

THE GLOBALIZED RULE OF LAW
Relationships between International and Domestic Law

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Canada's External Constitution and Its Democratic Deficit

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One of the international system's most striking developments during the last half-century is the vast proliferation of international organizations (IOs). These IOs are generally presented *individually* as addressing almost every imaginable policy issue concerning the global public domain, such as managing international air traffic, dividing up the universal radio wave spectrum, establishing a law of the sea, or lending to developing countries.

By their very nature, all international phenomena have a domestic incidence. At the same time as they create a transnational sphere of governance, multilateral institutions created by governments necessarily affect the internal affairs of the signatories, whether this is the pricing of drugs for their HIV/AIDS victims, the treatment of their Aborigines, or the size of their foreign debt and the interest payments they have to make on it.

This chapter argues that the best framework within which to understand Canada's relationship with these evolving instances of global governance is to reframe these IOs in terms of two constitutional expressions of their *collective* significance.

First, the steady accumulation of intergovernmental agreements and organizations has constituted a complex but substantial world order, which we can best conceptualize as comprising an emerging global constitution.

* Much of this analysis evolved through our collaboration as virtual professors at the Law Commission of Canada on the paper "Governing Beyond Borders: Law for Canadians in an Era of Globalization."

Second, and simultaneously, the global constitution restructures the legal order of every participating state by adding an external constitution to its domestic constitution, albeit in varying ways and to different degrees.

These two propositions need both to be amplified by defining *constitution* and by elaborating the complexities raised by this expanding dialectic reality in which the international has domestic roots and the local has global effects.

A. DEFINING A CONSTITUTION

A constitution is the set of fundamental rules and institutional practices according to which any organization—whether a small club or a large state—governs itself. Reduced to its essential features, a constitution demonstrates four main components. It typically sets out: the guiding *principles* that guide the community's collective life; the main *rules* that govern members' behaviour; the *rights* of community members vis-à-vis governing authorities; and the functions, scope, and limitations of the collectivity's executive, legislative, and judicial *institutions*.¹ In the realm of politics and public law, constitutions are associated almost exclusively with the nation-state²—an inward-looking understanding that needs to be supplemented by appreciating how international commitments also affect the domestic constitutional order. At the same time, as international governance arrangements have become more powerful and pervasive, it has become plausible to talk about them collectively as giving a constitutional character to the global community.

B. THE GLOBAL CONSTITUTION

Any consideration of the emerging global constitutional order must preemptively recognize its fragmentary, disconnected, imbalanced, heterogeneous, and multifarious nature. International organizations range in their territorial scope from bilateral to regional to global, and in their size from tiny to huge. Some are relatively autonomous, while others are little more than agents for their member states. Some may be quite insignificant, while others exercise substantial influence over world developments,

as well as over national governments. They vary from relatively informal secretariats to bricks-and-mortar organizations with their own buildings, permanent civil service, insignia, and flags (for example, the UN Development Program). They include ad hoc arrangements for cooperation in a specific functional area (for example, international fisheries management regimes) and general-purpose political structures complete with the organs of a would-be world government (the United Nations itself).

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

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

1. **Norms or principles** range from the vague (the aspiration for peace) to the specific (responsibility to protect). This chapter will restrict itself to such norms governing the economic behaviour of governments as national treatment and most favoured nation.

2. **The rules** emitted by IOs are multitudinous but more specific and forbidding, for example, preventing states from exploiting children. Since

1 For example, Joel Bakan *et al.*, eds., *Canadian Constitutional Law*, 3d ed. (Toronto: Emond Montgomery, 2003) at 3–4; *Black's Law Dictionary*, 5th ed. (St. Paul, MN: West, 1979).

2 Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Scarborough, ON: Carswell, 2004) at 1; Patrick Monahan, *Constitutional Law*, 2d ed. (Toronto: Irwin Law, 2002) at 3.

these rules are negotiated in a power-based process, they naturally reflect the interests of the dominant powers.

In the economic sphere, a great many of the rules reflect American norms. When the members of the World Trade Organization (WTO) reached an agreement in 1997 on the liberalization of their telecommunications sectors, the US trade representative Marlene Barshefsky exulted that the United States had just universalized its *Telecommunications Act of 1994* (*New York Times*, 7 February 1997). The WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement supported the interests of American, European, and Japanese big pharma, entertainment, and information-technology industries, but threatened those of the emerging economies.

3. Rights in the global constitution are generally expressed in very general terms, such as the right to justice or education or shelter.

In the economic side of the global constitution, rights become much more specific. Many bilateral investment treaties establish the right of foreign investors not to have their property expropriated by the host government.

4. Institutions can be found that are powerful, well financed, and sophisticated as in the partly supranational, partly intergovernmental, structure created by the various treaties that built the European Union into its own constitutional order. Other international institutions are quite flimsy. Whether strong or weak, international institutions can be analyzed as a global collectivity or as individual institutions in terms of their five principal functions.

a) Legislature. Taken as a totality, world institutions have a spotty and uneven legislative capacity, because their rule-making record is weak. The General Assembly of the United Nations is a major global debating forum, but its capacity to legislate has been contained by the UN's executive, the Security Council. The European Parliament's mandate has grown but remains inferior to the European Commission's substantial legislative capacity, which manifests itself in the form of hundreds of directives that its member states are bound to implement.

The WTO was born in 1995 with a vast number of rules already decided as a result of eight years' worth of intergovernmental negotiations. Its institutional ability to delete, amend, or add new rules takes the form of the biennial meeting of its members' trade ministers. However, the requirement that WTO decisions be made by consensus makes it extremely difficult to reach any decision acceptable to all—currently 148—member states. As a result, new rules for the WTO are made following years-long

negotiating “rounds” between the member-governments, as in the current Doha Round, named for the site of the ministerial meeting that launched it in 2001. The North American Free Trade Agreement (NAFTA)'s trade commission has virtually no rule-making authority: any rule changes must be negotiated by the continent's three states.

b) Executive. Most institutions have an executive group charged with managing day-to-day operations as well as making critical decisions such as whether the United Nations should endorse a pre-emptive war against Iraq. Putting all international organizations together, one of their second constitutional functions is the executive—largely because nation-states have been reluctant to allow devolve much decision-making authority beyond their control.

The WTO has no executive to speak of, while NAFTA's merely consists of periodic meetings of the three countries' trade ministers.

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

The WTO has an extremely lean administration: a mere five hundred people operate this globally crucial institution. NAFTA has no central administration at all. Each of the three signatory states maintains a small office to keep track of NAFTA-related paperwork and each federal government assigns civil servants to staff a few working groups that deal with some of NAFTA's minor, outstanding business.

d) Judiciary. Norms and rules are subject to diverse interpretations. Administrative actions cause compliance complaints. As a result, no organization can operate for long without having to resolve conflicts generated by its own mandate, measures, and mechanisms. Dispute settlement varies from the highly structured European Court of Justice, whose rulings have direct effect in each member state of the EU, to the largely ineffectual arbitration processes established in the International Labour Organization (ILO).

As we will shortly see when looking at the domestic impact of global economic norms and rules, the WTO's and NAFTA's judicial capacities can have decisive effects.

e) *Enforcement*. The European Commission's directives can be enforced through the rulings of the European Court of Justice, which have direct effect in the domestic legal system of the EU's member states. By contrast, the conventions of the ILO are unenforceable except by moral suasion.

Compliance with the WTO's dispute settlement rulings tends to be high, in large part because its rules permit economic retaliation against states that do not comply with its judgments. WTO rulings are also effective in part because a member considers it in its interests to comply with an adverse judgment, on the expectation that its counterparts will comply when it wins a ruling against their trade protectionism.

This is not the place to develop a more extended analysis of the global constitution in all its kaleidoscopic components and uneven functioning. The point of this section is to emphasize that, taken as a whole, existing international organizations create a global governance system which Canada has to take seriously, and for two reasons.

- First, as an agent in—or subject of—globalization, Ottawa participates in efforts to reform existing elements of the world order and develop new components as needs arise. Canada may have lost relative position in the global hierarchy of states over the last few decades, declining from being the seventh largest economy to battling with Brazil for ninth place, but it remains a player in the upper-middle range of semiperipheral states that can make a difference in the shadow of the more powerful states that bestride the centre of the world's power system. During the Uruguay Round of negotiations to reform the GATT, for instance, Ottawa made the original proposal that led to the new WTO receiving a powerful judicial capacity.
- The second reason why Canadians should take the global constitution seriously is that, as objects of globalization, their own political system is significantly affected by having imposed on it what this chapter calls a supraconstitution—to the explication of which we will now turn.

C. CANADA'S SUPRACONSTITUTION³

Because of the many IOs' cumulative domestic impact, the global constitution necessarily impinges on the constitutional order of every member

state but to a degree that depends on its inherent power. In this section, we will focus on the extent to which two international economic institutions—the global WTO and the continental NAFTA—have contributed to creating an external constitution for Canada.

The main thrust of economically focused regimes established in the past half-century is the liberation of international trade and investment from member governments' control. Through global, regional, or bilateral agreements, states commit themselves to dismantling barriers to the movement of goods, services, and capital (but generally not labour) across borders; to revoking policies that favour domestic over foreign producers, goods, or services; and to eliminating all forms of government intervention that distort market competition. All this is implemented in the hope of reaping the benefits of comparative advantage, more efficient production, lower prices, and greater consumer choice of goods and services.

Although presented at the time as a commercial agreement, the Canada-United States Free Trade Agreement (CUFTA)⁴ was historically significant as a step towards a new global investment regime, with fundamental implications for the structure of corporate-state relations, and the effective constitutionalization of an international corporate "personhood" complete with powerful individual rights.

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

NAFTA, which was signed in 1993 and came into force in 1994, in effect continentalized CUFTA's bilateral regime by incorporating Mexico into its then toughened set of rules. Driven by Washington's demands that its two neighbours open up their economies by cutting back their governments' controls, NAFTA strengthened CUFTA's investment provisions, extended its rules on services, and added powerful intellectual property rights that were of particular importance to American brand-name phar-

3 Much of this analysis is adapted from Stephen Clarkson, "Canada's External Constitution under Global Trade Governance," in Ysolde Gendreau, éd., *Dessiner la société par le droit/Mapping Society Through Law* (Montreal: Les Éditions Thémis, 2004) at 1.

4 CUFTA came into force in 1989.

maceutical transnational corporations (TNCs). NAFTA partially institutionalized the two peripheral economies' hitherto informal integration as territorial extensions of the American marketplace. It is worth noting that NAFTA became almost as divisive in American politics as CUFTA had been in Canada. Fearing the loss of jobs to Mexico because of that country's low wages and weak enforcement of environmental and labour standards, American environmental organizations and trade unions followed their Canadian comrades by launching a similarly futile campaign against the business-led agenda for continental economic integration.

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

1) Norms

The WTO and NAFTA establish general principles that are to guide state behaviour. National Treatment (NT) is a supraconstitutional norm in the sense that it controls government actions because it has been incorporated as a superior legal principle in general terms, but not as legislation applying to specific public policies. For instance, there is no Canadian law saying that the federal government must treat foreign-owned furniture companies at least as well as it treats Canadian-owned furniture firms. But now that these trade agreements have extended the national-treatment principle from goods to investments and then to services, if any federal or provincial or municipal government discriminates in favour of a nationally or provincially owned firm—whether one that manufactures goods or one that offers services, the government of Canada is liable to legal attack by another government belonging to NAFTA or the WTO that deems one of its companies in Canada to have suffered from unequal or discriminatory treatment. In other words, although not implemented in specific statutory texts, NT is a supraconstitutional principle on the basis of which NAFTA partners may litigate.

Along with National Treatment, the Most Favoured Nation (MFN) norm in GATT's Article I rules out discriminating among trading part-

ners, even for reasons of social or environmental policy. NT and MFN have become supraconstitutional along with countless other international commitments that Canada has made by signing, for instance, the many conventions on labour rights sponsored by the ILO. What makes NT and MFN more important than other norms in the global constitution is the fact that they can be enforced, as we will shortly see.

The domestic impact of these supraconstitutional norms is also growing because the judicial interpretation of the WTO's principles has proven far more expansive and intrusive than that of identical norms had been under the GATT. Even when government measures are formally neutral vis-à-vis nationality, for instance, the WTO may strike them down if, in practice, they are deemed to bias competitive conditions in favour of domestic service providers (national treatment) or of particular foreign providers (most favoured nation).⁵

When trying to assess the democratic implications of a country's supraconstitution, it helps to distinguish *process* legitimacy from *outcome* legitimacy. The insertion of authoritative new norms into the Canadian political order raises legitimacy issues, both in terms of process and outcome. The imposition of major constraints on the capacity not just of the federal, but also of provincial and municipal governments as a result of a negotiating process characterized by secrecy and non-transparency took place with a minimum of informed public debate. This absence of a democratic deliberation concerning a major shift in the parameters of the political order contrasts with the extensive engagement not just of the political parties, the media, and interest groups—the normal actors in a political process—but also of the highest court of the land from 1980 to 1982 when Prime Minister Pierre Trudeau led a campaign to patriate the domestic Canadian constitution into which he intended to introduce a *Charter of Rights and Freedoms*.

Normative additions to the Canadian legal order from NAFTA and the WTO had direct consequences in terms of their outcome legitimacy. National treatment for investment spelled the end to a whole generation of industrial development policies centred on the targeting of subsidies to domestic corporations or sectors to improve their competitive performance in order to boost their exports. It also called into question the capacity of the Canadian state to impose environmental regulations and bolster its

5 Scott Sinclair, *GATS: How the WTO's Expanded General Agreement on Trade in Services Will Erode Democracy* (Ottawa: Canadian Centre for Policy Alternatives, 2000) at 44.

cultural industries through favouring domestic entities in the private sector. In this way, supraconstitutional norms have had direct, delegitimizing impacts on the domestic legislative and administrative order without most of the public—and even much of the government apparatus—understanding this had happened.

2) Rules

When we speak of Canada's external constitution, we also refer to those rules at the international level that can be said to form part of the ensemble of fundamental practices by which Canadian society is governed, and from which domestic Canadian laws and policies may not derogate. Identifying all such rules is bound to be a monumental task, given the hundreds of international commitments Ottawa has signed. To illustrate the substance of Canada's supraconstitutional rules, we focus on those contained in CUFTA, NAFTA, and the WTO.

Continental economic integration was paid for by North America's two weaker partners with diminished political autonomy. While CUFTA and NAFTA did achieve somewhat reduced American tariffs for Canadian exporters, the price Ottawa had to pay for a partial opening of the US market was to accept constraints on the Canadian state's regulatory capacity. The federal government was no longer allowed to manage a two-price system that supplied petroleum products for domestic industry and consumers at lower prices than the export price charged to American importers. No new cultural policies could negatively affect the commercial interests in Canada of American entertainment corporations.

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

By the very act of signing CUFTA, NAFTA, and the WTO, Canada also undertook to make immediate changes in a wide range of legislation and regulations. CUFTA's investment chapter raised the exemption for a review of a foreign takeover from \$5 to \$150 million (CUFTA 1988). This required Canadian implementation legislation to make the appropriate amendment to the *Investment Canada Act*.

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

While free trade was extremely controversial in the late 1980s, CUFTA's process legitimacy was actually quite considerable. Although secret, the negotiation process was the subject of intense media and public interest. Once the agreement was published, fierce debate over its various provisions continued for months, reaching their climax in the 1988 federal election campaign whose results—a majority of seats (if only a minority of votes) for Prime Minister Brian Mulroney's Progressive Conservative government—gave the accord an ultimate parliamentary legitimacy. Nevertheless, CUFTA's practical outcome—the loss of hundreds of thousands of industrial jobs in the Canadian economy's manufacturing centres—left it highly unpopular among the labour unions and a number of popular grassroots movements, which continue to deem “free trade” an illegitimate expression of globalization.

The WTO's and NAFTA's rules are so comprehensive that, in their implementation legislation, their members had to change hundreds of existing laws. In the WTO's agreement on agriculture, member states committed themselves to transform such quantitative restrictions as import quotas into tariffs, which were then to be reduced. Canada duly proceeded to “tariff” its protective regulations for farmers in central Canada.

Benefiting from much less public debate and information, the process legitimacy of the WTO's and NAFTA's rules remains dubious. Their out-

come legitimacy is difficult to assess in any comprehensive way, since the effects of these rules may take years to become evident.

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

In this respect, not only has the *political* order been changed by the amendments, but the *legal* order has been altered by introducing legislative and regulatory changes over which Parliament no longer exercises sovereignty. This is what free trade's proponents meant when they described NAFTA as "locking in" neoconservative rules—despite the fact that the neoconservative model is no closer to being accepted as a sustainable societal contract in Canada than it is elsewhere.⁶ Even if more activist political parties were to win power, they would find their hands tied by these internationally negotiated and domestically implemented political limits to which their predecessors had committed them.

Another type of rule whose enforcement is contingent on foreign complaints is the prohibition of governments from imposing conditions on foreign investors, requiring them to make export commitments, to find local sources for their manufacturing needs, to transfer technology to domestic partners, or to guarantee set levels of employment.⁷ To be precise, these standards do not actually *prevent* governments from imposing performance requirements on foreign investors or subsidizing domestic

firms—just as traffic laws do not prevent a motorist from speeding. But any federal or provincial government that violates these NAFTA or WTO norms is vulnerable to a partner state initiating a legal action that could result in economic sanctions to compensate for the damage from which its corporations claim they have suffered.

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

3) Rights

The corollary of a limit on government may be a right for the citizen. In contrast with the EU, which does create direct rights for citizens in member states—for instance to sue their own governments before the European Court of Justice, the only "citizens" whose rights in Canada were expanded under NAFTA were corporations based in the United States or Mexico. Under the WTO's Trade Related Investment Measures agreement, rights were also created for all corporations based in states belonging to the WTO, not to their citizens. The national treatment principle and the right of establishment made it easier for firms owned in one country to do business throughout the continent. What makes NAFTA supraconstitutional in this regard is its creation of a right in Chapter 11 that gives non-Canadian NAFTA corporations the power to overturn such regulations as those designed to secure the health and safety of the citizenry by taking member

6 Tony Clark, *Silent Coup: Confronting the Big Business Takeover of Canada* (Toronto: J. Lorimer, 1997).

7 Ha-Joon Chang, "Transnational Corporations and Strategic Industrial Policy" in Richard Kozul-Wright & Robert Rowthorn, ed., *Transnational Corporations and the Global Economy* (Tokyo: The United Nations University, 1998).

governments to international commercial arbitration in alleged cases of expropriation.⁸

CUFTA's Article 1605 provided that no government may "directly or indirectly expropriate or nationalize," or take "a measure tantamount to expropriation or nationalization" except for a "public purpose," on a "non-discriminatory basis," in accordance with "due process of law and minimum standards of treatment," and on "payment of compensation."⁹ NAFTA's Chapter 11 contained an identical provision. In the face of Canada's *Charter of Rights and Freedoms* that deliberately excluded property rights (on the grounds that they would excessively enhance corporate power which was already adequately protected by the common law), this provision created a property right for foreign corporations that was understood neither (apparently) by the government nor (certainly) by the public.

Unlike rights in their internal constitution, this right was not available for Canadian corporations in Canada, where it can only be enjoyed by American and Mexican companies. The more citizens' groups understood that foreign corporations had been given invasive rights to nullify domestic legislation that were unavailable to Canadian enterprise, the more NAFTA's Chapter 11 became delegitimized, both in terms of its process and its outcomes. Also contrasting with a national constitution, the new justiciable empowerment accorded to transnational corporations subjects them to no balancing obligations. For instance, there are no continental-level institutions with the clout to regulate, tax, or monitor the newly created continental market that has proceeded to emerge.¹⁰ NAFTA's Chapter 11 expanded the scope of investment rights without requiring TNCs to promote the public interest by protecting the environment or public health.¹¹

8 Richard C. Levin & Susan Erickson Marin, "NAFTA Chapter 11: Investment and Investment Disputes" (Summer 1996) 83 *NAFTA: Law and Business Review of the Americas* 82 at 90.

9 CUFTA 1988, Canada-U.S. Free Trade Agreement, Article 1605.

10 Stephen Blank & Stephen Krajewski, "U.S. Firms in North America: Redefining Structure and Strategy" (February 1995) 5(2) *North American Outlook* 9.

11 Steven Shrybman notes that the powerful private enforcement machinery of international investment treaties has now been invoked by several transnational corporations to assail water protection laws, water export controls, and decisions to re-establish public-sector water services when privatization deals have gone sour. See Steven Shrybman, "The Impact of International Services and Investment Agreements on Public Policy and Law Concerning Water" (Paper presented at From Doha to Kananaskis: The Future of the World Trading System and the Crisis of Governance, conference at Ro-

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

Other WTO agreements also contained rights for international corporations but none for citizens, other than investors. Its agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) required that all member states amend their intellectual property legislation and change their judicial procedures in conformity with TRIPs' stipulated norms.¹² The external and constitutional quality of these rights can be seen in their giving transatlantic pharmaceutical firms the legal justification to have the EU successfully take a case to the WTO against Ottawa because its drug legislation did not give European big pharma the full patent benefits that they claimed were now their due.¹³

4) Institutions

With the major exception of the European Union, whose various institutions' decisions can directly affect the behaviour of its member states' individuals and corporations, global governance acts indirectly through influencing the behaviour of the nation states that have constructed its vari-

barts Centre for Canadian Studies, York University and Munk Centre for International Studies, University of Toronto, 1-3, 7 March 2002) [unpublished].

12 Christopher Kent, "The Uruguay Round GATT, TRIPS Agreement and Chapter 17 of the NAFTA: A New Era in International Patent Protection" (1994) 10 *Canadian Intellectual Property Review* at 711-33.

13 World Trade Organization, *Canada—Term of Patent Protection: Report of the Panel* (Geneva: World Trade Organization, 2000).

ous organizations. It would be surprising if, in Canada's case, the WTO and NAFTA would not have some indirect effects on its political institutions as well as their relationship with civil society.

Beyond inhibiting federal and provincial governments' previous capacity for policy action, provincial government powers are deeply affected by NAFTA and the WTO. For instance, only the federal government may launch a trade dispute and appear in its hearings, even when a provincial grievance or measure is the issue. NAFTA and the WTO may also have altered Canadian federalism's relative powers by realigning them between the two levels of government. By making Ottawa responsible for ensuring the provinces' conformity to its provisions, NAFTA arguably restored to the Canadian constitution a federal power of disallowance that had fallen into disuse. In this way it may possibly alter—to a potentially dramatic degree—the country's delicate constitutional balance.¹⁴ NAFTA norms also create constitutional abnormalities at the level of interprovincial relations. The application of national treatment and investor-state conflict resolution to subcentral governments creates the anomaly that provinces, territories, and municipalities have to give NAFTA investors non-discriminatory treatment, whereas the *Canada Constitution Act, 1982* does not prevent them from discriminating against Canadian investors from other provinces.

Global and continental rules have differing impacts on different parts of Canadian society. Take the country's two geographically determined types of agriculture. To the extent that the Prairie Provinces are exporters of grains and livestock, their farmers can expect to benefit from the WTO's agreement on Sanitary and Phyto-Sanitary (SPS) standards whose supra-constitutional norms limit *other* states' capacity to use health regulations to impede imports. As illustrated by the North American dispute with the European Union over its refusal to allow the import of beef raised with a growth hormone, the SPS norms, if successfully applied, should make it easier for Canadian cattle ranchers to expand their export markets. In contrast, farmers in central Canada—who supply a protected market of national consumers thanks to the quotas established by government-enforced marketing boards for eggs, milk, and poultry—can be expected to suffer under the WTO rules as their quantitative barriers are turned into

tariffs, which are subsequently cut to allow more foreign competition in the Canadian market.

An efficient public health system has become a defining characteristic of Canadians' sense of national identity. If the privatization of publicly provided services is the product of the services provisions in NAFTA and the WTO's GATS (the General Agreement on Trade in Services), Canadian society may risk losing a prime social institution that has played a major role in defining its identity and so threatening its cultural security.¹⁵ Should the impact of continental and global free trade norms cause the accelerated commercialization of health care with consequently increased inequality in the treatment of rich and poor, a central element of Canadian political culture will have been jeopardized. In this scenario, the external constitution's democratically inaccessible rule-making institutions would not just be of dubious process legitimacy in themselves but would help delegitimize the country's domestic political outputs.

Instead of developing its social and community cohesion, Canada appears to be polarizing into a society of those who can succeed in the globalized system and a society of those left behind. If this perception is linked to the norms and practices of global and continental governance regimes, serious repercussions may be felt in the legitimacy of the country's own representative system.¹⁶ If the external constitution has "hollowed out" the institutions of the Canadian state to the point that it risks being seen as incapable of defending its citizens' interests,¹⁷ the Canadian political system will lose credibility at the same time as neoconservative globalization loses legitimacy. Much hangs on the capacity and effects of judicial rulings concerning the conformity of domestic regulations with the supraconstitution.

5) Adjudication

For a foreign government to litigate a case against Ottawa presumes that global governance boasts adequate judicial capacity. This ability on the

14 Andrew Petter, "Free Trade and the Provinces" in Marc Gold & David Leyton-Brown, eds., *Trade-Offs on Free Trade: The Canada-U.S. Free Trade Agreement* (Toronto: Carswell, 1988) at 141-47.

15 Arup writes that "the main thrust of the GATS is deregulatory: it attacks non-conforming national government measures." See Christopher Arup, *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property* (Cambridge: Cambridge University Press, 2000) at 96.

16 Stephen McBride & John Shields, *Dismantling a Nation: The Transition to Corporate Rule in Canada*, 2d ed. (Halifax: Fernwood, 1997).

17 Harry Arthurs, "The Hollowing Out of Corporate Canada?" in Jane Jenson & Boaventura de Sousa Santos, *Globalizing Institutions: Case Studies in Social Regulation and Innovation* (London: Ashgate, 2000).

part of one state to pursue another for violating some supraconstitutional norm varies widely depending on the IO's own constitution. Global *environmental*, *human-rights*, and *labour* governance is notably bereft of adjudicatory sinew. The strength of global *economic* norms, rules, and rights is due to the muscularity of the WTO's dispute-settlement mechanisms. Whereas the WTO was endowed with an impressive apparatus for adjudicating intergovernmental disputes, NAFTA was created without a supranational judiciary. Instead, North American governance is distinguished by some precarious dispute-settlement processes whose supraconstitutional impacts vary from minor (for general disputes between member states) to negligible (for trade disputes between exporting and importing states) to substantial (for disputes between transnational corporations and host states).

a) NAFTA

i) Chapter 20: General Disputes

Continental dispute settlement was meant to depoliticize conflicts between the three governments through having their differences resolved by neutral arbitrators applying common rules. In this spirit, NAFTA's Chapter 20 provides for bi-national panels to be struck when the member states have been unable to resolve their differences related to issues generated by the agreement. Although Chapter 20 dispute settlement was considered expeditious at first,¹⁸ later decisions have proven unable to settle conflicts without resort to power politics.¹⁹ For example, when it lost a panel decision to Canada in a wheat case,²⁰ Washington responded by threatening to launch an investigation into Canadian wheat exports. Closure was only achieved when US pressure caused the Canadian government to give way by agreeing to limit wheat exports during 1994–95 to 1.5 million tons.²¹ If such Chapter 20 rulings are unable to constrain the continental hegemon, it becomes futile for its neighbours to submit general issues to NAFTA

18 William J. Davey, *Pine and Swine* (Ottawa: Centre for Trade Policy and Law, 1996) at 65.

19 Vilaysoun Loungnarath & Céline Stehly, "The General Dispute Settlement Mechanism in the North American Free Trade Agreement and the World Trade Organization System: Is North American Regionalism Really Preferable to Multilateralism?" (2000) 34 J. World T. 43.

20 *Interpretation of Canada's Compliance with Article 701.3 with respect to Durum wheat sales*, (1993), CDA-92-1807-01 (Ch. 18 Panel).

21 Davey, *Pine and Swine*, above note 18 at 65.

arbitration. Continental governance then gets delegitimized, being unable to deliver for its weaker members the rights for which they "paid" when negotiating the original compact. In this respect, the judicial function of NAFTA is faulty as an aspect of North American governance because it fails to have supraconstitutional effect in the US legal order.

ii) Chapter 19: Trade disputes

Had NAFTA created a true free trade area, its members would have abandoned their right to impose anti-dumping (AD) or countervailing duties (CVD) on imports coming from their partners' economies. In their place, problems of predatory corporate behaviour would have been dealt with by establishing continentwide antitrust and competition policies. The United States refused such a real levelling of national trade barriers that would have created a single continental market. It simply agreed to cede appeals of its trade-protectionist rulings to bi-national panels that were restricted to investigating whether the administration's AD or CVD determinations properly applied *domestic* trade law.²²

Written into NAFTA's Chapter 19, this putatively binding judicial expedient turned out to be almost as disappointing as its critics had predicted. When the United States' CVD action against Canadian softwood lumber exports was remanded for incorrectly applying the notion of subsidy as defined in US law, Congress simply changed its definition of subsidy to suit the Canadian situation. Beyond softwood lumber's long-lasting evidence,²³ Canada has not had a satisfactory experience in using Chapter 19 to appeal other American trade determinations. In 1993, for instance, there were multiple remands in five cases, which led the panels to surpass their deadlines significantly. Furthermore, problems have arisen over the lack of consistency in Chapter 19 panel decisions, which have shown differing degrees of deference to agency decisions.²⁴ Although AD and CVD jurisprudence may have been ineffective in helping the peripheral states constrain their hegemon, the opposite is not necessarily true. Canadian trade agencies have had to become more attentive to American interpretations of the standards they apply in AD or CVD determinations out of a

22 Leon Trakman, *Dispute Settlement under the NAFTA* (New York: Transnational, 1997) at 277.

23 Robert Howse, "Settling Trade Remedy Disputes: When the WTO Forum Is Better Than the NAFTA" (June 1998) C.D. Howe Institute Commentary 111 at 15.

24 Michael Trebilcock & Robert Howse, *The Regulation of International Trade*, 2d ed. (New York: Routledge, 1999) at 83.

concern for what the bi-national panels, which necessarily include American jurists, may later decide on appeal.

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

iii) Chapter 11: Investor-State Disputes

With NAFTA's Chapter 11, Canada constricted the authority of its national courts by accepting the jurisdiction of private international arbitration when American (or Mexican) corporations claim that action (or inaction) by a federal, provincial, or municipal government has an effect "tantamount to expropriation" of their property. (By the same token, of course, Chapter 11 also gives Canadian companies the right to sue US or Mexican governments.) Although barely noticed when NAFTA was debated in the public domain before its ratification, a then obscure dispute mechanism has established a powerful new zone of adjudication to enforce Article 1110's corporate rights. Under these investor-state tribunals, American (or Mexican) corporations with interests in Canada can initiate arbitration proceedings on the grounds of expropriation against a municipal, provincial, or federal policy that harms their interests. These "investor-state" disputes are taken for arbitration before an international panel operating by rules established under the aegis of the World Bank's International Convention on the Settlement of Investment Disputes between States and Nationals of other States, or the United Nations Commission on International Trade Law for settling international disputes between corporations.²⁵ Since these forums operate according to the rules and procedures of international commercial law, Chapter 11 disputes actually transfer the adjudication of disputes over government policies from the realm of public law to commercial law.²⁶

25 Gary Horlick & F. Amanda DeBusk, "Dispute Resolution Under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID" (1993) 27 J. World T. 21 at 52.

26 For example, in the *Metalclad* case, the tribunal ruled that the local municipality had exceeded its constitutional authority—a judgment that hitherto only the judges of the Supreme Court of Mexico had the power to make. Patrick Dunberry, "The NAFTA Investment Dispute Settlement Mechanism: A Review of the Latest Case Law" (March 2001) 2 Journal of World Investment 151.

Written by trade law specialists in closed hearings with virtually no opportunity for public input, Chapter 11 panel decisions have taken a fairly broad view of what is "tantamount to expropriation" and what counts as "property," going well beyond what is considered an impermissible taking in Canadian law and effectively restricting governments' ability to regulate transnational capital in what they see as the public interest. Since Chapter 11 allows American TNCs to take legal action directly without having to wait for their government to initiate arbitration proceedings, these firms gain the ability to short-circuit what may be lengthy diplomatic negotiations when they consider themselves to have been subject to abuse in the neighbouring jurisdiction as well as to avoid having to make their case in domestic tribunals where the pleadings would be more transparent and the rulings subject to appeal before superior courts. The threat of an adverse Chapter 11 ruling is sometimes enough to prompt Canadian governments to repeal offending laws without waiting for a decision (as was the case when the Canadian government rescinded its ban on the suspected neurotoxin, the gasoline additive MMT). The result of the various Chapter 11 cases that have been decided is the public awareness that TNCs from the US or Mexico have greater rights vis-à-vis the Canadian government than do domestic Canadian corporations or citizens.

Chapter 11 arbitrations both shrink the scope of the Canadian judicial system and overlay it with supraconstitutional processes that conflict with many of its historic values.

- *Transparency* is the first victim in this secret world of commercial arbitration: even the existence of a case may be kept secret, and the public may never learn what has happened or why.
- *Neutrality* is the second legal value that falls by the wayside. Since the plaintiff investor has the right to appoint one of the three arbitrators, the defending government already faces a bench that is substantially weighted in favour of corporate rather than public values.
- *Judicial sovereignty* is a third victim of this extraordinary addition to the Canadian legal order. As the corporate plaintiff and the defendant state choose the panel's chair by consensus, it is likely that there will be just one Canadian in tribunals adjudicating suits launched against federal, provincial, or municipal governments' policies.

With its intrusive judicial institutions, this dynamic continental economic regime creates new levels of uncertainty for domestic governments whose elected officials cannot be sure how measures they propose to im-

plement might be judged in some future trade tribunal. Many critics of the new external constitution have talked about a "regulatory chill," particularly in light of NAFTA Chapter 11 rulings on environmental matters that have given complaining businesses the benefit of the doubt and shown little deference to democratically-sanctioned government regulations. This suggests that, when a norm of international corporate law comes into conflict with a Canadian legal standard, the latter is likely to be overridden by the former to the profit of transnational corporate autonomy and with the decline in legitimacy of global economic governance in the public's eyes.

b) The WTO

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

The composition of its panels enhances the WTO's legalistic rigidity.²⁷ Panelists adjudicating WTO disputes are either trade lawyers and professors of international law who tend to stick very close to the black letter of the WTO's texts they are interpreting, or they are middle-level diplomats who take their cues from the Secretariat's legal staff. In either case, they know full well that their judgment will be appealed by the losing side and that the judges on the Appellate Body will be responding to highly refined legal reasoning.²⁸

While WTO Appellate Body rulings are not formally precedent-setting, it is generally recognized that the logic of one panel's decision can be carried over from case to case as the situation dictates. Palmetier and Mavroidis also note that the Appellate Body "operates on a 'collegial' basis. While only three of the seven members sit on any one 'division' to hear a particular appeal, and the division retains full authority to decide the case, views on the issues are shared with the other Appellate Body members before a decision is reached. Consequently, members of the Appellate Body, in confronting prior decisions, are far more likely to be confronting their own legal logic, or that of their close colleagues, than are WTO panellists. This relationship seems likely to lead to a stronger attachment to the reasoning and results of those decisions."²⁹ Under these conditions, "soft" arguments defending cultural autonomy or environmental sustainability hold little weight against the "hard" logic of the WTO's rules.

While the WTO's rules create new supraconstitutional norms for member states to accept, their meaning cannot be anticipated with any certainty. In referring to one contentious concept in trade law, the WTO's Appellate Body memorably compared the notion of "likeness" to "an accordion, which may be stretched wide or squeezed tight as the case requires." This judicial flexibility did not guarantee cultural sensitivity, as Canadians discovered when the WTO ruled that *Sports Illustrated Canada* (though filled with American content) was "like" *Maclean's* magazine (which was written by Canadian journalists for a Canadian readership).³⁰ This judgment meant that several key policy instruments, which had successfully promoted a Canadian magazine industry for several decades, were declared invalid.³¹ The permanent threat of a WTO court challenge of their regulations means that national policy-makers can only be sure that they will never know what this supreme court of commercial law will decide until a trade dispute concerning this policy is heard.³²

As any student of federalism knows, a system containing more than one order of jurisdiction creates conflicts between the cohabiting authori-

27 J.H.H. Weiler, "The Rule of Lawyers and the Ethos of Diplomats' Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) 35 J. World T. 191 at 194.

28 Raj Bhala, "The Myth About *Stare Decisis* and International Trade Law" (1999) 14 Am. U. Int'l L. Rev 845 at 847; David Palmetier & Petros C. Mavroidis, "The WTO Legal System: Sources of Law" (1998) 92 Am. J. Int'l L. 398 at 405.

29 Palmetier & Mavroidis, *ibid.*

30 World Trade Organization, *Canada—Certain Measures Concerning Periodicals: Ruling by the Appellate Body* (Geneva: World Trade Organization, 1997).

31 Daniel Schwanen, "The Summer of Our (Canadian) Content: Thinking About Canada's Response to the WTO Magazine Decision" (29 June 1998) C.D. Howe Institute Backgrounder at 29.

32 Robert Howse & Donald Regan, "The Product/Process Distinction—An Illusory Basis for Disciplining Unilateralism in Trade Policy" (2000) 11 Eur. J. Int'l Law 249 at 268.

ties. Whether the WTO rulings' supraconstitutional superiority over their own constitutional norms will be accepted by Canadian courts remains to be seen. No case has yet been brought to Canada's Supreme Court to test whether a ruling by a global or continental dispute panel takes precedence over a Canadian norm.³³ The introduction of a supraconstitution with judicial muscle suggests that continuing clashes between the external and internal constitutional orders must be expected. If, as further global limits on government are negotiated in the Doha Round, the federal government agrees to let education and health care be brought under the aegis of the GATS, it would affect the provincial constitutional order more than the federal. This action might also be of dubious constitutional validity since it would lead to a change in the norms governing the provinces without the appropriate amendment having been made in Canada's internal constitution.

Conflict can also be anticipated between the global and continental orders. The United States, for instance, challenged Canada's tariffication of its agricultural quotas as a violation of its NAFTA obligations.³⁴ The NAFTA panel ruled that the WTO's tariffication imperative prevailed.³⁵ Other conflicts between the two regimes' norms are bound to occur, complicating their constitutionalizing impact on their members.

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

The judicialization of trade rules has affected international cooperation on regulation in other areas, such as the environment. Before 1990, many governments, including Canada's, considered trade sanctions a legitimate tool for enforcing multilateral environmental agreements and pushed for their inclusion in such agreements. These governments (and many supportive NGOs and business groups) wished to apply the "teeth" of the trade

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

6) Enforcement

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

Like NAFTA, the WTO has no police service capable of implementing its judicial decisions. But unlike NAFTA, the enforcement provisions supporting its dispute settlement rulings are significantly stronger.³⁶ Once the final decision on a trade dispute has been handed down in which a signatory state's laws or regulations have been judged in violation of a WTO norm, the offending provisions are supposed to be changed by the defendant or compensation paid to the plaintiff state. A non-compliant state is

33 A constitutional challenge launched by the Canadian Union of Postal Workers and the Council of Canadians to NAFTA's Chapter 11 investor-state arbitration process is working its way through the Ontario court system and may ultimately land in the Supreme Court of Canada for resolution.

34 Trebilcock & Howse, *Regulation of International Trade*, above note 24 at 267.

35 *In the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (1996), CDA-95-2008-01 (Arbitral Panel).

36 Ostry called the DSU "the strongest dispute settlement mechanism in the history of international law." See Sylvia Ostry, "The Future of the World Trading System: Beyond Doha" in John J. Kirton and Michael J. Trebilcock, eds., *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Aldershot and Burlington, VT: Ashgate, 2004).

much more likely to be brought to “justice” by a litigant state because failure to abide by a WTO dispute ruling gives the winning plaintiff the right to impose retaliatory trade sanctions against the disobedient defendant. This retaliation can block any exports of the guilty state. The amount of the damage inflicted by the retaliation can equal the harm caused to the complainant by the violation. This self-enforcement system works better in the WTO where there is greater symmetry among the major powers, confirming that the global economic regime has a far more substantial supraconstitutionality for its members in its judicial dimension than does the regional NAFTA.³⁷

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

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

F. WHAT TO DO?

That the multilateral institutions of global governance are currently facing a significant set of challenges, or even a crisis, has by now become a relatively uncontroversial point of departure. In many accounts, this crisis of legitimacy centres on the processes of decision making in multilateral institutions, which remain largely state-driven and shielded from direct input from or accountability to citizens and non-governmental organizations. The crisis label also refers to widespread concern about the lack of substantive fairness of the policies adopted by these multilateral institutions, which are seen as contributing to the exacerbation of inequalities in the world economy between the richer countries of the North and the poorer countries of the South. While most agree that a crisis is being faced and even that it involves questions of the multilateral economic institutions' perceived legitimacy and accountability, there is no consensus on how to respond.³⁸

As with domestic constitutional borders, the supraconstitution is not a fixed entity but one that is constantly evolving as new rules are negotiated and judicial decisions are made by international trade and investment dispute settlement. The malleability of the country's external constitution raises a question about whether Canada should attempt to change it as a result of deliberate, proactive intervention. In other words, to the extent that Canada is an agent of globalization, what should be its program of action? The answer to this question depends both on assessing the global constitution's strengths and weaknesses and on defining Canada's national interest. In the view of many, the global order's excessively powerful economic norms and institutions serve the interests of the major powers and their transnational corporations. They may even perpetuate the vicious circles that keep the poor in poverty by denying them the very policy tools, such as the tariffs and industrial subsidies, that big powers used in the nineteenth and twentieth centuries to industrialize their own economies. The corollary weakness of transnational governance is to be found in the other institutions of the global constitution, principally the IOs defending human, labour, and ecological rights.

³⁷ Robert Howse, “The Canadian Generic Medicines Panel—A Dangerous Precedent in Dangerous Times” (July 2000) 3 *Journal of World Intellectual Property* at 493–508.

³⁸ Ruth Buchanan & Andrea Long, “Contested Global Governance: States, the World Trade Organization, and Global Civil Society” (Report prepared for the Law Commission of Canada “Governance Relationships in Transition” Program, December 2002) 1.

Recommendation: Twenty years ago, a similar study to this one could well have recommended that the government of Canada establish a full inventory of the country's international obligations to be used as an essential tool by its own policy-makers, by judges working in the judicial system, and for the general public's enlightenment. Now that NAFTA and the WTO have given international economic agreements supraconstitutional weight, what is even more urgently needed is a constantly updated document that details exactly what comprises Canada's external constitution.

While the implications of many of its norms, rights, rules, and institutions remain unclear, public officials as well as the general public, business people as well as civil society organizations need to have just as authoritative information about their external legal order as they do about the Canada *Constitution Act, 1982*. While most citizens will not know or care about most of their domestic constitution, accurate information becomes critical to them when an issue becomes significant—rights for same-sex couples, for instance. Similarly, vast areas of the country's external obligations are of little interest either to officials or citizens, who need nevertheless to have access to authoritative information when the need arises.

Recommendation: Following this analysis, Canada should strive to rebalance the global constitution in order to bolster weak environmental, labour, and human rights by giving them equivalent weight to its already robust economic rights.

If Canada's external constitution is not to become a source of political illegitimacy in its domestic politics, Ottawa must move both to bring transparency to this largely hidden reality and to join with other like-minded countries in rebalancing the evolving norms and institutions of global governance. While the Departments of Foreign Affairs and International Trade must play the lead role in the latter endeavour, the Department of Justice has the responsibility to deal with the former.