

CANADA’S EXTERNAL CONSTITUTION UNDER GLOBAL TRADE GOVERNANCE

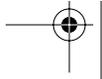
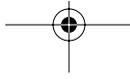
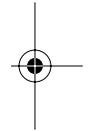
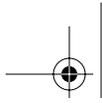
Stephen CLARKSON*

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* Professor of political sciences, University of Toronto.





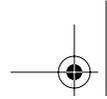


The negotiation of supranational trade regimes may well be considered by historians as one of the most pregnant developments which brought the twentieth century to a highly polarized close. At one extreme, the specialized community of trade experts hailed the treaties that set up global and continental institutions as giant steps forward in establishing the universal rule of economic law with its direct, trade-and investment-expanding impact on the world's economy (Jackson 2000; Trebilcock and Howse 1999; Ostry 1997). Global theorists who welcomed the cosmopolitan possibilities opened up by globalization embraced the new realities with enthusiasm and imagination (Held 1995).

At the other pole, the prime consequence of economic liberalization was seen in its power-constraining effects on the world's nation states. Environmental non-governmental organizations, for instance, took to attacking the World Trade Organization (WTO) or North American Free Trade Agreement (NAFTA) as powerful forces sapping the capacity of national policy regimes to achieve ecological sustainability (Shrybman 2002). In the minds of the identifiable political minority that is overtly hostile to globalization, a deep distrust of global institutions segues to a sense that, as mouthpieces for the United States, they release transnational corporations (TNCs) from democratic control (Klein 2000).

As they come to grips with the vast array of issues raised by globalization, two groupings of social scientists have an established claim for our attention. International relations (IR) scholars address the trade-offs that states make when signing treaties. In return for a necessary loss of formal sovereignty, governments calculate that they extract specific benefits from participating in the new continental or global organizations (Pauly 1997; Gilpin 2000). Major discrepancies between the autonomy lost and the benefits expected may depend on where a particular state is located in the global hierarchy. Hegemonic states may increase the scope of their authority if the rules further their interests. Peripheral states may find their plight worsened if they are deprived of their legislative capacities to extract benefits from foreign capital. These IR interests overlap with those of political economists who study the interactions between states and markets, assessing the extent to which corporations may have increased their autonomy from governments and how this shift of structural capacity may have impinged on the disparities between the very strong and the very weak. (Strange 1988).





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MAPPING SOCIETY THROUGH LAW

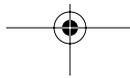
Situated within this general debate, this article takes Canada as exemplary of states in the middle of the power hierarchy that can be called semi-peripheral since they are neither fully dominant nor fully dominated.

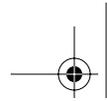
To understand how the special characteristics of semi-peripheral countries such as Canada have been affected by the last generation of intergovernmental economic agreements that transformed the meaning of global governance in the 1990s, we first have to differentiate the old from the new in the international political economy.

“Old” was the way that international relations have always been determined by the power disparities—structural, financial, military, scientific, and ideological—that differentiated those who made the rules by which the rest of the world operates from those who had to follow them. Old also included the world order comprised of hundreds of international organizations (IOs) established by intergovernmental treaty to deal with specific transnational functional problems. Some of these IOs formalized the power ascendancy of the United States in the global distribution of forces, a situation that was particularly true of the major international financial institutions (IFIs) that made up the Bretton Woods system (Moon 2000, 343).

Canada’s semi-peripherality in this second half of the twentieth century could be seen in its ambidextrous behaviour, illustrating the broad border zone it occupied between the very strong and the very weak. In one mode it participated actively in writing the formal rules by which all these IOs were to operate. Here it punched well above its weight thanks to the substantial role it had played in the Anglo-American triangle during and immediately after World War II. Although a small if significant *rule maker* in the creation of a the Bretton Woods system of regulation that supported the emerging regime of capital accumulation that was centred on the autonomous Keynesian welfare, Ottawa was also mainly a major *rule taker*, having subsequently to play by the rules it had participated in fashioning.

With this sketch of the post-World War II order as context, the “new” experienced by Canada during the 1990s can be understood as a transnational *mode of regulation* put in place by governments which were responding to the perceived needs of their economic actors in a regime of capital accumulation that was becoming increasingly global. The basic template for Canada’s position in this new regulatory regime was forged in tough negotiations with Washington in 1987 and came into force on January 1, 1989 as the Canada-United States Free Trade Agreement (CUFTA), a document with a broad constraining impact on the kinds of policies that Cana-





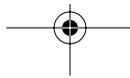
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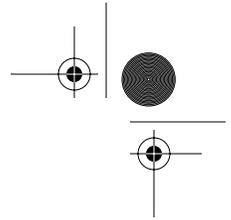
dian governments, provincial as well as federal, could adopt thereafter (Rotstein 1988, 401). Given that TNCs in North America were increasingly taking advantage of Mexico's low labour costs when redeploying the various facilities in their production processes, it was but a small step to expand a bilateral CUFTA into a trilateral NAFTA which came into effect on January 1, 1994 and extended "free trade" as a continental mode of regulation for what was becoming a continental *regime of accumulation*.

NAFTA was just a way-station in a journey with a much broader horizon, because corporations were not simply transnationalizing in North America. Whether involved in producing physical goods or less tangible services, those TNCs, which had developed a global regime of accumulation, had expressed an urgent need for a global mode of regulation. These global corporate players were not intellectually isolated. Their desire for freedom from national regulations was theorized and proselytized by a transnational network of neoclassical trade economists, international trade lawyers, and business-financed think tanks in the major capitalist economies arguing for deregulated national economies within a reregulated global economy to generate greater efficiency and so promote greater global welfare.

A decade of difficult negotiations on an enormous agenda driven primarily by the United States was accepted ultimately by the European Union (EU) and Japan, but was resisted anxiously by major third-world states such as India and Brazil. Just over a year after NAFTA's implementation, the powerful new WTO was in place, its thousands of provisions accepted holus-bolus as a single undertaking, however reluctantly and however uncomprehendingly by central, peripheral and semi-peripheral states alike (Ostry 1997).

For this chapter, I want to explore the governance implications of the WTO and its continental counterpart, NAFTA, for Canada. Helpful though it may be as a first approximation to define a semi-peripheral state as one that is both rule-maker and rule-taker, this dichotomy only serves to identify a broad middle ground between the global or regional hegemons at the top and the peripheral states at the bottom of the global hierarchy. How much Ottawa contributed to making the rules can be established by careful diplomatic historical research. How it responds to the international rule book can be observed in concrete cases. But this is too blunt to produce a nuanced appreciation of how Canada's own political system has altered under global governance.





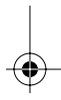
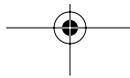
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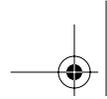
Another approach could be to catalogue the various powers that had been devolved to these international economic regimes. In terms of theoretical *sovereignty* nothing is formally lost, because the relevant treaties always allow a signatory government to abrogate its commitments and so recall its displaced functions. In terms of the actual reduction of a country's *autonomy*, making an inventory of lost capacity would be possible in the abstract but difficult to effect for three reasons. As the power to make and implement decisions, autonomy will vary with the ideology of the decision maker. Where national treatment could constrain social democrats from enacting industrial policies, neoconservatives might feel uninhibited because they have no desire to intervene in the market place to start with. Secondly, non-decisions—the actions not taken by government officials because they feel impeded by exogenous inhibitors—are extremely difficult to detect. Finally, calculating the loss of a country's autonomy can never be completed in a situation where the problem has a supraconstitutional character.

This third conundrum holds out promising analytical advantages, despite its apparent inapplicability. In the main, the political use of “constitution” has been reserved for the rule book prescribing the internal organization of territorial states. It has also been applied to such international organizations as the United Nations. This contribution links these two usages by asking how international regimes restructure their member states' domestic legal orders. Specifically it will explore how NAFTA and the WTO impinge on the Canadian polity. I argue that these continental and global manifestations of economic governance are so substantial that they constitute a *supraconstitution* that has significantly reconstituted the Canadian state by adding external tiers to certain aspects of its legal order. If in this logic Canada remains semi-peripheral, it is because its legal order has neither been totally transformed (as is the case in heavily indebted third world countries on whom the IFIs have imposed radical structural adjustment programs) nor left virtually untouched (as is the case with the U.S.A., because as global hegemon and chief international rule maker, the rules it makes universalize its own domestic norms).

I. CONSTITUTION

Generally understood, an organization's constitution lays out a set of principles that prescribe how it is to function and assigns rights plus obligations to its members. In the case of a state, the norms and rules (whether





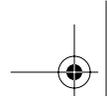
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codified in texts or established by custom) have to be interpreted by courts when clashes occur over their meaning. A constitution in a contemporary liberal democracy generally demonstrates eight principal attributes.

- It expresses the *will* of a would-be community to establish some kind of order for its constituents.
- It may entrench certain *norms* that are inviolate, that is above the reach of any politician to alter. Following a civil or foreign war, the victorious side often tries to lock in rules to defend their interests by embedding them in a constitution.
- It sets up the rules of the political game by establishing decision-making (executive) and law-making (legislative) *institutions* that will have authority over the territory and establishes the government (administrative) structure needed to apply the laws and regulations they create.
- At the same time that it establishes institutions and enables them with powers, a liberal constitution also constrains them by setting *limits* to what they can do in exercising their powers.
- As the corollary to limiting government, a state constitution establishes specific *rights* for its citizens, whether individual or collective.
- Norms, limits, and rights are dead letters unless there is a *judicial function* to interpret the constitution's texts in the light of conflicts over their meaning.
- Legal judgments are in turn dead letters unless the constitution provides mechanisms for the *enforcement* of the courts' judgments and to ensure the observance of all laws and regulations.
- Finally constitutions, which are initially legitimized by some form of *ratification*, need procedures for *amending* or abrogating them in response to systemic changes.

This is not the place to analyze the WTO's and NAFTA's own constitutions, an exercise which would reveal the continental organization to be far weaker and less capable of evolving than its global counterpart. My objective is rather to consider to what extent membership in these global and continental economic regimes adds a supraconstitutional matrix to Canada's domestic constitution.





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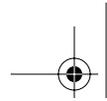
When former colonies or territories joined the Canadian federation they retained sovereignty in some areas that were declared by the constitution to be under provincial jurisdiction but agreed to be governed by certain inviolable principles and accepted specific limits on what they could do in spheres allocated to federal competence. In compensation for this loss of capacity, the new provinces also gained certain rights over the other provincial members of the federation. Similarly, Canada's supraconstitutional participation in NAFTA required it to accept limits but gives its corporations certain rights in the US and Mexico, rights which are supraconstitutional in those jurisdictions. Its membership in the WTO gives its companies in 143 other countries supraconstitutional rights that parallel the limits it accepted for itself. Towards the end of the essay we will consider the value abroad of Canada's supraconstitution. First, however, we need to examine how these continental and global trade regimes act as Canada's new external constitution.

II. SUPRACONSTITUTIONAL NORMS

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

Along with national treatment, the *most favoured nation* (MFN) norm in GATT's Article 1 rules out discriminating among trading partners even for reasons of social or environmental policy. Now that they are part of the WTO's normative structure, this and other basic trade principles are supra-





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constitutional because they are mandatory for its members, unlike international commitments that Canada has made by signing, for instance, the many conventions on labour rights sponsored by the International Labour Organization. As well, the interpretation of the WTO's norms is far more expansive than that of identical norms under the GATT. Even when government measures are formally neutral vis-à-vis nationality, the WTO may strike them down if in practice they bias the competitive conditions in favour of domestic service providers (national treatment) or of particular foreign providers (most favoured nation). (Sinclair 2000)

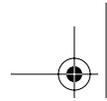
Such normative additions to the Canadian legal order have direct legislative consequences. National treatment for investment spelled the end to a whole generation of industrial development policies centred round the targeting of subsidies to domestic corporations or sectors to improve their competitive performance in order to boost their exports. It also called into question the capacity of the Canadian state to continue to bolster its cultural industries through favoring domestic entities in the private sector. In this way supraconstitutional norms have had direct impacts on the domestic legislative and administrative order.

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

III. LIMITS ON GOVERNMENT POWERS

By the very act of signing CUFTA, NAFTA, and the WTO, Canada undertook to make immediate changes in a wide range of legislation and regulations. CUFTA's investment chapter raised the exemption for a corporation from review of a foreign takeover from \$5 to \$150 million (CUFTA 1988). Canadian implementation legislation made the appropriate amendment to the Investment Canada Act. In the WTO's agreement on agriculture, member states committed themselves to transform such quantitative





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restrictions as import quotas into tariffs, which were then to be reduced. Canada duly proceeded to “tariffy” its protective regulations for farmers in central Canada. The WTO’s and NAFTA’s rules are so comprehensive that, in their implementation legislation, their members had to change hundreds of existing laws.

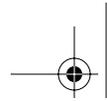
What makes NAFTA supraconstitutional, in the sense in which I am using the concept, is the signatory governments having to change their laws and regulations through the implementation of various clauses in the NAFTA in a context which makes them irreversible. Normally, changes in laws and regulations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

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

Another type of limit whose enforcement is contingent on foreign complaints is the prohibition of governments from imposing requirements on foreign investors, for instance, to make export commitments, to find local sources for their manufacturing needs, to transfer technology to domestic partners, or to guarantee set levels of employment (Chang 1998).

To be precise, these standards do not actually *prevent* governments from imposing performance requirements on foreign investors or subsidizing





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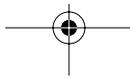
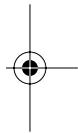
domestic firms. But any federal or provincial government that violates a NAFTA or WTO norm is vulnerable to a partner state initiating a legal action that could result in economic sanctions to restore the damage from which its corporations claim they have suffered.

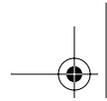
Contingent supraconstitutional norms are only one pressure that the external trade regimes exert over member states' regulatory behaviour. There is also a process of external oversight that keeps the Canadian state's behaviour under transnational scrutiny. The United States Trade Representative's Office keeps federal and provincial policies under regular review, reporting annually to Congress about Canadian compliance with the obligations it assumed in NAFTA and the WTO.

The WTO's Trade Policy Review Mechanism reviews Canada's policies every two years. This surveillance mechanism presses governments to ever greater transparency before the epistemic community of trade liberalizers. At these encounters Canada's trading partners cannot force it to make changes, but they ask about governmental measures that interfere with their investments or trade and so put Canada's governing elite on the defensive if it is caught practicing discrimination.

IV. RIGHTS

The corollary of a limit on government may be a right for the citizenry. Although the EU does create direct rights for citizens in member states—for instance to sue their own governments before the European Court of Justice—the only 'citizens' whose rights in Canada were expanded under NAFTA were corporations based in the US or Mexico. Under the WTO, rights were also created for corporations, not citizens. National treatment and the right of establishment made it easier for firms owned in one country to do business throughout the continent. What makes NAFTA supraconstitutional in this regard is its creation of a judicial process that gives non-Canadian NAFTA corporations the power to overturn the legislative outcomes of national political debates on the desirable regulatory regime to secure the health and safety of the citizenry. A particularly striking example of trade governance creating corporate rights is NAFTA's provision for foreign corporations to take member governments to international commercial arbitration in alleged cases of expropriation (Levin and Martin 1996).





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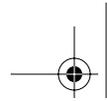
CUFTA's Article 1605 provides that no government may "directly or indirectly expropriate or nationalize", or take "a measure tantamount to expropriation or nationalization" except for a "public purpose," on a "non-discriminatory basis," in accordance with "due process of law and minimum standards of treatment" and on "payment of compensation". NAFTA contained an identical provision. In the face of Canada's constitution, which had been amended in 1982 to incorporate a Charter of Rights and Freedoms that deliberately excluded property rights (on the grounds that they would excessively enhance corporate power), this provision created a property right for foreign corporations that neither the government nor the public had at first understood.

Unlike rights in their internal constitution, this right was not available for Canadian corporations in Canada where it could only be exploited by American and Mexican companies. Also contrasting with a national constitution, the new justiciable empowerment accorded by trade agreements to transnational corporations subjects them to no balancing obligations by continental-level institutions with the clout to regulate, tax, or monitor the newly created continental market that has proceeded to emerge (Blank and Krajewski 1995). NAFTA's Chapter 11 expanded the scope of investment rights without requiring TNCs to promote the public interest by protecting the environment or public health.¹ In other words NAFTA supported a regime of continental accumulation less by creating a new institutional structure for it than by reducing member-states' capacities to control corporations which were given both greater freedom to operate transcontinentally and a means to discipline governments that stood in their way.

Many of the WTO's agreements also contained rights for international corporations but none for citizens. Its agreement on Trade Related Aspects of Intellectual Property Rights required that all member states amend their intellectual property legislation and change their judicial procedures in conformity with the stipulated norms (Kent 1994). The external and constitutional quality of these rights can be seen in their giving transatlantic

¹ Steven SHRYBMAN, *The Impact of International Services and Investment Agreements on Public Policy and Law Concerning Water*, Toronto, University of Toronto, March 1-3, 2002, 7. 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.





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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 firms the full patent benefits that they claimed were now their due (WTO 2000).

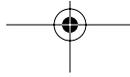
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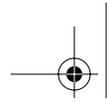
For a foreign government to take a case against Ottawa presumes that global governance includes judicial capacity. This ability on the part of one state to accuse another of violating some supraconstitutional norm varies widely depending on the IO's own constitution. Global *environmental* governance is notably bereft of adjudicatory muscle. The strength of inter-governmental *economic* agreements that establish limits and create rights is due to their 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

1) *General Disputes*

Continental dispute settlement was meant to depoliticize conflicts between the three governments by having their differences resolved by neutral arbitrators applying common rules. In this spirit NAFTA's Chapter 20 provides for binational panels to be struck when the member-states have been unable to resolve their differences related to issues generated by the agreement. Although "Chapter 20" dispute settlement was considered expeditious at first, (Davey 1996, 65) later decisions have proven unable to settle conflicts without resort to power politics (Loungrath and Stehly 2000, 43). For example, when it lost a panel decision to Canada in a wheat case (Canada 1992). Washington responded by threatening to launch an investigation into Canadian wheat exports. Closure was only achieved when U.S. pressure caused the Canadian government to give way by agreeing to limit wheat exports during 1994/95 to 1.5 million tons (Davey 1996, 56).





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If such Chapter 20 rulings are unable to constrain the continental hegemon so that it becomes futile to submit general issues to NAFTA arbitration, continental governance appears judicially unable to deliver for its weaker members the rights for which they “paid” when negotiating the original compact. In this respect the judicial function of NAFTA is faulty as a constitution for North America by failing to have supraconstitutional effect in the US legal order.

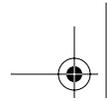
2) *Trade disputes*

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

Generalized to its two peripheral partners in NAFTA’s chapter 19, this putatively binding judicial expedient turned out to be as disappointing as its critics had predicted. When the United States’s CVD against Canadian softwood lumber exports was remanded for incorrectly applying the notion of subsidy as defined in U.S. law, Congress changed its definition of subsidy to suit the Canadian situation. Beyond softwood lumber’s long-lasting evidence (Howse 1998, 15), Canada has not had a satisfactory experience in using Chapter 19 to appeal other American trade determinations. In 1993, for instance, there were multiple remands in 5 cases, which led the panels to surpass their deadlines significantly. Furthermore, problems have arisen over the lack of consistency in Chapter 19 panel decisions, which have shown differing degrees of deference to agency decisions (Trebilcock and Howse 1999, 83).

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





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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 but has some effect on Canadian administrative justice. When these processes don't satisfy Washington, it can still exercise its raw power to achieve its objectives.

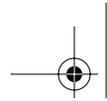
3) Investor-state disputes

Although barely noticed when NAFTA was debated in the public domain before its ratification, an obscure dispute mechanism buried deep in Chapter 11 has established a powerful new zone of adjudication to enforce Article 1110's corporate rights. Under these investor-state tribunals, an American or Mexican corporation with interests in Canada can initiate arbitration proceedings on the grounds of expropriation against a municipal, provincial or federal policy that harms their interests. These "investor-state" disputes are taken for arbitration before an international panel operating by rules established under the aegis of the World Bank's International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) or the United Nations Commission on International Trade Law for settling international disputes between corporations (Horlick and DeBusk 1993, 52). Since these forums operate according to the norms of international commercial law, Chapter 11 disputes actually transfer the adjudication of disputes over government policies from the realm of public law to commercial law (Dunberry 2001).²

Beyond shrinking the scope of the Canadian judicial system, "Chapter 11" arbitrations overlay it with a supraconstitutional process that conflicts with many of its historic values. *Transparency* is the first victim in this secret world of commercial arbitration: even the existence of a case may be kept secret and the public may never learn what has happened or why. *Neutrality* is the second legal value that falls by the wayside. Since the plaintiff investor has the right to appoint one of the three arbitrators, the defending government already faces a bench that is substantially weighted in favour of corporate rather than public values. *Judicial sovereignty* is a third victim of this extraordinary addition to the Canadian legal order. As

² 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.





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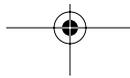
the corporate plaintiff and the defendant state choose the panel's chair by consensus, it is likely that there will be just one Canadian in tribunals adjudicating suits launched against Canadian governments. This suggests that, when a norm of international corporate law comes into conflict with a Canadian legal standard, the latter is likely to be overridden by the former.

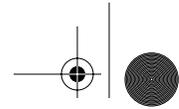
B. The WTO

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 unprecedented importance lies in the power and neutrality of its dispute-settlement mechanisms. Unlike NAFTA's Chapter 19 and 20 panels, WTO panellists are chosen from countries other than those involved in a particular dispute. Their rulings are not based on the contenders' own laws, as they are in NAFTA's AD and CVD cases but on the WTO's international rules. They make their judgements quickly on the basis of the WTO's norms that they interpret in the light of the international public law developed by prior GATT jurisprudence.

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

³ Joseph WEILER, paper, University of Toronto Faculty of Law; and Robert HOWSE, personal communication. It might also be said that while formally speaking, Appellate Body rulings are not precedent setting, it is generally recognized that the logic of one panel's decision can be carried over from case to case as the situation dictates. D. Palmetier, and P.C. Mavroidis, (1998, 405) also note that the Appellate Body "operates on a 'collegial' basis." While only three of the seven members sit on any one "division" to hear a particular appeal, and the division retains full authority to decide





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ing 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 conceptual flexibility did not guarantee cultural sensitivity, as Canadians discovered when the WTO ruled that *Sports Illustrated Canada* was “like” *Maclean’s* magazine (WTO 1997). This ruling meant that several key policy instruments, which had successfully promoted a Canadian magazine industry for several decades, were declared illegal (Schwanen 1998). This broad approach to the adjudication of its rules means that national policy makers can only be sure that they will never know what this supreme court of commercial law will decide until a trade dispute concerning this policy is heard (Howse and Regan 2000, 268).

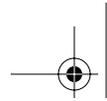
Whether the WTO rulings’ supraconstitutional superiority over their own constitutional norms will be accepted by Canadian courts remains to be seen. As any student of federalism knows, a system containing more than one order of jurisdiction creates conflicts between the cohabiting authorities. No case has yet been brought to Canada’s Supreme Court to test whether a ruling by a global or continental dispute panel necessarily has precedence over a Canadian norm.⁴ The introduction of a supraconstitution with judicial muscle suggests that continuing clashes between the external and internal constitutional orders must be expected.

Conflict can also be anticipated between the global and continental orders. The United States, for instance, challenged in a NAFTA panel Canada’s tariffication of its agricultural quotas as a violation of its NAFTA obligations (Trebilcock and Howse 1999, 267). The panel ruled that the WTO’s tariffication imperative prevailed (Canada 1995). Other conflicts

the case, views on the issues are shared with the other Appellate Body members before a decision is reached. Consequently, members of the Appellate Body, in confronting prior decisions, are far more likely to be confronting their own decisions, or those of their close colleagues, than are WTO panelists. This relationship seems likely to lead to a stronger attachment to the reasoning and results of those decisions.

⁴ WTO decisions generate international governmental rights/obligations but not necessarily for judicial arms of government at the national level. Communication from Howard Mann, trade lawyer, to the author, January 2001.





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between the two regimes's norms are bound to occur, complicating their constitutionalizing impact on their members. The WTO may be superior to NAFTA in many respects, but multilateralism does not necessarily present Canada with a real escape from US-dominated continentalism. Indeed much of the constraint that the WTO has imposed on the Canadian state in the first few years of its existence has been an application of US-driven demands that Canada comply with US-inspired WTO rules on behalf of US-based pharmaceutical and entertainment oligopolists.

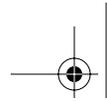
VI. ENFORCEMENT

As with other trade treaties, NAFTA has no enforcement capacity other than the parties' sense of their long-term self-interest. If one member state does not comply with the judgments of disputes that it loses, it cannot expect its partners to do the same. Under the extreme asymmetry prevailing in North America, the hegemon is largely unconstrained by such prudential considerations. The U.S. remains able to flout the trade agreements' rules as interpreted by its judicial processes. Washington has repeatedly done this 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.⁵ Once the final decision on a trade dispute has been handed down in which a signatory state's laws or regulations have been judged in violation of a WTO norm, the offending provisions are supposed to be changed or compensation paid. A non-compliant state is much more likely to be brought to "justice" by a litigant state because failure to abide by a WTO dispute ruling gives the winning plaintiff the right to impose retaliatory trade sanctions against the disobedient defendant. This retaliation can block any exports of the guilty state. The amount of the damage inflicted by the retaliation can equal the harm caused to the complainant by the violation. This self-enforcement system works in the WTO where there is greater symmetry among the major powers. This confirms that the WTO has a far more substantial supraconstitutionality for its members in its judicial dimension than does NAFTA (Howse 2000).

⁵ Indeed, Ostry, S., *Global Integration: Currents and Counter-Currents*, Walter Gordon Lecture, Massey College, University of Toronto, 2001, 6 has called the DSU "the strongest dispute settlement mechanism in the history of international law."





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VII. INSTITUTIONS

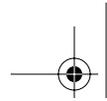
With the major exception of the European Union, whose various institutions' decisions can directly affect the behaviour of individuals and corporations in its member states, global governance acts indirectly through affecting the behaviour of the nation states that have constructed its various organizations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

Beyond inhibiting federal and provincial governments in their policy actions, NAFTA and the WTO may also have altered Canadian federalism's distribution of powers between the two levels of government. By making Ottawa responsible for ensuring the provinces' conformity to its provisions, NAFTA may have restored to the Canadian constitution a federal power of disallowance that had fallen into disuse. In this way it may possibly alter—to a potentially dramatic degree—the country's delicate constitutional balance (Petter 1988, 141-7). For example in the Doha round of WTO negotiations, should the federal government agree to let education and health care be brought under the General Agreement on Trade in Services (GATS) rules, it would be taking a step that affects the provincial constitutional order more than the federal. This action might also be of dubious constitutional validity since it would lead to a change in the norms governing the provinces without the appropriate amendment having been made in the Canadian constitution. Even before further global limits on government are negotiated, provincial government powers are deeply affected by NAFTA and the WTO. For instance, only the federal government may launch a trade dispute and appear in its hearings, even when a provincial grievance or measure is the issue.

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

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





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

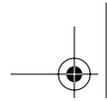
An efficient, publicly funded health system has become a defining characteristic of Canadians' sense of national identity. If the commercialization of publicly provided services is the product of the services provisions in NAFTA and the WTO's GATS, Canadian society may risk losing a prime social institution that has played a major role in defining its identity and so sustaining its cohesion.⁶ Should the impact of continental and global free trade norms cause the accelerated privatization of health care with consequent increases in inequality of treatment between the rich and the poor, a central element of Canadian political culture would be jeopardized.

VIII. WILL

Instead of developing its social and community cohesion, Canada appears to be polarizing into a society of those who can succeed in the globalized system and a society of those left behind. If this perception is linked to the norms and practices of the global economic governance regimes, serious repercussions may be felt in the legitimacy of the country's own representative system (McBride and Shields 1997). If global institutions have 'hollowed out' the Canadian state to the point that it risks being seen as incapable of defending its citizens' interests (Arthurs 2000), the Canadian political system will lose credibility at the same time as neo-conservative globalization loses legitimacy. These fragile issues involving the public's acceptance of and commitment to its institutions leads us to consider the prospects for change generated by the interaction between global and domestic modes of governance.

⁶ Arup (2000, 96) writes that "the main thrust of the GATS is deregulatory: it attacks non-conforming national government measures."





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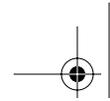
The concept of constitution conveys a connotation of rigidity, if not permanence. NAFTA was acclaimed by its negotiators for having locked in the neoconservative norms and rights which were *ipso facto* immunized from partisan political reversal. In this light, NAFTA and the WTO can be understood as enabling their negotiators to disempower not just present but also future generations who have been disenfranchised preëemptively from pursuing certain legislative goals through the democratic process (Schneiderman 1996).

But constitutional theorists recognize that popular will is the binding agent in such a social contract as a constitution. This implies that, should a constitutional order lose legitimacy, the societal will required to sustain it could collapse. That the will for global governance is at best shaky is suggested by the spectacular demonstrations that have been mounted since 1999 to protest not just the global WTO and the IMF but the hemispheric Organization of American States and the Free Trade Area of the Americas. Canadian civil society organizations, such as the Council of Canadians, have been amongst the most active within the semi-periphery in mounting vocal opposition to manifestations of global or continental governance (Ayes 1998).

Canadian participation in polarizing world opinion about globalization also impinges on the Canadian constitutional order. When protesting at the “wall of shame”, the link-fence barrier erected in Quebec City in April 2001 to keep opposition groups away from delegates to the Summit of the Americas, Canadian citizens and NGOs were not just making the point that global governance was unfairly privileging the interests of business over the interests of labour or the environment. They were also contributing to the aggravation of attitudes within Canada that are delegitimizing the Canadian constitutional order. If Canadian leaders are seen to be complicit in the imposition of reviled supra-constitutional norms on environmental regulation, for instance, the amount of deference accorded them by the public diminishes further. In short, the constitutional fallout from global governance’s democratic deficit may be worsening the democratic deficit from which the domestic legal order suffers.

The new global governance regimes of the 1990s had another effect on the domestic democratic deficit due to their being constructed without their designers fully understanding the consequences of their creations. Certainly their publics had little knowledge of the WTO’s or NAFTA’s contents. As the passing years revealed their implications, civil society discovered that





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there is nothing neutral about rules which reflect the demands of the continental hegemon and transnational capital.

IX. EXERCISING SUPRACONSTITUTIONAL RIGHTS ABROAD

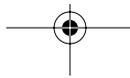
In transnational global governance, these limits on government, rights for corporations, and judicial mechanisms have external as well as internal dimensions. When Sweden joined the EU it accepted an array of limitations on what its government could do. By the same token it joined fourteen other members whose governments were limited by identical constraints and in whose economies the EU gave Swedish corporations and citizens new rights. These limits on other members can be seen as external rights belonging to the citizens of the trade regimes' member states.

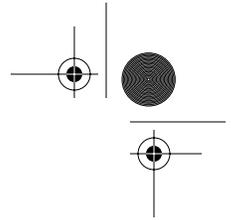
Similarly for Canada, the relationship between domestic and external constitutional orders is not a one-way street in which autonomy is only lost to transnational institutions or markets. A balancing of political power can be seen when its loss of *internal* autonomy is offset by the capacity to exercise power outside the national boundaries. This trade-off was visible when Ottawa participated in the deliberative process at the global level that established the norms, regulations, and disciplines it subsequently imposed on itself.⁷

In principle, participating in a rules-based system should have given the semi-peripheral state the capacity to have the hegemon play by the same book. In practice it is the hegemon that has used the new rules to cause Canada to yield. When Canada, along with the EU prepared to invoke WTO rules to discipline through the Dispute Settlement Body the extra-territorial implementation of the US Helms-Burton law on Canadian and European assets in Cuba, Washington threatened to boycott the proceedings by invoking the higher norm of national security. When the game was going to go against it, the USA refused to play.

The forest company Canfor's use of NAFTA's Chapter 11 dispute process to sue the United States government for actions "tantamount to expropriation" in illegitimately levying countervailing and anti-dumping duties

⁷ Wolfgang Streeck (1996) has suggested a similar hypothesis for the member states of the European.





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against softwood lumber exports remains in doubt. It would seem that Canada's asymmetrical relationship with the continental and global hegemon has been made more disproportionate.

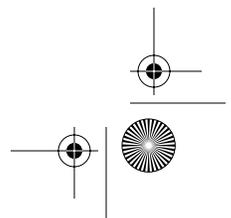
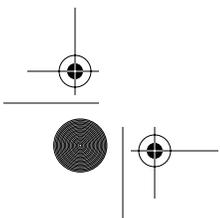
On the other hand, Canada's own unequal relations of dominance vis-à-vis weaker states have been accentuated. However much it has complained about the unfairness of NAFTA's Chapter 11 clauses on investor-state dispute settlement, Ottawa has imposed the same provisions on South Africa. However unsuccessfully Ottawa tried to keep the power to impose performance requirements on foreign investors in Canada, Canadian mining companies are nevertheless profiting in several African countries from just such bans on domestic performance requirements. With other semi-peripheral countries of its own size, Canada's use of the global constitution has produced balanced results. Although Brazil was able to use the WTO to discipline Ottawa's subsidies for Bombardier, Canada was also able to use the same supraconstitutional reality to discipline Brasilia's subsidies for Embraer.

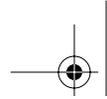
Canada has been quite energetic in proactively using NAFTA's and the WTO's supraconstitutional status in other countries to defend its corporate interests there. It joined the United States in using the WTO's sanitary and phytosanitary measures to prevent the European Union from banning the import of beef raised with the growth hormone commonly used by North American ranchers. It also tried, though without success, to get the WTO to stop France from prohibiting the import of Canadian asbestos for insulation. The WTO appellate body's ruling on the asbestos case leads us to a consideration of how Canada's supraconstitutional framework could change, whether through formal or informal processes.

X. AMENDING THE SUPRACONSTITUTION

Formal changes to the WTO's or NAFTA's own constitutions can only be effected through these regimes' members reaching a consensus about a new rule.⁸ This means that Canada has a veto power to block rule changes to which it objects. It also means in principle that the government of

⁸ Barfield (2001) has recognized this principle as a serious deficiency of the WTO. He argues that it encumbers the legislative function of the organization to the extent that most of the rule-making is done through litigation rather than legislation. He regards this as a serious problem with respect to the democratic nature of the regime.





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Canada's role in making new rules, which could alter its external supra-constitution, would be proportional to its effectiveness in representing its interests in these regimes. Both these regimes have weak legislative capacities.

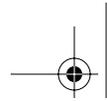
The WTO's principal legislator is its biennial ministerial council meeting which can alter the organization's institutions (Krajewski 2001). It can also mandate negotiating rounds, which can create whole new sets of limits on governments and rights for corporations. The Uruguay Round was dominated by the triad of the US, the EU, and Japan, with Canada playing a booster role in the wings. With the Third World having successfully blocked the launch of the putative Millennium Round at the 1999 ministerial meeting in Seattle, the Doha Round will give the South far greater voice.

NAFTA's legislative capacity is limited to the minor annual or emergency meetings of the North American Free Trade Commission, which is made up of the three countries' trade ministers who are empowered to make whatever changes they deem appropriate. This authority includes the power to make "interpretations" which Chapter 11 investor-state tribunals are bound to accept. This means that NAFTA's own constitution can evolve, though without any direct accountability to the Canadian public. These changes in NAFTA's rules would then affect Canada's external supra-constitution.

Because of the uproar over the Ethyl, S.D.Myers, and Metalclad cases among Canadian environmentalists, the Canadian government has lobbied its NAFTA counterparts since 1998 to amend the investor-state dispute feature of Chapter 11. Mexico was opposed to the change—on the grounds that Mexico's attractiveness to foreign capital lay in offering iron clad guarantees of investor rights—so Canada could not obtain a trilateral consensus to make this change. Finally, on July 31, 2001, the three trade ministers were able to agree on the meaning of "international law" in Article 1105 (declaring that it means international customary law) for use by Chapter 11 arbitrators. The clarification is unlikely to have much effect (Weiler, 194).

Informal change in state constitutional systems can be brought about through a number of channels, chief of which is the adjudication function. Decisions by judges "make" law and in practice amend constitutional meaning through their rulings. In NAFTA, it is Chapter 11 tribunals which have shown the greatest supraconstitutional capacity for making law in





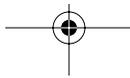
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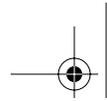
Canada. More accurately, the cases launched by Ethyl and S.D. Myers Corps. resulted in *un*making legislation that had been passed. In the first instance Ottawa settled privately by withdrawing the law forbidding the trade of the alleged neurotoxin MMT when Ethyl initiated an investor-state dispute process. In the second Chapter 11 affair the tribunal ruled that a federal law banning the export of PCBs expropriated the waste disposal company's property (even though its processing plant was in the United States). In affirming the notion that S.D. Myers had suffered action tantamount to expropriation, the tribunal was invalidating a federal law, changing the notion of expropriation previously employed in the Canadian legal order, and imposing a 'chill' on state regulators who now must factor Chapter 11 challenges into their policy recommendations.

The general thrust of dispute settlement under NAFTA and the WTO has been to validate corporate rights and declare illegal conflicting environmental or labour rights norms. This apparent bias of the global trade regime towards neoconservative values helped trigger the protests against globalization that have marked the turn of the century. These denunciations of judicial actions have themselves had some effect on the judicial process. For, as legal theorists can tell us, judges have two audiences in mind when they deliver their judgments. They are making determinations that are scrutinized by their legal peers, but their rulings are also addressed to the general public. And if the public finds them overstepping the normative system to which it is attached, they can be repudiated.

The WTO's asbestos judgment, which allowed the French public's concerns about health to weigh in the balance, may herald an incorporation of civil society's values into the trade adjudication process. Moreover in making its Shrimp/Turtles decision the Appellate Body adopted what Barfield calls a "dynamic interpretation" of Article XX, arguing that it must look at the text in light of "contemporary concerns of the community of nations about the protection and conservation of the environment (Barfield 2001, 92).⁹ The point for our analysis is that neither constitutional nor supraconstitutional elements are fixed in stone. They can evolve through the informal alteration of the trade arbitrators' normative framework.

⁹ See also WTO, *United States Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, para. 129. Geneva: World Trade Organization, 1998.





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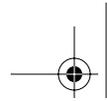
The way the rules are interpreted by economic tribunals is no more critical than the behaviour of states in enforcing or resisting the international judgments. We have seen that the hegemon's behaviour can be decisive. But the system's functioning can also be influenced by the behaviour of mid-sized powers like Canada. Were Ottawa to have declared that considerations of national security prevented it from accepting the WTO's ruling on the question of the split-run edition of *Sports Illustrated*, it could have set limits to the trade regime's capacity to undermine not only its own carefully constructed cultural policy but other countries' domestic priorities.

CONCLUSION

By exploring the dynamic between the Canadian political system and the legal structures of NAFTA and the WTO, we have seen how these two regimes have become external tiers of the Canadian constitution, tying the state's own hands in the name of liberalization. Not only do they entrench a broad set of neoconservative norms. They have the capacity to be developed much further in successive multilateral negotiations, such as the WTO's Doha Round launched in 2001 or the hemispheric talks aimed to create a Free Trade Area of the Americas by 2005. In both forums, the United States is pressing for public services such as health and education to be included in states' commitments under the General Agreement on Trade in Services so that the global market can be broadened by their privatization and the scope of TNC investment expanded accordingly (Sinclair 2001). What is not clear is the Canadian state's capacity to amend its supraconstitution in these processes.

If a sense of fatalism permeates much of current discourse on globalization—to the effect that democratic governments are no longer capable of improving the lives of their citizens or that globalization is irreversible, this is because these remote, invisible organizations are presented as having arrogated to themselves vast powers which they are proceeding to expand in the name of a self-regulating market. But, as Karl Polanyi showed six decades ago, 'laissez-faire was planned' (Polanyi 1957, 141) by dominant governments in the late nineteenth century which took specific legislative steps to create free markets. When this laissez-faire was perceived by national publics to be creating social misery, a "double movement" generated reaction by civil society organizations such as labour unions, which successfully pressed their governments for protection against job insecurity and ultimately achieved the Keynesian welfare state.





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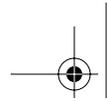
That nation states themselves constructed the globalized market made possible by late-twentieth-century trade regimes suggests that they can also play a role in modifying them. For those who would reverse globalization's tendency to increasing inequalities within and among states, the new forms of global governance must be taken seriously. The civil society organizations working in the labour and environmental movements or militating for human security and civil rights may still become sufficiently powerful forces to create a new double movement that rebalances global economic rules.

We can observe in the interim that the U.S.-led reaction to al-Qaeda's coup of September 11, 2001 against the Pentagon and New York City's World Trade Center confirmed that the state is far from powerless. New domestically monitored limits on financial flows that might support terrorist groups, new controls on immigration, new authority for surveillance of the internet are indications that nation states can recapture their powers. The supraconstitution is neither immutable nor irreversible.

How it mutates will depend on the evolving international struggle of interests, among which Canada's role will continue to be of some interest. In this situation, it remains a classic power caught in the middle. Semi-peripheral in its partly hegemon-owned, partly resource-based, partly manufacturing, and partly service economy, it is also semi-peripheral in remaining suspended somewhere between the powerful centre as rule maker and the weak periphery as rule taker. Its interest in the evolution of a multi-tiered system is clear from its active negotiation stance in all trade organizations including Asia Pacific Economic Cooperation. Whether it will shift from endorsing a continual expansion of neoconservative economic norms cannot yet be known. Neoconservatism may be locked in but it is not cemented in.

The development of a more humane form of globalizing capitalism and the resultant amendment of Canada's external constitution will depend on the action of its global partners and conflicting domestic forces which are also organized transnationally. What I hope I have demonstrated with the Canadian case is that new forms of global governance have become an important new reality not just in international relations but as a supraconstitution in domestic politics. For legal pluralists, this phenomenon raises questions of how to resolved conflicts between the national and transnational legal orders, an issue that Canada's Supreme Court has not yet had to confront. For those more influenced by social science scholarship, Canada's new, formal supraconstitution will always need to be weighed in





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practice against the convention-based understandings that give American governments the capacity to disregard the rules that they have themselves negotiated in order to further their interests. In this sense, the rules-based system so precious to the community of trade-law specialists may turn out to have less clout than the power-based system of Washington's imperial rule.

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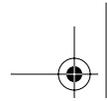


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