, *supra* note 4 at 5.
- ²⁰⁰ R. Lipschutz, "Reconstructing World Politics: The Emergence of Global Civil Society" (1992) 21:3 *Millenium journal of International Studies* at 418
- ²⁰¹ Dobbin, *supra* note 4 at 93.
- ²⁰² Nader, *supra* note 157 at 7.
- ²⁰³ Hermann, *supra* note 68 at 286.
- ²⁰⁴ Nader, *supra* note 157 at 7.
- ²⁰⁵ Nader, *supra* note 157 at 7.
- ²⁰⁶ Hermann, *supra* note 68 at 286.
- ²⁰⁷ Nader, *supra* note 157 at 7.
- ²⁰⁸ R. Falk, & D. Griffen, *Postmodern Politics for a Planet in Crisis* (Albany: State University of New York Press, 1993) 166.
- ²⁰⁹ Hirst and Thompson, *supra* note 17 at 409.
- ²¹⁰ M. Mannin, "Global Issues and the Challenge to Democratic Politics", in C. Bretherton, & G. Ponton eds., *Global Politics*, (Oxford: Blackwell Publishers, 1996) at 222.
- ²¹¹ R. Lipschutz, *Global Civil Society & Global Environmental Governance: The Politics of Nature from Place to Planet* (Albany: State University of New York Press, 1996) at 2.
- ²¹² J. Scholte "The geography of collective identities in a globalizing world" (Winter 1996) 3(4) *Review of International Political Economy* at 591.
- ²¹³ *Ibid.* at 571.
- ²¹⁴ Lipschutz, *supra* note 211 at 2.
- ²¹⁵ Lipschutz, *supra* note 200 at 419.
- ²¹⁶ Lipschutz, *supra* note 200 at 419.

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- ²¹⁷ Lipschutz, *supra* note 211 at 1.
- ²¹⁸ Lipschutz, *supra* note 200 at 407.
- ²¹⁹ Lipschutz, *supra* note 200 at 417.
- ²²⁰ Lipschutz, *supra* note 200 at 418.
- ²²¹ Lipschutz, *supra* note 211 at 1-2.
- ²²² Scholte, *supra* note 212 at 588.
- ²²³ Scholte, *supra* note 212 at 588.
- ²²⁴ Scholte, *supra* note 212 at 588.
- ²²⁵ This point is well argued in S. Kobrin, "The MAI and the Clash of the Globalizations" (Fall 1998) No. 112 Foreign Policy at 97-109.
- ²²⁶ S. Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations* at 2. Online: <www.law.indiana.edu/glsj/vol5/no1/hobe.html> (date accessed 18 November, 1999)
- ²²⁷ Ibid.
- ²²⁸ Kobrin, *supra* note 225 at 108.
- ²²⁹ Lipschutz, *supra* note 211 at 237.
- ²³⁰ J. Roseneau "Governance, Order, and Change in World Politics" in J. Roseneau & E. Czempiel, eds., *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992) 4-5. Cited in Lipschutz, *supra* note 211 at 249.
- ²³¹ P. Wapner "Governance in Global Civil Society" in R. Young, ed., *Global Governance* (London: The MIT Press, 1997) at 67.
- ²³² Ibid. at 80.
- ²³³ Ibid. at 79.
- ²³⁴ Ibid. at 79.
- ²³⁵ R. Deibert, *Parchment, Printing and Hypermedia: Communication in World Order Transformation* (New York: Columbia University Press, 1997) 162-163 in R. Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines" (1998) 52:3 International Organization at 626
- ²³⁶ Price, Ibid. at 618.
- ²³⁷ Price, Ibid. at 618.
- ²³⁸ Price, Ibid. at 618.
- ²³⁹ Price, Ibid. at 618.
- ²⁴⁰ Price, Ibid. at 629.
- ²⁴¹ Price, Ibid. at 618.
- ²⁴² Price, Ibid. at 620.
- ²⁴³ Price, Ibid. at 625.
- ²⁴⁴ Price, Ibid. at 622.
- ²⁴⁵ Price, Ibid. at 623.
- ²⁴⁶ Price, Ibid. at 634.
- ²⁴⁷ Price, Ibid. at 619.
- ²⁴⁸ Price, Ibid. at 638.
- ²⁴⁹ Kobrin, *supra* note 225 at 100.
- ²⁵⁰ T. Clarke, and M. Barlow, *The Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Toronto: Stoddart, 1997) at 33.
- ²⁵¹ Ibid. at 36.
- ²⁵² Kobrin, *supra* note 225 at 102.
- ²⁵³ Clarke, and Barlow, *supra* note 250 at 31.
- ²⁵⁴ Kobrin, *supra* note 225 at 97.
- ²⁵⁵ Kobrin, *supra* note 225 at 98.
- ²⁵⁶ Kobrin, *supra* note 225 at 99.
- ²⁵⁷ U. Beck, "The Cosmopolitan Manifesto" (1996) 11:496 New Statesman at 30.
- ²⁵⁸ D. Held, "Cosmopolitan Democracy and the Global Order: Reflections on the 200th Anniversary of Kant's 'Perpetual Peace'" (1995) 20 Alternatives at 418.
- ²⁵⁹ D. Held, "Democracy and the New International Order" in D. Held, and D. Archibugi eds., *Cosmopolitan Democracy, An Agenda for a New World Order*, (City: Polity Press, 1995) at 118.
- ²⁶⁰ Held, *supra* note 258 at 418.

²⁶¹ Held, *supra* note 258 at 418.

²⁶² Held, *supra* note 259 at 108.

²⁶³ Held, *supra* note 259 at 108.

²⁶⁴ Held, *supra* note 259 at 111.

²⁶⁵ Held, *supra* note 259 at 111.

²⁶⁶ Held summarizes the long term objectives of Cosmopolitan Democracy Held, *supra* note 259 at 279-281.

²⁶⁷ Held, *supra* note 153 at 543.

²⁶⁸ Held, *supra* note 153 at 31.

²⁶⁹ R. Falk, "The World Order Between Inter-State law and the Law of Humanity: The Role of Civil Society Institutions" in Held and Archibugi eds., *supra* note 259 at 171.

²⁷⁰ Falk, *Ibid.* at 171.

²⁷¹ Falk, *Ibid.* at 172.

²⁷² Scholte J, O'Brien R, & Williams M, "The WTO and Civil Society" (1998). Department of Politics and International Studies, University of Warwick. GSGR Working Paper No. 14/98, online: Centre for the Study of Globalisation and Regionalisation <http://www.warwick.ac.uk/fac/soc/CSGR> (date accessed: 27 November, 1999) at 5.

²⁷³ *Ibid.*

²⁷⁴ Dobbin, *supra* note 4 at 284.

²⁷⁵ Dobbin, *supra* note 4 at 299-306. Dobbin cites numerous instances of 'civil disobedience' that have, in his opinion, allowed the citizen gain a 'heightened awareness' of the true powers of democracy.

²⁷⁶ Dobbin, *supra* note 4 at 292-293.

²⁷⁷ Dobbin, *supra* note 4 at 293.

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