

## 1Chapter 9

### **Global Governance and the Semi-Peripheral State: The WTO and NAFTA as Canada's External Constitution**

Stephen Clarkson

A particular conundrum for political economists trying to understand the meaning for semi-peripheral countries of the recent emergence of continental and global economic governance is its impact on these formerly sovereign states' capacity to manage their own affairs. Global governance is a less urgent question for the understanding of dominant states which, having historically imposed their own norms on the rest of the world, have shaped the new multilateral institutions to serve their needs. It does not even present much of a problem for analysing peripheral states for which the current global order is just another iteration of the old story of imperial control. But for those many states in the middle of the globe's hierarchy of power – except for the sui generis European Union, which has transformed stateness for the smaller of its fifteen members – the new multilateral economic institutionalisation presents a radical challenge to the modus operandi they had worked out in the period after World War II, when Keynesian policy activism premised on national autonomy drove the elite consensus throughout the capitalist world.

This chapter develops the argument that the North American Free Trade Agreement (NAFTA) and the World Trade Organisation (WTO), of which Canada became a founding member in 1994 and 1995, are such intrusive manifestations of global governance that they constitute the country's *supraconstitution*. The recognition that an external constitution has

become a standard feature of the territorial state's structure under conditions of advanced globalisation then enables strategies for correcting its deficiencies.

## **Constitutions**

Generally understood, an organisation's constitution lays down principles that prescribe how it is to function and assign rights plus obligations to its members. In the case of a liberal-democratic state, a constitution 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.
- 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 administrative structure needed to apply the laws and regulations they create.
- Having empowered institutions, it also constrains them by setting *limits* to what they can do.
- It establishes specific *rights* for its citizens, whether individual or collective.
- It established a *judicial function* to interpret the constitution's texts in the light of conflicts over their meaning.
- It provides mechanisms for the *enforcement* of courts' judgments and to ensure the observance of all laws and regulations.
- It provides procedures for *amending* or abrogating the constitution in response to systemic changes.

My objective is not to analyse the constitutions of NAFTA and the WTO as organisations in their own right. It is to consider to what extent membership in NAFTA and the WTO adds to Canada's already existing domestic constitution a supraconstitutional matrix understood in terms of these eight categories.

## **Norms**

The WTO and NAFTA entrench such norms as 'national treatment' that is not necessarily incorporated into domestic legislation. 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 favours 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 discrimination.

National treatment for investment brought to an end a whole generation of industrial development policies centred on supporting domestic corporations to improve their competitive performance and boost their exports (Sinclair 2000: 44). It also called into question Canadian governments' capacity to bolster their cultural industries through encouraging domestic entities in the private sector. In this way supraconstitutional norms have direct impacts on the domestic legislative and administrative order.

Another type of limit whose enforcement is contingent on foreign complaints is the prohibition of governments from imposing obligations on foreign corporations as a condition for

granting permission to invest. 'Performance requirements', for instance, can include export commitments, undertakings to find local sources for their manufacturing needs, to transfer technology to domestic partners, or to guarantee set levels of employment (Chang 1998: 232-237). Strictly speaking, these norms do not actually *prevent* governments from extracting undertakings from foreign investors or subsidising domestic firms. But federal or provincial or municipal governments that violate a NAFTA or WTO norm are vulnerable to a partner state initiating a legal action that could result in economic sanctions to restore the damage from which its corporation claims to have suffered.

NAFTA and the WTO's trade principles are thus supraconstitutional because they give legal grounds to foreign corporations to 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 broken the global rules. Ottawa was obliged to mend its ways.

### **Limits on Government**

By the very act of signing the earlier bilateral Canada-United States Free Trade Agreement (CUFTA 1989), NAFTA, and the WTO, Canada undertook to make specific changes in a wide range of legislation and regulations. For instance, CUFTA's investment chapter raised the exemption from review of a foreign takeover of a Canadian firm from \$5 to \$150 million. Canadian implementation legislation accordingly made the appropriate amendment to the

Investment Canada Act. 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 preceded 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, Canada had to change hundreds of existing laws.

These changes to laws and regulations mandated by the WTO and NAFTA were supraconstitutional not just because they had to be made automatically but because they were irreversible. When legislatures amend their statutes they can subsequently amend or revoke their acts in response to changing conditions. But statutory amendments incorporating international trade norms can only be amended if the external regime changes its rules by international agreement. In this respect accepting changes over which Parliament no longer exercises sovereignty has fundamentally altered the legal order. This is the constitutional significance of free trade discourse about NAFTA 'locking in' neo-conservative values, making them immune from partisan politics. In practical terms this means that, even if more activist politicians were to win power, they would find their hands tied by these internationally negotiated but domestically implemented political limits to which their predecessors had committed them (Schneiderman 1996). In this light, NAFTA and the WTO enabled their proponents to disempower not just their present adversaries but also future generations who have been disenfranchised preemptively from pursuing different legislative goals through the democratic process.

### **Rights for Corporations**

The classic corollary of limits on government is rights for the citizenry. Although the European

Union (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 United States (US) or Mexico. Similarly, under the WTO, rights were created for foreign corporations, not for citizens. National treatment, the right of establishment, and intellectual property rights gave firms owned in other countries greater entitlements when doing business outside their home economy.

## **NAFTA**

Article 1110 of NAFTA provides that no government may ‘directly or indirectly expropriate or nationalise’, or take ‘a measure tantamount to expropriation or nationalisation’ 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 Art. 1110). 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 its internal constitutions, this right was not available for Canadian corporations in Canada where it could only be exploited by American and Mexican companies. Also contrasting with national constitutions, the rights accorded by trade agreements to transnational corporations subject 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 Transnational Corporations (TNCs) to promote the public interest by protecting the environment<sup>1</sup> or public health. 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 a means to discipline governments that stood in their way.

### **The WTO**

Many of the WTO's agreements also contained rights for international corporations but none for citizens. TRIPs, the 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 European 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).

## **Adjudication**

For a foreign government to 'take a case to the WTO' against Ottawa presumes that global governance includes judicial capacity. This ability on the part of one state to litigate against another for violating some supraconstitutional norm varies widely depending on each international organisation's own constitution. Despite the many international agreements concerning the ecology, global *environmental* governance is notably bereft of adjudicatory muscle. Similarly, many of the conventions negotiated by the International Labour Organisation have had little effect on their signatory states, for lack of adjudicatory muscle. The strength of the new breed of intergovernmental *economic* agreements that establish limits on national states and create rights for transnational corporations is due to their strong dispute settlement mechanisms.

## **NAFTA**

Whereas the WTO, as we shall shortly see, 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).

## **General Disputes**

Continental dispute settlement was meant to depoliticise 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 (Loungnarath and Stehly 2000: 43). For example, when it lost a panel decision to Canada in a wheat case (CDA-92-1807-01), Washington responded by threatening to launch an investigation into Canadian wheat exports. Closure was only achieved when US pressure caused the Canadian government to give way by agreeing to limit wheat exports during 1994/95 to 1.5 million tons (Davey 1996: 56). If such Chapter 20 rulings are unable to constrain the continental hegemon so that it becomes futile to submit general issues to NAFTA arbitration, continental 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 American legal order.

## **Trade Disputes**

Had NAFTA created a true free trade area, its members would have abandoned their right to impose anti-dumping (AD) or countervailing duties (CVD) on imports coming from their

partners' economies. The United States refused such a real levelling 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 *American* trade law (Trakman 1997: 277).

Generalised 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' CVD against Canadian softwood lumber exports was remanded for incorrectly applying the notion of subsidy as defined in US 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 five cases, which led the panels to surpass their deadlines significantly.

Although AD and CVD jurisprudence may have been ineffective supraconstitutionally in helping the peripheral states constrain their hegemon, the opposite is not necessarily true. Canadian trade agencies have had to become more attentive to American interpretations of the standards they apply in AD or CVD determinations out of a concern for what the binational panels, which necessarily include American jurists, may later decide on appeal. Thus Chapter 19 confirms the experience of Chapter 20, that NAFTA's judicial function is asymmetrical in its impact. On the one hand it does not have supraconstitutional clout over the hegemon's behaviour. On the other it is used to enforce NAFTA rules in the periphery with some effects on Canadian administrative justice.

### **Investor-State Disputes**

Although barely noticed when NAFTA was debated before its ratification, an obscure dispute mechanism buried deep in Chapter 11 has established a powerful new adjudication mechanism 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 arguing 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 or the United Nations' procedures 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 out of the country judicial authority over government policies from the realm of public national law to private international commercial law.<sup>2</sup>

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

## 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 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 judgments quickly on the basis of the WTO's norms that they interpret in the light of the international public law developed by the prior General Agreement on Tariffs and Trade (GATT) jurisprudence.

The sociology of the WTO's dispute panels fosters a rigid legalism in its jurisprudence (Weiler 2001: 194). Panellists adjudicating WTO disputes are either trade lawyers or 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.<sup>3</sup> Under these conditions, 'soft' arguments defending cultural autonomy or environmental sustainability hold little weight against the 'hard' logic of applying the WTO's rules.

While these 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* – the proposed split-run Canadian edition of *Sports Illustrated* produced with the American editorial content but local advertising -- was 'like' *Maclean's Magazine* (WTO 1997). This finding meant that several key policy instruments, which had successfully promoted a Canadian magazine industry for several decades, were declared illegal (Magder 1998). This expansive approach to the adjudication of the global rules means that national policy makers can only be sure that they will never know what Geneva's 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 domestic 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.<sup>4</sup> The introduction of a supraconstitution with judicial muscle suggests that continuing clashes between the external and internal constitutional orders must be expected.

Interconstitutional conflict has already broken out between the global and continental orders, as when the United States challenged in a NAFTA panel Canada's tariffication of its agricultural quotas. The panel ruled that the WTO's tariffication imperative prevailed over Canada's NAFTA obligation not to raise its tariffs (CDA-95-2008-01). Other conflicts between

the two regime's norms are bound to occur, complicating their constitutionalising impact on their members.

The WTO's dispute system may be procedurally superior to NAFTA's, but multilateralism does not necessarily present Canada with an escape from a Washington-dominated continentalism. Indeed a significant part 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 (Moon 2000: 346-7) WTO rules on behalf of US-based entertainment oligopolies. Nor does multilateralism necessarily offer allies to help Canada resist the relentless liberalising pressure of transnational capital. Another part of the WTO's supraconstitutional pressure on Canadian legislation has come from European pharmaceutical giants exploiting TRIPs to support their American counterparts in their demands that Canada abandon the terrain it reserved for generic drug producers and strengthen the monopoly prerogatives of branded drugs.

## **Enforcement**

### **NAFTA**

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 great asymmetry prevailing in North America, the hegemon is less constrained by such prudential considerations. The US remains able to flout NAFTA's rules even when interpreted by its judicial processes, as

was seen when it refused to honour its NAFTA commitment – confirmed by a clear Chapter 20 dispute panel ruling – to open its highways to Mexican truckers.

## **The WTO**

Like NAFTA, the WTO has no police service capable of implementing its judicial decisions. But unlike NAFTA, the enforcement provisions supporting its dispute settlement rulings are significantly stronger.<sup>5</sup> When a final decision on a trade dispute deems a signatory state's laws or regulations 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, although Washington still remains leery about obeying the rulings of the global organisation to which it gave life (Howse 2000).

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 while thumbing its nose at the international community when it felt vital political issues were at stake. When Canada, along with the EU, prepared to invoke WTO rules to discipline through the Dispute Settlement Body the extra-territorial application to Canadian and European assets in Cuba of the US Helms-Burton law,

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.

## **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 by affecting the behaviour of the nation-states that have constructed its various organisations 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 provincial conformity to its provisions, NAFTA may have restored to the Canadian constitution a federal power of disallowance that had fallen into disuse. The fact that only the federal government may launch a trade dispute under NAFTA or the WTO and appear in its hearings, even when a provincial grievance or measure is the issue, shifts further power towards Ottawa from the provincial capitals. NAFTA norms also create abnormalities in 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 in favour of their own, locally-based firms against Canadian investors from other provinces. In these ways global governance

may alter – to a potentially dramatic degree – the country’s delicate constitutional balance (Gold and Leyton-Brown 1998).

In offering to have public education and health care brought under the General Agreement on Trade in Services (GATS) liberalising rules on services in the Doha round of WTO negotiations, the federal government made a step that will affect provincial jurisdiction more than its own. This action is also of dubious constitutional validity since it would change the norms governing the provinces without the appropriate amendment having been made in the Canadian constitution.

## **Will**

Legitimacy among the citizenry is the binding agent sustaining such societal contracts as constitutions. Civil society organisations (CSOs) were not much interested in economic liberalisation when free trade agreements were first being negotiated. Their memberships had little interest in or knowledge of NAFTA or the WTO’s contents. As time revealed their implications, activists have discovered that there was nothing neutral about rules which reflected the demands of the continental hegemon and transnational capital but protected neither labour nor the environment.

That popular support for global governance can no longer be taken for granted was suggested by the spectacular and continuing demonstrations that have been mounted since 1999 to protest not just the global WTO and the IMF, but the hemispheric Organisation of American States and the Free Trade Area of the Americas as well. Canadian CSOs like 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.

Canadian participation in polarising world opinion about globalisation also impinges on the domestic 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 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 strengthening attitudes that are delegitimising the Canadian constitutional order. If Canadian leaders are seen to be complicit in the imposition of reviled supraconstitutional norms that negate environmental regulation, the amount of deference accorded them by the public diminishes further. In short, the constitutional fallout from global governance’s democratic deficit may worsen the democratic deficit from which the domestic legal order suffers.

Declining deference for politicians may be linked to a growing concern for the deterioration of public services. An efficient, publicly funded health system has become a defining characteristic of Canadians’ sense of national identity. If the commercialisation of publicly provided health care is the product of the services provisions in NAFTA and the WTO’s General Agreement on Trade in Services (GATS), Canadian society will lose a prime social institution that has played a major role in defining its identity and so sustaining its cohesion.<sup>6</sup> Should continental and global free trade norms accelerate privatisation of health care with consequent increases in inequality of treatment between the rich and the poor, Canadian political culture would become more fractured.

Instead of developing its social and community cohesion, Canada appears to be bifurcating into a society of those who can succeed in the globalised 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, (Jessop 1997: 561-81) the Canadian political system will lose credibility at the same time as neo-conservative globalisation loses legitimacy. If the public's commitment to the institutions or global governance is fragile, we need to consider the prospects for changing the external constitution.

### **Amending the Supraconstitution**

Although the concept of constitution connotes stability, if not permanence, constitutions that fail to adjust to changing conditions will lose their legitimacy. Typically, constitutional change takes place through formal amendments, through the evolving concepts generated by judicial interpretation, and through the way that principals comply with judicial rulings.

### **Formal Amendment**

Changes to the WTO's or NAFTA's own set of rules can only be affected through these regimes' members reaching a consensus.<sup>7</sup> While this gives Canada a veto to block changes to which it objects, it also means in principle that the government of Canada's role in making new rules would be proportional to its diminishing effectiveness in representing its interests in these regimes, which each have extremely weak legislative capacities.

The WTO's principal decision-making institution is its biennial ministerial council meeting which can emit new rules and alter the organisation's institutions (Kajewski 2001). It can also mandate negotiating rounds, which have so far been designed to produce new bodies of rules that set limits on governments and define rights for corporations. The Uruguay round was dominated by the triad of the US, the EU, and Japan, with Canada playing a supportive but not decisive role in the wings. Anger at the WTO in the Third World and continuing protests from civil society has given peripheral states and CSOs more weight in its Doha round of negotiations.

NAFTA's decision-making capacity is limited to the minor annual or emergency meetings of the North American Free Trade Commission, which has no bureaucratic base and is simply made up of the three countries' trade ministers. These trade-minister summits are empowered to make whatever changes they deem appropriate (NAFTA Chapter 20). 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 – that is, Canada's external supraconstitution – can evolve, though without any direct accountability to the Canadian public.

Because of the uproar among Canadian environmentalists over several ecologically adverse Chapter 11 rulings (described by David Schneiderman in Chapter 12), the Canadian government has lobbied its NAFTA counterparts since 1998 to amend the investor-state dispute process. Mexico opposed the change on the grounds that its attractiveness to foreign capital lay in offering iron-clad guarantees of investor rights. The clarification agreed to on 31 July 2001, by the three trade ministers concerning the meaning of 'international law' in article 1105 for use by Chapter 11 arbitrators is unlikely to have much effect.

No more promising are the North American Commissions for Environmental and Labour Co-operation that were established under NAFTA's aegis. The CLC has been notably

ineffectual in affecting labour standards and cannot be expected to develop a capacity to achieve change. While the CEC has more autonomy, a more substantial institutional structure, and a larger budget, it has failed to moderate the pro-business bias of NAFTA dispute settlement.

### **Informal Amendment**

Change in constitutional systems can be brought about through a number of channels, chief of which is through the adjudication process. Decisions by judges ‘make’ law and on occasion amend constitutional meanings. In NAFTA, it is Chapter 11 tribunals which have shown the greatest supraconstitutional capacity for making law in Canada. More accurately, the cases launched by the Ethyl and S.D. Myers Corporations, which are discussed at greater length in Chapter 12, 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 both invalidating a federal law and amending the notion of expropriation previously employed in the Canadian legal order.

If the general trend of legal interpretation of NAFTA and the WTO rules has been towards strengthening corporate rights and weakening governmental powers, amendment through the judicial process offers a faint hope for a state-friendly rebalancing of global governance. That faint hope lies in the very protests triggered by the trade regime’s bias towards

neo-conservative values. These denunciations of judicial actions may already have had some effect on judicial decision-making.

As legal theorists advise us, judges working within national legal systems have two audiences in mind when they deliver their judgments. On the one hand, they make determinations in terms of the black letter of the law since they know their peers will scrutinise their reasoning. On the other hand, their rulings are also addressed to the general public which is sensitive to the respect for basic societal standards. And if citizens find a judgment has overstepped the bounds of the value system to which they are presently attached, the ruling and the judge who made it can be repudiated. While easily observable within domestic courts, this process of informal dialogue between judging and civil society is less prone to observation internationally.

The WTO's asbestos judgment, which allowed the French public's fear of a carcinogenic product to be taken into consideration, may herald an incorporation of civil society's values into the trade adjudication process. Moreover, in revising the famous Shrimp/Turtles decision in order to legitimate regulations that discriminate against harvesting shrimp with nets that killed sea turtles, 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; WTO 1998: para. 128). 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.

## Compliance

The way the rules are interpreted by economic tribunals is no more critical than the behaviour of states in complying with or resisting the international judgments. As we have seen, 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 – in the face of American dominance of the nation's magazine industry – prevented it from accepting the WTO's ruling on the question of the split-run edition, *Sports Illustrated Canada*, 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.

## Exercising Supraconstitutional Rights Abroad

Transnational global governance limits on government and rights for corporations have external as well as internal effects. 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 member-states 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.<sup>8</sup>

Global governance has given Canada a vehicle for accentuating its own unequal relations of dominance vis-à-vis states in the periphery. However much it has complained about the unfairness of Chapter 11's investor-state dispute settlement, Ottawa has imposed the same provisions on Third World countries. Canada's investment treaty with South Africa requires Canadian transnationals be granted property rights denied South Africans by their state's newly crafted constitution. 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 experience under the global constitution has produced more balanced results. Although Brazil was able to use the WTO to discipline Ottawa's export subsidies for Bombardier, Canada was also able to use the same supraconstitutional framework 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.

## **Conclusion**

Historians remind us that a constitution expresses a system's power structure at the moment of

its writing. This typically happens at independence, when the ex-colonial elite writes new rules for itself, or occurs in the trauma of military defeat, when the victors try to mould the defeated in their own image – as the Americans did to Japan and Germany after World War II. The WTO expressed the balance of forces in which the US, the EU, and Japan could write rules for the world's economy that favoured their transnational corporations and protected their less competitive interests. On a smaller scale NAFTA represented the continental corporate interests in the three states of North America.

Historians can also tell us that the challenge for any constitution is to respond to emerging forces ineffectively represented in the original power relationship – such as the blacks in the US legal order. Unfortunately for the world, the global economic constitution has actually increased the power of its founding fathers, so that those who are disadvantaged – the Third World in general, and the disempowered within the industrial economies – are losing bargaining power. But the fact that global institutions such as the International Monetary Fund and global corporations, as voiced at Davos, are acknowledging the failures of neo-liberal formulae shows that constitutional change is on the global agenda.

In this situation, Canada remains a classic semi-peripheral power-in-the-middle looking up to the powerful centre and down at the weak periphery. Rather than putting its limited diplomatic resources into clinging to its unjustifiable participation in the central powers' G7/G8 summits, the world's interests would be better served by Canada allying itself with other semi-peripheral states in order to remake the rules of the international system.

The precondition of progressive change is reaching a consensus on a viable new globalist paradigm. It then requires mobilising to implement the new vision. As social-democratic values regain global currency, action must be directed to rebalancing the disequilibrium created by the

excessively market-liberating rules of the WTO and its related regional blocs. Environmental, labour, human rights, and cultural governance regimes must gain equal weight to that of economic governance so that the supraconstitution for Canada and other states becomes an instrument not for denying but for achieving human welfare and social justice.

## **Notes**

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’ (Shrybman 2002: 7).

<sup>2</sup> 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 (Dunberry 2001: 1). The Metalclad case is described in Chapter 5, p. 105 and Chapter 12 pp. 295-8

<sup>3</sup> Robert Howse, personal communication. While strictly speaking, Appellate Body rulings are not precedent setting, it is generally recognised that the logic of one panel’s decision can be carried over from case to case as the situation dictates (Bhala 1999: 847). David and Petros C. 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, in considering prior decisions, members of the AB are likely to be confronting their own decisions, or those of their close colleagues. This relationship seems likely to lead to a stronger attachment to the reasoning and results of those decisions (Palmer and Mavroidis 1998: 398, 405).

<sup>4</sup> ‘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.

<sup>5</sup> Indeed, Sylvia Ostry has called the Dispute Settlement Body ‘the strongest dispute settlement mechanism in the history of international law’ (Ostry 2001: 6).

<sup>6</sup> Christopher Arup writes that ‘the main thrust of the GATS is deregulatory: it attacks non-conforming national government measures’(Arup 2000: 96).

<sup>7</sup> Claude E. Barfield has recognised this principle as a serious deficiency of the WTO. He argues that it encumbers the legislative function of the organisation to the extent that most of its rule-making is done through litigation rather than legislation, compromising the regime’s democratic nature (Barfield 2001, ch. 2).

<sup>8</sup> Wolfgang Streeck (1996) has suggested a similar hypothesis for the member-states of the European.

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