

**The Toronto branch of the Canadian Institute of International Affairs,
the University of Toronto Press, and
The Toronto branch of the Canada-U.S. Fulbright Alumni Association**

Stephen Clarkson

Uncle Sam and Us: Canada's Secret Constitution

October 1, 2002

“He fools me once, shame on him. He fools me twice, shame on me.”

This pearl of Ontario folk wisdom relayed by my mother-in-law to my daughters has been on my mind recently as I've reflected on how Canadians have collectively been fooled about trade liberalization not once, not twice, but three times and counting.

Actually, the majority of Canadians weren't fooled by Brian Mulroney and his allies into accepting the original “free trade” agreement with the United States in 1988. In the federal election that year 57 per cent of the electorate voted for the two parties opposing the FTA. But they were cheated by the electoral system which translated 43 per cent of the vote into a big majority of the seats in Parliament for the Conservatives who proceeded to sign the highly contested deal.

The second time the public was taken for a free-trade ride involved another kind of chicanery. This was in the federal election in 1993 when the issue was the FTA being strengthened and expanded to include Mexico in a North American Free Trade Agreement. Having said he was so opposed to NAFTA that he would renegotiate it if elected, Mr. Chrétien proceeded to sign the text on January 1, 1994 soon after he became prime minister and had arranged a face-saving exchange of letters with the then President Bill Clinton.

A year later Canadians were sold a bill of goods about economic “liberalization” for a third time. Canada joined over a hundred other countries as a founding member of the World Trade Organization, a powerful international institution that was intended to transform the rules of the game for global commerce and investment.

The legerdemain to which the public was exposed when these three landmark treaties 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, as I explain in *Uncle Sam and Us*. 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.

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. My secondary position is that, while having an external constitution is an unavoidable, and, if fairly constructed, even desirable, feature of globalization, this particular, economics-based constitution is badly flawed and in urgent need of major correction. We should beware of being fooled again.

With all the imagery around national constitutions -- their founding fathers in sepia photographs, their baroque language, the near-religious awe with which commentators refer to them -- the notion that trade agreements could be a constitution may strike you as odd, so let's return to more familiar ground.

Do you remember the big constitutional debate that preoccupied phone-in shows across the country in 1980 and 1981 about who should be protected in the bill of rights that Pierre Trudeau was championing? Members of Parliament and Senators sat long hours on a joint parliamentary committee that heard submissions from hundreds of groups and citizens arguing their own cause.

Do you remember Doris Anderson, that doughty crusader for women's rights, taking on Lloyd Axworthy, then Trudeau's cabinet minister responsible for the status of women, in the wintry days of 1981? Their exchange provoked a conference of dedicated feminists who ultimately convinced the Liberals to enhance their position in what became the Charter of Rights and Freedoms. Other protesting groups such as the handicapped
Clarkson: *Constitution*

were also given satisfaction.

Do you remember Bora Laskin, the courtly, white-haired chief justice? Trudeau had asked the Supreme Court to rule on the constitutionality of his attempt to get Prime Minister Margaret Thatcher in London to amend the British North America Act so that Canada would finally – after 114 years – be free of British control and assume legal sovereignty over its own political rule book.

And do you recollect how Laskin and his colleagues contrived such a Solomonic judgment -- the Liberal prime minister's unilateral initiative was valid according to the black letter of the British North America Act but his defiance of provincial opposition to a measure that would affect the province's powers violated a convention of consent -- that Trudeau was forced to engage in one last round of negotiations with the recalcitrant provincial premiers in order to achieve sufficient agreement among them to pass the Court's test of consensus?

What about René Lévesque? Do you recall his bitter anger at his fellow premiers for giving up their opposition to Trudeau's project and making him the victim of what he saw as a power ploy against Quebec?

And Queen Elizabeth: who can forget the image of her signing in one of her unmatched frumpy hats, the new Constitution Act in April 1982 on Parliament Hill as thousands shivered in the rain to witness this historic moment of patriation?

If you *don't* remember these events, because such memories belong to your parents' generation, you're more likely to recall Canada's last round of constitutional politics because it happened only ten years ago this autumn. Intensive debate had begun in 1991 when the Mulroney government suggested giving Ottawa greater power over the economic union (at the expense of the provinces) and restricting the Bank of Canada's role to controlling price increases (at the expense of promoting full employment). Orchestrated by Joe Clark, nationally televised consultations in every region of the country engaged not just the usual cast of premiers but selected citizens who rapidly nixed Mulroney's aspirations to entrench his neoconservative economic ideas.

What's more, constitutional politics had become more inclusive. Aboriginals were invited to the final negotiating table in Charlottetown at the insistence of Ontario's premier Bob Rae. And by the late summer of 1992 it had become politically unthinkable not to hold a referendum in each province to validate the Charlottetown Accord, which almost every political leader endorsed, including the Liberal premier of Quebec, Robert Bourassa.

Clarkson: *Constitution*

Once again the radio phone-in shows buzzed with impassioned conversations over arcane phrases like “distinct society” and whether “Charlottetown” would be good or bad for the West, good or bad for national unity. At the end of the campaign in which the country’s political, economic, and media elites argued near unanimously for the Yes (with the notable exception of Preston Manning, then leading a fledgling Reform Party), the public voted No. The referendum was lost, and the Canadian constitution remained unamended from its 1982 format.

Even if you aren’t in a position to remember Charlottetown, I hope you can at least agree that constitutional politics is serious business because it’s about issues that determine the framework and the rules within which governments operate.

- Constitutions contain the political equivalent of the ten commandments, that is norms or principles that dictate how governments should behave. Even if they weren’t handed to us on stone tablets, a constitution's norms cannot be easily changed. Suprapolitical, they are beyond the reach of parliaments to alter.
- Having established rule and decision-making institutions, constitutions set limits to the powers of the governments they create.
- They sanction the superior status of certain *rights* and so redistribute power to those who acquire them. We saw this in Canada when women and Aboriginals found that the Charter had indeed strengthened their situation.
- They establish courts which are called upon to settle disputes over the meaning of these rights. In writing their rulings, judges may actually create new rights, as happened when the Supreme Court read into the Charter a right not to be discriminated against for one’s sexual orientation.

Constitutions have three other characteristics which we should look out for.

- To be considered legitimate, constitutions generally need to be ratified. If they lose their legitimacy, citizens may start to question why they should be obeyed.
 - A constitution incorporates the ideology of those who won the power struggles that created it. 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
- Clarkson: *Constitution*

interests written into the constitution. René Lévesque and gays were not.

With these characteristics of conventional internal constitutions in mind, let's take a look at how NAFTA and the WTO -- with very few people realizing it -- have become an external, if virtually secret, constitution for Canada

Norms and Principles of the Secret Constitution

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 .

Because of Canada's historically high level of foreign ownership, Ottawa had stoutly resisted international pressure to give national treatment to investment until the FTA came along. It wanted to continue developing industrial strategies to help domestic entrepreneurs overcome the inherent disadvantages they suffered by operating in a small, open economy.

As a suprapolitical norm contained in the texts of the WTO and NAFTA, national treatment isn't written into Canadian laws. But if any Canadian government restricts its programs' benefits to domestic firms, it violates this new external constitution and may suffer penalties as a result.

The WTO adds the *most-favoured-nation* norm to national treatment. This means that, if Alberta allows an American firm to offer its services in the health care system, then companies in Europe or Japan can demand similar access to the whole Canadian market.

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. What Alberta's petroleum exporters won, Ontario's manufacturers lost.

NAFTA is a thousand pages long because it is full of many specific limits which
Clarkson: *Constitution*

the Canadian government accepted. What also makes these limits constitutional is their irreversibility. By signing one of these treaties, the signatory governments are obligated to implement their provisions in their statutes, which cannot be rescinded without breaking the treaty. 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, 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. That Canadian corporations enjoy similar rights in the U.S. and Mexico 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, Clarkson: *Constitution*

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.

Courts

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

A constitutionally explosive aspect of NAFTA lies in the novel provision in its Chapter 11 that gives American (and in theory Mexican) corporations the right to sue Canadian governments before international tribunals for measures that "expropriate" their earnings. One such tribunal overruled Canada's ban on the export of PCBs 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 have proven to be heavily biased towards corporate and against government interests, are largely secretive, and are virtually closed to observation and participation by civil society.

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.

Clarkson: *Constitution*

These international economic treaties have transformed the Canadian 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 cumulatively more pressing.

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 this November when the WTO held the meeting that was meant to launch a new, "millennial" round to negotiate still more rules.

You will recall 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
Clarkson: *Constitution*

clearly conveyed the message at these international meetings 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. Unlike Doris Anderson and her allies in 1981, 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*.

Which brings me back to my mother-in-law's maxim.

If many were fooled about the political side of the FTA in 1988, this was in part because the Prime Minister's Office had a strategy (revealed in a leaked PMO document) of minimizing the information it provided about the agreement – on the perceptive grounds that the more the public knew of the deal, the less it would like it.

If we were fooled about NAFTA this had something to do with an information deficit. NAFTA was presented as simply an extension to Mexico of the great gains that Ottawa had supposedly won with the FTA. Apart from that, we weren't to worry our pretty little heads. It seems that even our negotiators didn't worry as much as they should have. It's clear now that they had not understood the retrograde significance of Chapter 11's investor-state dispute process on which they signed off.

The World Trade Organization's information deficit was far worse. Its many agreements with their 22,500 pages of text were negotiated in secret on Mulroney's watch and gladly signed by the Chrétien government, which could not possibly have known what its effects would be. In these circumstances, ordinary Canadians could be forgiven for being fooled about its political significance.

Clarkson: *Constitution*

Now we're in the process of being misled for a fourth and fifth time, though now the fooling is happening simultaneously. 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.

But this time the rest of us can't claim ignorance as an excuse. 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 institutions as the WTO and NAFTA, 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.

If we let this happen, shame on us.

Stephen Clarkson teaches political economy at the University of Toronto. On October 1, Clarkson: Constitution

at Hart House in the University of Toronto, he will present this argument, which is based on the analysis in his book, Uncle Sam and Us: Globalization, Neoconservatism, and the Canadian State, published by the University of Toronto Press.