

Inroads

North America's Grand Bargain and Canada's Secret Constitution

In 2003, as Canadians were contemplating their future in a North America to which their economy had become irrevocably integrated but in which their participation was held hostage to the U.S. administration's fixation on homeland security, they were being exposed to a vigorous debate. At one extreme were those who find a voice in the Canadian Centre for Policy Alternatives where they favour buttressing national autonomy and argue against any deepening of the continental dependence which had made Canadians' well-being so vulnerable to the border blockade that had briefly paralyzed Canada-U.S. trade following the terrorist coup of Sept. 21, 2001. At the other extreme were those published by the C.D. Howe Institute who promote enhanced continental integration and argue for a Big Idea, a grand bargain with Washington, to erase the remaining vestiges of the economic border between Canada and the U.S.A.

This bold initiative would create what former Canadian ambassador to the United States, Allan Gotlieb, called a "community of law" at a conference organized by the Woodrow Wilson Center in Washington. Inspired by the solidaristic side of the European model but designed for the North American context, this grand scheme, Gotlieb argued, would put in place a common competition law and tribunal (to replace the partners' trade-remedy legislation), a common external tariff (to eliminate rules of origin and the need for customs agents at the Canadian-American border), and a common security perimeter (to alleviate American concern about Canada's anti-terrorism capacities). But in defiance of the structural side of the European model, Gotlieb's community of law would have neither legislature nor executive, neither administration nor court.

The conception of an entity created by the United States and Canada, and possibly Mexico, to transform intergovernmental relations on the continent without having law-making, law-applying, law-enforcing, or law-adjudicating mechanisms was both bold and controversial. Fortunately for North Americans, this proposal does not need to be evaluated in the abstract, since we have a recent and relevant precedent to assess. This is the Canada-United States Free Trade Agreement (CUFTA, which came into force on January 1, 1989) and its trinational successor, the North American Free Trade Agreement (NAFTA, which came into force on January 1, 1994), which included Mexico while tightening the disciplines on the signatory governments' policy autonomy. Within a year the three states of North America had also signed on as founding members of the World Trade Organization (WTO).

A "big idea" in own right, NAFTA embodied a vision of a reconstituted continental economic integration. For its part, the WTO was an even bigger idea because it reconstituted the global economic order with a vast set of wide-ranging and deeply intrusive rules designed both to deregulate national markets and to reregulate them

globally.

My primary argument is that the three supposedly *economic* treaties which Canada has already signed are so *politically* pregnant that they comprise a second, external constitution for Canada.

Reduced to their essence, constitutions provide the rule book for political systems. They start with the political equivalent of the ten commandments, that is supralegislative *norms* that dictate how governments should behave but are beyond the reach of parliaments to alter. Having established rule and decision-making institutions, constitutions set *limits* to these bodies. They sanction certain *rights*. They establish a *judiciary*, which settles disputes over the meaning of these rights.

Seen geopolitically, constitutions incorporate the ideology of those who won the power struggles that created them. Pierre Trudeau's advocacy for a bill of rights articulated a liberal, individualistic vision that finally prevailed over the provincial premiers' conservative and collectivist resistance. Constitutions also express the balance of power between the winners and losers involved in their drafting. Women and Aboriginals were strong enough to get their interests written into Canada's Constitution Act of 1982. René Lévesque and gays were not.

With these characteristics of conventional constitutions in mind, consider how NAFTA and the WTO have become an external, if virtually secret, constitution for Canada.

Norms

NAFTA's counterpart to the first commandment is Thou shalt give *national treatment* to foreign investments. This means that federal, provincial, and municipal governments must give foreign firms the same benefits they give firms owned by Canadians and controlled in Canada. So if the government of British Columbia decides to let private firms of BC doctors offer heart or hip transplants, it is obliged to let any American (or in theory Mexican) medical company offer its services in the province as well.

The WTO adds the *most-favoured-nation* norm to national treatment. This means that, once Victoria allows an American or Mexican firm to offer its services in the health care system, then companies in Europe or Japan can demand similar access to its market. (Some argue that foreign heart or hip transplant companies could lever this provincial measure into access to the whole Canadian market.)

As supralegislative norms contained in the texts of NAFTA and the WTO, neither national treatment nor most-favoured nation is written into federal, provincial, or municipal laws. But if any Canadian government restricts its programs' benefits to domestic firms, it violates these new principles and risks suffering penalties as a result.

Limits on Government

Under the FTA, Canada agreed to forego setting domestic prices for oil and gas below the level of their export price to the U.S.. The ideological load of this provision was expressed when former Alberta premier Peter Lougheed exulted that the West could never be subjected to another National Energy Program of the type it had abominated under the more interventionist Liberals, who had decreed a low national price for oil and gas as a competitive advantage for Canadian industry and consumers. When free trade advocates talk about "locking in" constraints on what governments are allowed to do, they are acknowledging that these limits are constitutionalized and so put beyond the reach of future politicians who might be elected on the strength of having more activist ideas about using the state to achieve social justice or economic growth.

To say international economic rules have constitutional weight is not to suggest they are necessarily perverse. Mulroney failed to persuade Washington to include a subsidy code in either the FTA or NAFTA. In contrast, the WTO does have rules that specify which economic subsidies are acceptable and which are not. In ruling out subsidies that promote a country's exports, the WTO gave Ottawa a weapon with which to pursue Brazil for subsidizing the exports of its Embraer regional jet aircraft at the expense of those made by Bombardier in Quebec. (The same rules enabled Brazil to pursue Canada for the same sin.)

Rights

Like domestic constitutions, trade agreements create rights. But unlike the Charter of Rights and Freedoms, the rights NAFTA sets up are for corporations, not citizens. And they are for American (and in theory Mexican) corporations operating in Canada, not for domestic firms.

Connoisseurs of the Charter will recall Parliament proposed in 1981 not to entrench property rights since owners of property were already well protected by the legal system. NAFTA, however, introduces property rights into Canada's constitutional order, but only for American (and Mexican) investors who as a result enjoy greater legal armaments with which to attack government regulations in Canada than do their domestic competitors.

NAFTA's Chapter 11 gives these firms the power to challenge almost every "measure" taken by federal, provincial, or municipal governments that might 'expropriate' their future earnings. This has proven the most controversial of the external constitution's provisions, because it allows NAFTA firms to overturn the outcomes of domestic political debates on the desirable regulatory regime to secure the health and safety of a city's, a province's or the federation's citizenry. That Canadian corporations enjoy similar rights if they operate transnationally in the U.S. and Mexico shows NAFTA's supralegislative quality in those states but is not of much comfort to those

concerned about their federal, provincial, or municipal governments' integrity.

One of the most powerful parts of the WTO is the agreement on intellectual property rights, many of which were formulated in response to the demands of the world's largest pharmaceutical corporations. In stark contradiction to the idea of free flows of commerce, these rules grant monopoly rights to the holders of drug patents. With branded products protected by the WTO from the competition of the generic pharmaceutical producers, drug costs have escalated, putting Canada's healthcare system under further financial strain.

Judiciary

However good or bad a constitution's principles, limits, and rights may be, they have no practical practical significance unless it also contains a judicial mechanism through which these provisions can be interpreted. Both NAFTA and the WTO provide for arbitration, but of very different quality.

Although most of NAFTA's judicial apparatus is inconsequential, its one constitutionally powerful aspect lies in the novel provisions embedded in Chapter 11. This gives American (and in theory Mexican) corporations the right to sue Canadian governments before international tribunals for measures that "expropriate" their earnings. Since expropriation is defined very broadly as an impairment of a company's income prospects, one such tribunal overruled Canada's ban on the transborder shipment of PCBs for treatment in the United States even though Ottawa was bound by an international environmental agreement not to export hazardous chemicals. Threats by U.S. corporations to sue the federal government under Chapter 11 have already made Ottawa abandon attempts to control cigarette advertising and to eliminate an alleged neurotoxin from gasoline.

Canadians are accustomed to rigorous neutrality, transparency, and accessibility in the judicial system provided under their domestic constitution. But Chapter 11 tribunals are largely secretive, are virtually closed to observation and participation by civil society, and have proven to be heavily biased towards corporate and against government interests..

Implications

What makes the WTO's massive rule book so powerful is its impressive legal process for adjudicating commercial conflicts between member states. Canada, which played some part in designing its strong dispute settlement process, has already been found in violation of WTO norms on several occasions. Most famously, its various policies, which had been painstakingly developed by Conservative and Liberal governments over the decades to support domestic magazines living in the shadow of the overwhelming American magazine industry, were deemed in violation of its WTO obligations. The laws that were perfectly legal according to Canada's old domestic

constitution turned out to be “illegal” according to its new external constitution.

These international economic treaties have shifted Canada’s federal legal order. Under our original constitution, the issue used to be whether it was Ottawa or the provinces that had jurisdiction to develop a particular policy or whether the proposed policy was in conformity with the Charter. Now the question becomes whether *any* government has jurisdiction to legislate in a field where foreign corporations may have an opposing interest.

There is no question that transnational corporations doing business around the world are well served by the WTO and NAFTA, which arm them with general principles and specific rules aimed at reducing nation-states’ capacity to take social, cultural, or environmental measures in the interest of their societies. In this sense the WTO and NAFTA constitutionalized the ideological program of neoconservatism, representing a colossal breakthrough towards creating a global market unrestrained by government.

For both objective and subjective reasons, this situation cannot be expected to last. Objectively speaking, the breakthrough towards economic liberalization has knocked off kilter the previous balance between states and markets that was established after World War II. As corporations and their political representatives block governments from dealing with issues of concern to their publics, unresolved crises will become acute.

The more the public demands action and the more politicians explain that it’s the WTO and/or NAFTA that prevent them from acting, the more visible will become the external constitution -- and the more unpopular. The contested legitimacy of the external constitution was dramatized by the demonstrators who closed down Seattle three years ago last November when the WTO held the meeting that was meant to launch a new, “millennial” round to negotiate still more rules.

A blur of demonstrations that showed environmentalists, trade union leaders, and human rights activists protesting at meetings of the World Bank (Washington, 2000) or the International Monetary Fund (Prague, 2001) or the Economic Summit (Genoa, 2001) or the Organization for American States (Windsor, 2000) or the Summit of the Americas (Quebec, 2001). Some protesters deliberately caused trouble, but most traveled at considerable personal sacrifice as citizens wanting to express their concerns

Unlike the intense but civil tone that marked the public discussion of our constitution’s Charter, the tear gas, pepper spray, arrests, attack dogs, and police brutality at these international meetings clearly conveyed the message that the citizenry was the enemy. Far from promoting a democratic community nourished on deliberation, the chain link fences and the serried ranks of riot police told us that, under neoconservatism, the national leaders, their bureaucrats, and international secretariats have become a global priesthood deciding what is good for the public while refusing to hear its views.

These demonstrators don’t generally agree about very much. They come from the left and come from the right. From church groups and from anarchist cells. They represent labour unions who fear for their jobs and environmental organizations that fear

for the planet earth. But the general theme that unites them is that economic globalization threatens their democratic values. Yet civil society is barely seen or heard in the institutions of global economic governance, which have been designed to exclude national citizens.

Europeans, who are strongly connected to their institutions of continental governance through the various bodies attached to the European Union, nevertheless complain of a "*democratic deficit*." By contrast, Canadians' experience of global economic liberalization is of a *democratic vacuum*.

The legerdemain to which the public was exposed when CUFTA, NAFTA and the WTO were signed was based on their presentation in the language of economics. Who in her right mind would oppose making markets more efficient or object to having more competition in telecommunications -- if that meant lower long distance phone bills? Who could object to "free" trade? NAFTA and the WTO do address economic issues, of course. They determine tariff levels. They lay down new rules governing investment. And they cover much, much more economic ground. But since these rules are for governments to obey, they can't be presented simply as economic issues. They must also be discussed in the language of politics. And there's the rub.

It was a shrewd move on the part of our political leaders to avoid engaging with trade liberalization as a political issue because, as soon as it is seen in terms of its implications for governance, citizens who had agreed that markets should be efficient or that services should be competitive, strongly object to their country's political system being undermined without their knowledge or consent.

Ottawa is involved in concurrent negotiations that are already proceeding at both the global and the hemispheric levels.

- Globally it's the new, Doha round of palavers to expand the WTO's rules even before we can know the full implications of the existing ones.
- Hemispherically it's the effort to create a Free Trade Area of the Americas by the year 2005.

Once again we are being told not to worry: our negotiators only have our best interests at heart. Doubtless they do, though their neoconservative definition of what is good for Canadian society (weaker governments and freer markets) and the public's understanding of what it wants from its government (excellent public health care and schooling) may differ radically.

Once again we seem helpless, as a process whose purpose is to add new rules to our external constitution takes place by stealth. The watchdogs of Canadian sovereignty are dismissed as extremists, though they have been proven correct in most of the alarms they previously raised about the FTA, NAFTA, and the WTO.

Everyone now knows that the globalization that has been practised for twenty years according to the neoconservative handbook has failed to deliver economic progress.

Even the World Bank acknowledges that cutting back the state has created worse problems than those it was supposed to solve. Readers of the mainstream *New York Times* know this from the paper's extended coverage of Latin America's deterioration following its adoption of neocon policies.

Because of such democratically-unfriendly institutions as NAFTA and the WTO, global governance has become skewed, empowering market values at the expense of clashing social, environmental, and cultural priorities. Should the Doha and FTAA negotiations continue in their present direction, they will only make the imbalance worse by further restricting their member states and further liberating transnational corporations from the discipline of state governments.

Which brings us back to Allan Gottlieb's big idea. In negotiating powerful economic rules for a continental "community of law" in the early 1990s, the United States, Canada, and Mexico adopted a grand bargain that was complemented by the weakest possible political to oversee its evolution. The three parties achieved enough of what they wanted that they readily put aside any thought about creating a more robust institutional structure for managing the agreement's implementation and developing its norms. As a result, a trilateral North America has become more economically integrated through the increase of cross-border trade and cross-border production processes while remaining bereft of a capacity to manage its increased interdependence.

The unintended consequence of economic success were such negative effects of increased vulnerability as Mexico's increasing economic and social disparities which impinge on the United States in the form of an inexorable flow of immigrants, legal or illegal. Yet when negotiating their scheme, the three countries deliberately refrained from establishing mechanisms that might be in a position to address the problems that the continent's new rule book might engender. The minimalist institutions – a few misformed dispute settlement mechanisms, an unstable executive, and a network of committees whose mandates far exceeded their capabilities for fulfilling them – have left NAFTA with a chronic disease in which its norms are condemned to atrophy for lack of a continuing supply of political energy.

Rather than resolve them with NAFTA panels, major disputes are taken for resolution to Geneva because of the WTO's more robust judicial processes. New norms are negotiated at the global level in the Doha Round or hemispherically in the Free Trade Area of the Americas rather than in North America where there is no viable forum for deliberation and decision.

This experience suggests that, while a grand bargain can deal with the problems that are presently on the protagonists' agenda – yesterday, trade; today, terrorism – it cannot deal with tomorrow's issue, whatever that may turn out to be. Without institutions that can breathe life into the new community of law, tomorrow's issues will have to be addressed – if they are addressed at all – by yesterday's structures, that is the individual member-states bargaining with each other on an ad hoc, incremental, and power-based

basis, using the same mainly bilateral channels through which they managed their affairs before the first Big Idea was turned into rules a decade and a half ago.

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