Canada's Secret Constitution: NAFTA, WTO and the End of Sovereignty?

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When a country signs a treaty it partly *internationalizes* the state's legal order to the extent that domestic laws are har monized with the norms embodied in the accord. Before the advent of the new global trade order, even hundreds of international organizations (IOs) did not constitute a significant constitutional challenge to the conventional nation state, whose legal sovereignty was barely compromised. If a state strongly disagreed with an IO's mandate, it could abrogate its commitment — as the United States and Britain did by withdrawing from UNESCO because they considered that its policies responded too much to Third World concerns. Nor was a government bound to comply with a ruling by an international body that it considered adverse to its interests or incompatible with its culture. Canada has occasionally been willing to flout international law that challenges a constitutional norm,[1] but generally it has self-consciously played a model role: when it has been shown to be in violation of a multilateral convention that it has signed, it has mended its ways.

In sharp contrast with most international organizations, the WTO creates a new mode of economic regulation with such broad scope and such unusual judicial authority that it has transformed not just the nature of global governance, but the political order of each of the 144 states that had become members by 2002. For Canada, the WTO's economic rules are complemented by NAFTA's parallel set of provisions. Since many of the chapters in my new book, *Uncle Sam and Us: Globalization, Neoconservatism, and the Canadian State* look at the specific impact of these regimes' individual rules, I offer in this text the minimum amount of detail necessary to explain the constitutional significance of the five major elements of NAFTA and the WTO – norms or principles, limits on government, rights, adjudication procedures, and enforcement mechanisms.

Norms or Principles

Constitutions typically entrench certain inviolate principles or norms that are above the reach of any politician to alter, and both NAFTA and the WTO have done this.

NAFTA

NAFTA established several government-inhibiting principles to be applied to all policies, regulations, and actions of member states. In agreeing that CUFTA should enshrine the principle of *'national treatment (put in italics, as is most favoured nation in following secion),'* Canada was not simply reiterating a commitment that it had made in 1948. In GATT, national treatment stipulated that member states treat *goods* that had entered their economy from abroad in the same way as they treated domestically-produced items. In other words, they agreed not to discriminate against foreign-made products once they had cleared border barriers such as tariffs.

CUFTA was a pioneering document in this regard, since for the first time a trade agreement brought the vast, but uncharted territory of business *services* under norms that had so far applied only to goods. Under economic liberalization, 'national treatment' would henceforth apply not just to physical objects but to services such as banking operations and insurance contracts, legal and architectural work, education and health care.

A further innovation was to apply trade rules to *investments* as well as to goods. This means that signatories commit themselves to treating foreign investors the same way as they treat domestic entrepreneurs – a concession that Canada had long resisted because of its economy's high proportion of foreign direct investment. The federal government had not wanted to abandon economic development policies that tried to promote domestically owned firms as national champions and discriminated against foreign capital. National treatment for foreign investors required amputation of that limb of government dedicated to supporting domestic enterprise.

In the event, the acceptance by Brian Mulroney's government of national treatment constituted the loss of a power that for ideological reasons it did not want to keep. By committing itself to offering American and Mexican companies the same incentives that it might give domestic firms to boost their prospects, it engaged itself, the provincial governments, and their successors in perpetuity to desist from the kinds of

industrial strategies that had formed the core of much of federal and provincial policy activity for twenty years. It touted national treatment as the way to prevent any repetition of Pierre Trudeau's use of post-Keynesian, interventionist approaches to generate economic growth of the type that had culminated with the (in)famous National Energy Program of 1980. If CUFTA or NAFTA tied the government's hands, this was a plus for the Conservative prime minister, not a minus — a clear illustration of how international agreements can be used to constitutionalize a domestic ideological position. The aim was to let market forces do their economic job free of political control and prevent future politicians of a different persuasion from messing things up ever again.

The right of establishment was a second supraconstitutional principle that was pregnant with potential effects because it guaranteed foreign corporations' ability to do business in the economy and so qualify for national treatment.

These norms are supraconstitutional because they control government behaviour even though they are not part of the domestic constitution. They may not necessarily have been implemented in specific legislative changes, but they remain as prescriptions to which NAFTA partners may appeal if they feel that Canada is not fulfilling its obligations.

WTO

GATT's normative apparatus was often thought to have no more significance for its member-states' political orders than any of the other high-sounding declarations that constitute the conventions of international treaty law. GATT's trade principles were reformulations of conventions that had gradually emerged in the course of several centuries of international commerce. States actually paid considerable heed to these principles, because they had learned that, in the long run, they profited from practising them and being seen to do so. Otherwise their competitors could have good reason to cheat.

Along with national treatment, the *'most favoured nation'* (MFN) norm in GATT's Article 1 rules out discriminating among trading partners even for reasons of social or environmental policy. Now that they are part of the WTO's normative structure, this and other basic trade principles are supraconstitutional because they are mandatory for its members, unlike international commitments that Canada has made by signing, for instance, the many conventions on labour rights sponsored by the International Labour Organization. As well, the interpretation of

the WTO's norms is far more expansive than that of identical norms under the GATT. Even when government measures are formally neutral vis-a(grave accent on the a)-vis nationality, the WTO may strike them down if in practice they bias the competitive conditions in favour of domestic service providers (national treatment) or of particular foreign providers (most favoured nation).[2]

We can see the intrusiveness of the WTO's rules most easily by looking at how rulings on disputes over services have been brought within the scope of global economic governance. In the case that Japan and the EU brought against the Auto Pact, the panel ruled that allowing domestically produced services to count in meeting Canada's minimum value-added standard for a car to qualify for duty remission constituted de facto discrimination against foreign service providers and so a violation of national treatment for 'like' services.[3] Canadian trade negotiators had included the wholesale market for motor vehicles in the commitments that they had made in signing the General Agreement on Trade in Services (GATS) and had erroneously thought that NAFTA's exemption from GATT rules as a free trade area protected the Auto Pact from the application of GATS.[4] A citizen can hardly be expected to comprehend such complexities, whose implications the Canadian government's own legal experts had misunderstood.

The existence of these supraconstitutional norms in NAFTA and the WTO is only one pressure that the external trade regimes exert over states' regulatory behaviour. There is also a process of external oversight that applies transnational scrutiny to the Canadian state's behaviour. The United States Trade Representative's Office keeps federal and provincial policies under regular review, reporting annually to Congress about Canadian compliance with its obligations in NAFTA. The WTO's Trade Policy Review Mechanism reviews Canada's compliance with these norms every two years. At these reviews trading partners cannot force changes, but they ask about governmental measures that interfere with their investments or trade and so put Canada's governing elite on the defensive if it is found dilatory in restraining its protectionism.

With its broader membership, its more symmetrical balance of power among the major regions, its more inclusive provisions, and its more legitimate institutions, the WTO has compounded the impact of CUFTA and NAFTA on Canada's political order by producing a more generalized set of norms that will apply more authoritatively to its members, including the United States.

Limits to Government Policy

Beyond the general norms that it establishes, a constitution also sets limits to what governments can do in specific policy domains. By signing CUFTA, NAFTA, and the WTO, Canada undertook to make immediate changes in a wide range of legislation and regulations. CUFTA's investment chapter raised the size of a corporation whose foreign takeover would be subject to review from $5 to $150 million. Canadian implementation legislation accordingly made the appropriate amendment to the Investment Canada Act. Because WTO and NAFTA rules are so comprehensive, the central and provincial governments had to change myriad existing laws.

NAFTA

Tariff reductions or the prohibition of import and export controls are straightforward examples of the kind of supraconstitutional limits on government that any trade treaty imposes. Reducing tariffs on agricultural products showed how the three NAFTA partners attempted to negotiate declining levels of defensive measures against each others' exports. Canada conceded zero tariffs in the foodstuffs that it produced most efficiently and retained the longest transition period for those that were most vulnerable to being overwhelmed by cheaper California, Florida, or Mexican produce.[5]

Detailed rules of origin were also required to distinguish products that qualified for the lower border tariffs from those that had insufficient North American content. Two American industries with great political clout in the negotiations not only improved their position vis-à-vis their continental rivals but gained greater protection against extra-continental competition. American clothing manufacturers protected themselves against Canadian imports of suits by an import quota on the number of suits made from foreign cloth. They also achieved a further plum by a rule specifying that textiles had to be woven from North American yarns to qualify for intra-continental tariff exemption. These provisions set limits on the Mexican and Canadian governments' ability to promote their own textile sectors.

Trade liberalization theory promotes lowering border barriers to let the market operate in the most efficient way to provide the cheapest goods to the consumer. In stark contradiction to this principle, a basic component of trade law aims at preventing the free flow of knowledge

in the public domain. NAFTA and the WTO now constrain government efforts to make drug patents available for general manufacture, giving corporations monopoly rights over their 'intellectual property' so that they can profit from commodifying their knowledge. For instance, NAFTA's chapter on intellectual property forbids renting computer software in order to duplicate it. The Canadian Copyright Act was accordingly changed by section 55 (2) of the NAFTA Implementation Act.[6]

Whereas NAFTA's intellectual property rights guarantee corporations the right to exploit their knowledge, the treaty enjoins Canadian governments from benefiting from their natural endowment in cheap fuels. Its energy chapter forbids federal or provincial governments from pricing energy consumed by Canadian citizens or industries below its export price. Even in an energy supply crisis, Canada must share with the United States the same proportion of its energy production as it has done for the preceding three years. (Although Mexico is geopolitically weaker than Canada, it was less compliant on energy issues than Canada. It refused to accept this restriction in the exploitation of its prime natural resource.)

Canada had already given up under CUFTA most of the powers to regulate foreign investments that it had created under the Foreign Investment Review Agency (later renamed by the Mulroney government the Investment Canada Act).[7] Indirect takeovers — when another foreign company bought a Canadian subsidiary of a foreign company — were to be entirely exempted from review.

Government procurement contracts issued by federal departments and federally controlled state enterprises valued above U.S. $50,000 and construction contracts over U.S. $6.5 million could no longer be reserved for national bidders but had to be opened to bids from NAFTA companies. While this reduced the protection provided Canadian companies at home, it also opened up possibilities for Canadian transnational corporations (TNCs) such as Bombardier to bid for projects such as the Mexico City metro or public works projects in U.S. states that were previously out of bounds because of 'Buy America' laws.

Entrenching neoconservatism at home by accepting Washington's desire to constrain Canadian governments' interventionist potential was only a secondary objective for Ottawa. Its main negotiating aim was to put limits on the harassment costs that the American government could impose on Canadian exporters by unilateral protectionist actions. Ottawa wanted exemption for Canada from American trade remedy sanctions. First, it wanted Washington to renounce anti-dumping actions as

inappropriate within the free trade area. Second, a comprehensive subsidy code would defang U.S. countervail measures. Such a code would specify what kind of Canadian subsidies were unacceptable to the Americans (and so legitimate targets for countervailing duties), as opposed to what ones were acceptable. Canada completely failed in this objective in both agreements, which imposed negligible limits on U.S. trade law. Indeed, CUFTA acknowledged, in a standard clause that U.S. negotiators insert in commercial documents, Congress's constitutional right to pass new trade measures that could supersede the trade agreement. In supraconstitutionally constraining the peripheral states without equally constraining the continental hegemon, NAFTA made the two existing bilateral relationships more asymmetrical than they had been before.

These changes to laws and regulations mandated by the WTO and NAFTA were supraconstitutional less because they had to be made automatically than because they were irreversible. Unlike the normal amendments to statutes made by sovereign legislatures, which can further amend or revoke their acts in response to changing domestic considerations, statutory amendments incorporating international trade norms can be validly amended only if the external regime changes its rules by international agreement. In this respect not only has the political order been changed by the amendments, but the legal order has been altered by Parliament's accepting legal and regulatory changes over which it loses sovereignty. This is what defenders of free trade meant when they described NAFTA as 'locking in' the neoconservatism currently practised in Ottawa. Even if more activist political parties were to win power, they would find their hands tied by these externally defined but domestically implemented limits to which their predecessors had committed them.

WTO

Below its normative system, the WTO includes many specialized agreements, all intended to limit governments' capacity to restrain trade or to interfere with the investment decisions of transnational or domestic capital.

Some of these interdictions impede states that are dependent on exporting primary resources from taking measures to increase the local processing of raw materials. Preventing the sale abroad, say, of raw logs can be a policy tool for promoting the industrial development of a hinterland economy or for supporting community development in indigenous communities. Such *export controls*, which have been a basic tool of industrial development for staples-exporting economics, are banned

as a quantitative restriction. While NAFTA and the WTO contain some exceptions allowing governments to pass laws in the public interest, states appealing to these provisions to justify trade-restricting environmental actions have typically found the exceptions to be interpreted very narrowly by GATT dispute tribunals.

Technical barriers to trade (TBT) embrace environmental, health, food safety, and other regulatory standards. Measures in these fields must restrict trade as little as possible. Measures commonly used to manage industrial processes on behalf of the public's need for such public goods as a sustainable environment and healthy food are now subject to review if deemed to improperly restrict trade.

The foodstuff sector was brought within GATT's disciplines by two sets of rules. The WTO's Agreement on Agriculture expanded GATT's scope to include agricultural policy. Members committed themselves to transforming such quantitative restrictions as import quotas into tariffs, which they were then to reduce. Canada duly proceeded to 'tariffy' its protective regulations for farmers in central Canada. The WTO's Agreement on Sanitary and Phytosanitary Measures (SPS) required that governments have scientific evidence to justify imposing any food or health safety regulations controlling the import of agricultural products that are more restrictive than the standards established by the Codex Alimentarius – an international institution staffed by scientists and government officials. The SPS agreement gave the United States and Canada a legal weapon with which to contest the European Union's ban on importing North American beef that is raised with a growth hormone.

Canada's interests are unevenly affected by this new regime because of its two, geographically determined types of agriculture. To the extent that its western provinces are exporters of grains and livestock, Canada can expect to benefit from these new rules, which will have paraconstitutional impact on other members by restraining the massive subsidies that the European Union, Japan and the United States offer their farmers. In contrast, farmers in central Canada, who supply a protected market of domestic consumers thanks to government-enforced marketing boards for eggs, milk, and poultry, will probably suffer from the required conversion of all quantitative restrictions into tariffs, which must then be gradually reduced.

Some WTO rules constraining member governments may work more in Ottawa's favour than in Washington's. When negotiating with Canada and Mexico, the United States refused to consider a subsidy code, which could have imposed some limits on its trade agencies' freedom to har-

ass Canadian exporters by alleging that they have received unfair subsidies. Not gaining a subsidy code meant Mulroney failed to achieve the 'secure access' he had promised and vitiated the value of CUFTA and NAFTA for Canada as an equitable trade regime. Whereas these two agreements left Canada vulnerable to its power imbalance with the U.S.A., the WTO's subsidy text offsets this asymmetry. With the WTO's Agreement on Subsidies and Countervailing Measures, the United States has brought its countervail measures under international discipline. The WTO's specifications distinguish three types of industrial subsidies - acceptable ('green light' measures), unacceptable ('red light' measures), and contestable ('orange light'). In this instance the United States had to concur with other countries' (in particular the European Union's) notions of acceptable industrial development policies, which are generally closer to Canada's more interventionist practice. This reduces the vulnerability of Canadian exports to the kind of American harassment that can arbitrarily identify unfair subsidies and impose stiff, pre-emptive countervailing duties.

In sum, the WTO's many agreements contain two types of supraconstitutional limits on member governments. Positive, 'thou shalt' agreements *prescribe* how members must rewrite, for example, their laws on intellectual property. Negative, 'thou shalt not' agreements such as SPS and TBT *proscribe* a wide range of practices. When global trade scholars talk of the deep integration embraced by the WTO, they are referring to the intrusive quality of these rules, which dictate how governments should or should not act in realms where they had previously been sovereign.

Rights

As the corollary to limiting government, a state constitution establishes specific rights for its citizens, whether individual or collective.

NAFTA

The only 'citizens' whose rights in Canada were extended by continental governance are corporations based in the United States or Mexico, which received a powerful new defence against governments whose regulations might reduce their earnings.

Under previous international commercial law, a company whose business was hurt because of a foreign government's action had either to defend itself within that state's legal system or to prevail on its own government to launch a trade complaint through the GATT on its behalf. Transnational capital wanted to enjoy protection not just from outright nationalization but from normal regulatory actions of a state using its sovereign discretion within its own borders. NAFTA's major innovation in the service of corporate empowerment was to broaden the definition of investment (for instance, to include mortgages) and to extend investors' rights to include the capacity of a NAFTA firm - that is, a company headquartered in a partner state - to challenge a government's domestic legislation on the grounds it might jeopardize its profitability.[8]

Article 1110 provides that no government may 'directly or indirectly expropriate or nationalize', or take 'a measure tantamount to expropriation or nationalization' except for a 'public purpose,' on a 'non-discriminatory basis,' in accordance with 'due process of law and minimum standards of treatment' and on 'payment of compensation.'[9] While not appreciated at first by most observers, including the Canadian government officials who 'signed off' on the clause, this innovation has given NAFTA firms the power to challenge almost every regulatory action taken by federal, provincial, or municipal governments that might 'expropriate' their future earnings. This 'Chapter 11' prohibition of actions 'tantamount to expropriation' was tantamount to a new constitutional right for foreign corporations. Indeed, it has proven the most controversial of the external constitution provisions, because it allows NAFTA firms to overturn the outcomes of national political debates on the desirable regulatory regime to secure the health and safety of the citizenry. (In the United States, a NAFTA firm would be a Canadian or Mexican company; in Mexico, an American or Canadian business.)

An illustrative case is Ottawa's debacle over cigarette packaging. In the mid-1990s the federal government decided to ban differentiated cigarette packaging as a natural extension of its prohibition on cigarette advertising. Although the tobacco industry claimed that *branding* served no other purpose than facilitating competition for existing smokers, the government maintained that it was targeted at 'lifestyle marketing' and thus promoted increased sales and smoking.[10] Misunderstanding the treaty that it had negotiated, the government had thought that NAFTA merely required it to respect the principle of national treatment. In other words, as long as it treated American and Mexican tobacco companies the same as Canadian ones, the proposal was NAFTA-proof.[11] After lobbying efforts threatened to invoke Chapter 11's corporate rights against 'expropriation,' Ottawa officials became convinced they would lose a challenge and gave way. The movement to liberalize foreign investment rules had become a means to prevent government from regulating business in defence of the public's health.

When Canada's domestic constitution was amended in 1982 to incorporate a Charter of Rights and Freedoms, property rights were excluded on the grounds that they would excessively enhance corporate power. NAFTA's Chapter 11 has created property rights only for foreign corporations with implications that neither the government nor the public at first understood.[12] Local entrepreneurs, whose sales had been hurt by some new municipal by-law, would have to take their lumps. An American competitor could launch a suit for damages against the city in question because the value of its property had been 'expropriated.'[13] The potential effects of this provision are increased by the wide latitude given the notion of investor: an American or Mexican investor would have the right to sue about some government regulation merely when seeking to be an investor, even before actually making an investment.[14]

The corollary of the new disciplines that Chapter 11 imposed on governments was the new freedom it gave corporations. No longer could NAFTA states impose performance requirements on foreign investors in order, for instance, to achieve environmental goals or promote indigenous people's welfare. Beyond having to determine whether they could afford a measure or had enough public support for it, the federal and provincial governments now have to live with 'the most extensive rights and remedies for foreign investors ever set out in an international agreement.'[15]

Although corporations received new rights and opportunities, including temporary immigration of their key personnel for business pur-

poses and although firms had greater freedom to locate where they wanted (and so unemploy those workers left behind when they closed branch operations), no balancing obligations were imposed on them. No continental-level institutions similar to those of the European Union had the clout to regulate, tax, or even monitor the newly created continental market that has proceeded to emerge.[16] Nor were Chapter 11's new corporate rights balanced by a provision to promote the public interest by protecting the environment or public health. To sum up, NAFTA empowered the continental market less by creating a new institutional structure for it than by reducing members' capacities and by creating a means for capital to discipline governments that stood in its way.

WTO

In some respects the fit between NAFTA and the WTO is very close. First, the rights incorporated in the WTO are not for its members' citizens but for their corporations. Second, some of the **rules** are nearly identical. This is the case for the WTO agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), adopted after years of sustained lobbying from the American information, entertainment, and pharmaceuticals sectors in concert with their European and Japanese counterparts. First written into the Uruguay Round's Dunkel draft, they were then incorporated, at U.S. insistence, in NAFTA's Chapter 17, which gave NAFTA firms new rights in Canada. Ultimately TRIPs became part of the WTO's GATS and now benefit firms from all the WTO's members.[17] This means that their disciplinary effect on the Canadian state is greater than was NAFTA's clauses in this area.

Adjudication

Norms, limits, and rights rapidly become dead letters without a judicial system to interpret the constitution's texts in the case of conflicts over their meaning. Whereas most of NAFTA's adjudicatory provisions are of little consequence, the WTO's most significant innovation – and the principal cause of its power as global governance – is its powerful judiciary.

NAFTA

A principal criticism of the old Canadian-American relationship was its lack of institutions that could mediate the disputes that erupted over each government's actions and claims by corporations or citizens that the other side had caused them damage. Trade liberalizers hoped to depoliticize these conflicts by creating powerful dispute settlement institutions. In practice, the two trade agreements' judicial effect has not been to empower a continental level of governance. Rather it has endowed the corporate sector with greater muscle vis-à-vis the three territorial states. To understand this situation, we must distinguish between NAFTA's three main processes for settling disputes. The import of one is negligible (for trade disputes), that of another is substantial (for investor-state disputes), while the third is minor (for general disputes).

Trade Disputes

For Canadian promoters of free trade, far more important than reducing American tariffs was gaining 'secure access' to the U.S. market. But Washington had no interest in real trade freed of internal barriers. The American negotiators refused to grant exemptions for Canadian exporters from harassment by U.S. anti-dumping (AD) and countervailing duty (CVD) actions. Faced with the impossibility of achieving their prime objective, Canada's negotiators had focused on the second-best goal of an authoritative arbitration system to contain U.S. protectionism.[18]

Article 1902 allows each party the right to continue to apply its existing AD and CVD law to goods imported from the territory of any other party.[19] Retaining their sovereignty, Canada, the United States, and, later, Mexico avoided creating a permanent supranational institution. They simply agreed to cede appeals of their trade determinations to binational panels that could review the AD or CVD determinations

made by one party against imports coming from another party's exporters. CUFTA's resulting Chapter 19 created an unusual tool for settling conflicts over AD and CVD actions. This mechanism, over which much ink has been spilled,[20] merely enabled a party to request the striking of an ad hoc panel to consider whether an AD or CVD ruling properly applied that country's trade law. If the panel found that the law had not been properly applied, it would recommend to the Trade Commission that the decision be remanded for review.

Canada has not had a satisfactory experience in using Chapter 19 to appeal American trade determinations. In 1993, for instance, there were multiple remands in five cases, which led the panels to exceed their deadlines significantly. Furthermore, problems have arisen over the lack of consistency in Chapter 19 panel decisions which have shown differing degrees of deference to national agency decisions. That Chapter 19 did not establish an effective, rules-based continental judicial order was demonstrated by the long-running dispute over softwood lumber, which failed to settle a high-tension Canadian-American conflict in either an expeditious or a rules-based manner. The long, drawn-out process whose roots are in the 1970s was dealt with by power politics in the 1990s,[21] even though Canada won its case after a CUFTA panel ruled that the US action improperly applied the definition of subsidy in U.S. law .[22] Congress proceeded to amend the definition of subsidy so that the Canadians' short-term victory resulted in long-term defeat when the Americans launched another CVD action against the Canadian lumber exporters. Motivated by fear of future U.S. harassment over exports of softwood lumber – and since a Chapter 19 panel decision does not set a precedent that would constrain future legal manoeuvres by the American lumber lobby[23] – Canada agreed to U.S. demands for restrictions on Canadian softwood exports to the United States.[24] The fight returned with the new millennium to make a mockery of NAFTA's so-called binding dispute settlement. Astronomical countervailing and anti-dumping duties have been levied on softwood exports by Canada, which has found scant support from NAFTA's Chapter 19.

The spectacle of foreign nationals passing judgment on the application of American law has seemed to some U.S. legislators an unacceptable infringement of congressional sovereignty. That some of these panels should have remanded U.S. trade determinations as improperly made became the source of further political outrage in Washington. Accordingly, when it came time to negotiate NAFTA, Congress demanded that the new settlement mechanism for Chapter 19 disputes be weakened. The roster for panels, which had been dominated by trade experts who

tended to criticize the lax reasoning and arbitrary method in U.S. trade remedy determinations, was now to be weighted towards retired judges, who could be expected to express greater deference to American institutions. Procedures of the Extraordinary Challenge Committee (ECC) have made it easier to challenge NAFTA panel decisions, facilitating U.S. appeals of rulings under Chapter 19 that turn out to be in Canada's favour.[25]

In American exporters' appeals under Chapter 19 against determinations by Canadian agencies (Revenue Canada or the Canadian International Trade Tribunal) on AD and CVD, Ottawa has 'won' and 'lost' in almost equal amounts. Under CUFTA, Canada won seven of the eleven U.S. challenges. It consistently won cases in which an agency levelled countervailing duties for injury caused by U.S. producers to the Canadian market. However, in panels involving the application of anti-dumping duties, Canada consistently lost challenges. Some panel determinations have been made more than once because an agency's non-compliance required the panel to be reconstituted at the plaintiffs' request.[26]

Although AD and CVD jurisprudence is highly technical, binational review has broader implications for the policy-making capacity of the federal government as well as for the behaviour of trade law administrators. Anticipating possible CVD actions being launched by Washington, policy makers in Canada have become cautious about the policies they create that may appear to offer subsidies to Canadian exporters. Canadian trade agencies have become more careful in the standards that they apply in determining AD or CVD out of concern for what panels may later decide.

The addition of continental participants to domestic review gives non-national actors some influence over domestic trade procedures. The result is that Chapter 19 panels have had a small supraconstitutional impact, altering the rules by which these bodies operate. For instance, Ottawa amended the standard of review it employed to include two new grounds for remanding agencies determinations: when a tribunal acted (or failed to act) by reason of fraud or perjured evidence, and when it acted in any other way contrary to the law.[27] Thus some U.S. judicial norms have been imported through NAFTA into the standard of review for Canadian agencies.

Investor-State Disputes

The panel system set up by Chapter 19 to oversee trade remedies bureaucratized AD and CVD cases without depoliticizing the major

cases. Chapter 11 has established a new zone of privatized adjudication which has politicized issues that would previously have escaped most public notice. Not only has it added to the Canadian constitution a new corporate property right which treats firms unequally depending on their nationality. It has introduced an existing arbitration mechanism designed to handle international corporate disputes, turning it into a device to constrain governmental capacity.

Cases initiated against a municipal, provincial, or federal government under the investor-state provisions of Chapter 11 are not heard before a Canadian court using Canadian jurisprudence. These 'investor-state' disputes go to arbitration before an international panel operating by rules established under the aegis of the World Bank or the United Nations for settling international disputes between transnational corporations.[28] Since each of these forums operates according to the norms of international commercial law, Chapter 11 actually transfers adjudication of disputes over government policies from the realm of national law to international commercial law, with several serious implications.

This process violates many values held dear in the common law tradition. Transparency is the first victim in this secret world of commercial arbitration. Proceedings are held in camera. The briefs that document the parties' pleadings and even the existence of a case may be kept secret if the parties so wish. The public may never learn what has happened or why, even though its government may have been forced to change its properly passed regulations as a result of this process.

Appeals from these rulings can take place only in the jurisdiction where the arbitrators declared their formal address. When the U.S. waste-disposal company Metalclad used Chapter 11 to attack the environmental order made by a Mexican village that had shut down its landfill site, the arbitrators, who met in Washington, ruled in the firm's favour. Because the tribunal had named Vancouver as its nominal address, the Mexican government's appeal had to invoke BC jurisprudence, adding yet another twist of legal strangeness.

Neutrality is the second legal value that falls by the wayside. The plaintiff investor has the right to appoint one of the three arbitrators, which is something like having one-third of the jury taking sides before hearing the evidence. This means that 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. A privatized process – whose rulings directly affect member-states' policies and institutions and bypass their

public courts[29] – creates more supraconstitutional norms. The sociology of the panellists' selection makes it more likely that they will respond to the legal arguments privileging the norms of international commercial law. As the investor and the state each have the right to appoint one arbiter, and since the panel's chair is chosen by consensus, it is likely that there will be just one Canadian 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. Since American corporate law tends to dominate international commercial law cases, conflicts between U.S. corporations and the Canadian state will inexorably cause U.S. legal definitions to infiltrate Canadian legal standards and force Canadian governments to operate as if American law on 'regulatory takings' applied to them. While some observers expected that Canadian, American, and Mexican jurisprudence would interpret 'expropriation' differently in each country,[30] it is generally acknowledged that panel findings will impose the U.S. interpretation instead of the other two signatories' legal notions.[31]

Chapter 11 disputes have a great potential for developing more supraconstitutional norms. For instance, NAFTA accepts government monopolies if they provide essential services to the public, but such crown corporations must 'act solely in accordance with commercial considerations.'[32] But providing an essential public service may be uneconomic, requiring, for instance, subsidizing reasonably priced telephone or postal services in remote communities by charging higher rates in urban areas. Should a provincial government set up crown corporations to build and maintain non-profit housing, a NAFTA corporation could argue that the public entities' failure to operate by commercial standards reduced its profits. A Chapter 11 arbitration could decide what was permissible action for a crown corporation, subject only to 'interpretations' offered by the NAFTA trade commission. The Canadian regulatory system thus becomes subject to judgment and correction by arbitrators who are not necessarily privy to the cultural and historical rationale for its practices and who are applying norms developed under the influence of the litigious and individualistic American legal culture to Canada's less litigious and less entrepreneurial public domain.

Ottawa's abandonment of its cigarette packaging policy and of several environmental regulations suggests that, under the supraconstitutional aegis of NAFTA's Chapter 11, the issue is no longer which order of government — federal or provincial — *should* initiate a

regulation. It becomes whether either order of government *can* initiate such legislation at all.[33] Beyond questions surrounding this stunning and unacknowledged change in Canada's constitutional sovereignty and regulatory autonomy, these examples raise the spectre of a serious democratic deficit.

Access to continental justice under NAFTA varies according to subject and chapter. Only the federal government of Canada, Mexico, or the United States can initiate a Chapter 20 proceeding, although a third party may join the process when the matter has reached the panel stage in disputes involving environmental concerns.[34] Governments initiate Chapter 19 panels on behalf of grieving corporations. Foreign corporate actors can challenge domestic law under Chapter 11.[35] So, unless they are corporations, third parties are generally excluded from continental dispute settlement. Given that citizens and non-governmental organizations (NGOs) can neither launch a complaint nor be involved until the matter reaches the panel stage, the public is effectively shut out of continental dispute settlement processes. The restriction of standing to corporate and governmental players necessarily skews the course of continental justice.

Through NAFTA's environmental and labour commissions, environmental organizations and trade unions enjoy some modest access to litigating in defence of their values, but these organizations are so tightly circumscribed that their presence does not begin to tip the balance of power away from governmental and corporate dominance. Apart from these symbolic genuflections in the direction of civil society, CUFTA and NAFTA's adjudicatory institutions overwhelmingly favour market forces.

General Disputes

CUFTA's Chapter 18 and NAFTA's derivative Chapter 20 provide for panels to be struck when member-states have been unable to resolve their differences over issues generated by these economic agreements. Although under CUFTA's Chapter 18, dispute settlement was initially expeditious,[36] some panel decisions caused more controversy than calm. One concerned the enforceability of putatively binding decisions. Despite a panel ruling in Canada's favour in the wheat case,[37] Washington responded to its loss by threatening to launch an investigation into Canadian wheat exports. Temporary closure on this issue was only achieved when political pressure from the United States caused the Canadian government to give way. Ottawa ultimately agreed to limit wheat exports to the United States during 1994/95 to 1.5 million

tons, with certain exceptions.[38] Repeated rhetorical attacks by U.S. farmers on the Canadian wheat board as a public grain marketing agency and several investigations by the U.S.T.R. warn Canadian grain growers that no trade agreement can ultimately shelter them from relentless political pressure.

Chapter 18 raised a different problem in the case over Puerto Rico's obstructing the import of Quebec's long-life milk.[39] Essentially, the panel offered a compromise between the two governments' positions.[40] Since neither government felt that the process enforced the trade agreement's rules, the political dénouement decreased the legitimacy of dispute settlement under CUFTA. If legal norms are ignored and replaced by political deals, predicting the outcomes of disputes becomes more difficult and governments are less likely to risk using the process.[41]

Both the U.S. and Canadian governments have demonstrated their dissatisfaction by their decreasing use of Chapter 18 for resolving disputes – twice in the first year of CUFTA, but only three times in the next five years.[42] With Canada not receiving 'secure access' through Chapter 18 dispute settlement, Ottawa is forced back to the political bargaining table, but with a less powerful position than it had enjoyed before it signed CUFTA.

NAFTA's Chapter 20 (which supersedes CUFTA's Chapter 18) manages to complicate dispute resolution without really removing it from continental power politics. It allows for the adjudication of a broader range of issues,[43] but its alterations aggravated, rather than resolved the main problems demonstrated by the old Chapter 18. The reformed process still does not prevent panels from delivering compromises. Nor does NAFTA make panel decisions under Chapter 20 binding: these rulings are merely recommendations to the NAFTA trade commission which is a fancy name for periodical meetings of the three countries' trade ministers..

In the end, the three governments may feel that the submission of serious issues to continental dispute settlement is largely futile. If a case is going to end up in political bargaining, it runs the risk of inflaming, not depoliticizing Canadian-American conflicts. If continental dispute settlement degenerates into a shoving contest where might prevails over right, the concerned governments may choose instead the global dispute settlement system embodied in the WTO. With numerous members, a substantial subsidy code, and a more authoritative process for resolving conflicts, the WTO is better able to offset the asymmetric power relationship with the United States that CUFTA and NAFTA failed to mitigate.[44]

WTO

Without a means of adjudication, the stupendous expansion in the scope of the WTO's rules would have been as inconsequential as the International Labour Organization's legion conventions. The explanation for the WTO's importance lies in its dispute-settlement mechanisms, which are far stronger than those of either the old GATT or the new NAFTA. Panellists base rulings not on the contenders' own laws, as in NAFTA's Chapter 19, but on the international norms written into the WTO's texts and the international public law developed by prior GATT jurisprudence.

Also in contrast with NAFTA, WTO panellists are not nationals to the dispute in question. This makes their decisions less liable to accusations of unfairness for reason of national bias, and hence more legitimate in the eyes of the international community. However, when a country loses a case, the foreign panellists' unfamiliarity with its cultural and societal specificity can seriously undermine the decision's legitimacy.

Strict time limits and appeal procedures were designed to forestall future U.S. use of its unilateral trade remedy legislation and so promised prompt, less politicized justice. However, 'less politicized' can also mean less responsive to the specific circumstances obtaining in each state.

The speed and effectiveness of the WTO's dispute settlement body give it authority but do not guarantee legitimacy. The behind-closed-doors secretiveness of its judicial process leaves the public ill-informed. Only territorial states have standing in this system, which excludes all but government representatives. This adds to civil society's frustration from being left outside a process that affects social interests such as the environment, cultural sectors, and labour.

Notwithstanding a formal lack of precedent-making capacity in the WTO's dispute settlement process, the logic of one panel's decision can be invoked in the argumentation placed by the contending parties before another panel. Given the permanence in office of the Appellate Body's (AB) members, their individual rulings are cumulating as a body of coherent and predictable trade law. The AB has regularly given a broad interpretation to rules inhibiting government policy that might limit trade. Since these judgments have tended to give a narrow interpretation to principles invoking 'legitimate domestic objectives' such as cultural diversity, public health, and environmental sustainability, they have further delegitimized the WTO in the eyes of NGOs working to promote non-economic causes. These groups have learned that, in

case after case, the goal of expanding trade trumps that of cultural and environmental protection. Even when international environmental agreements enshrine the objective of sustainability by seeking to control the trade of endangered species or hazardous substances, trade panels habitually rule against measures embodying such objectives in favour of promoting trade unhampered by moral or ecological concerns.

The sociology of dispute panels enhances the WTO's legalistic rigidity. Panellists adjudicating WTO disputes are either trade lawyers and professors of international law, who tend to stick very close to the letter of the WTO's texts that they are interpreting, or middle-level diplomats who take their cues from the secretariat's neoconservative 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 AB will be responding to highly refined legal reasoning.[45] Under these conditions, 'soft' arguments defending cultural autonomy or environmental sustainability hold little weight against the 'hard' logic of the WTO's rules.

While the WTO's norms, limits, and rights create new supraconstitutional principles for member-states to ingest, their practical meaning, as interpreted by the dispute settlement process, cannot be anticipated with any certainty. The AB memorably compared the concept of 'likeness' to 'an accordion, which may be stretched wide or squeezed tight as the case requires.' This arbitrariness in the WTO's judicial interpretation of its rules means that national policy makers can be sure only that they will never know what this supreme court of commercial law will decide until it rules on a trade dispute involving a specific WTO provision.[46]

Its initial bias towards dogmatic neoconservatism is not a *necessary* quality of the WTO's judicial system. Beyond the anticipated reaction of their professional colleagues, judges also have to consider the reactions of the general public when rendering their rulings. As the WTO's judgments reach deep inside members' regulatory systems, the panels may find themselves pressed by an emerging global public opinion to give greater heed to environmental, social, and cultural values in their decisions. In the Canadian government's case against France for banning the import of asbestos, the AB recognized the French public's health concerns as a valid conditioning factor in denying Ottawa's petition.

Whether national courts will unquestioningly accept the superiority of the WTO's rulings over their own constitutional norms also remains to be seen. Colombia's superior court has ruled that a WTO decision does not invalidate national law. The Mexican Supreme Court de-

creed in 2000 that the country's constitution was superior to international treaties. The fact that treaties properly negotiated and signed by the Mexican government made them automatically 'the supreme law of the land' – and so hierarchically superior to federal and local law – did not mean they could trump the constitution's own supra-legislative norms.[47] 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.[48] We must expect continuing clashes between these external and internal constitutional orders.

Enforcement

As with other trade treaties, NAFTA has no enforcement capacity other than the parties' sense of their long-term self-interest. If one member-state does not comply with the judgments of dispute panels, it cannot expect its partners to continue to do so. In the background there remains the resort to economic muscle. Under North America's conditions of extreme asymmetry, the hegemon remains able to reject the trade agreements' rules and to impose its will, as it has done repeatedly in the long-standing disputes over Canadian softwood lumber and American split-run magazines.

Under GATT, a signatory state's failure to accord national treatment to some foreign good was unlikely to have very serious consequences because dispute settlement was a slow, diplomatic process in which a guilty defendant state could often escape retribution. Under the new liberalization agreements, an errant state is much more likely to be brought to 'justice' by a litigant partner state because dispute settlement is an efficient process and its judgments cannot be ignored.

Once a signatory state's behaviour has been judged in violation of a WTO norm, it's supposed to change the offending provisions or pay compensation. The WTO has no police service capable of enforcing its dispute decisions, but it does mandate the winning litigant legitimately to make reprisals if the losing side does not comply. This retaliation can target any exports of the guilty state and can amount to the harm caused to the complainant. The global trade regime's enforcement muscle makes the WTO far more legitimate than CUFTA or NAFTA.[49]

Conclusion

When Ronald Reagan hailed CUFTA as North America's new 'economic constitution,' he was not showing signs of premature senility. Even if it did not define new institutions for the two countries, CUFTA did constrain the role of governments (though those of Canada more than those of the United States). It did define rights for citizens (albeit those of TNC's rather than those of individuals). It did establish a judicial process (if only an appeal system accessible by the federal government and corporations but not by provinces or citizens). It was ratified by each government's duly passing the requisite implementing legislation. And it did allow for amendment and termination.

Much the same was said of NAFTA, mutatis mutandis. 'North America' now took on its true geographic sense by including Mexico. But the rule book of its new economic bloc had very different effects on its three members. With most of its new rules extending the U.S.A.'s norms to its neighbours and with its lack of a supranational institutional structure that could give Canada and Mexico voice at the continental level, it barely affected U.S. constitutional reality. For the two peripheral countries, NAFTA entered their constitutional makeup as external components, reconstitutionalizing both.[50] The previous, informally operating norms of continental coexistence had given way to elaborate, highly specific rules designed to bind governmental practices at the federal, provincial, and municipal levels.

Since political regimes are socially constructed, we can expect the robustness at these five levels of state activity to differ from each other and to change over time in an interrelated manner. If the federal level becomes weaker, provincial and local orders will probably become stronger. If the global becomes more authoritative, the continental will lose some of its dominance. If new norms on investment, cultural protection or intellectual property rights are successfully developed during the WTO's new Doha Round of negotiations, the scope of its legal impact on government decisions would increase. If these efforts fail, and the regulation of these issues falls to continental or inter-continental agreements such as the proposed hemispheric Free Trade Area of the Americas, then the latter would be proven ascendant. If hemispheric and continental governance falters, the national may regain lost clout.

This suggests that constitutionality, like statehood, is a matter of degree and power: some constitutional orders are more legitimate and authoritative than others. Indeed, the same external constitution's le-

gitimacy may vary between members. Ottawa's acceptance of a WTO ruling is virtually automatic. By contrast, Washington's acceptance of the WTO's authority is conditional. When the European Union threatened to launch a dispute panel to challenge the Helms-Burton Act, the U.S. government made it clear that it considered this a matter of its national security, so it would boycott any legal proceedings. What was considered unconstitutional by the hegemon was accepted as supraconstitutional in the semi-periphery.

Whether the Canadian public will continue to accept its new external constitution is another matter entirely. How long citizens will tolerate politicians' claiming impotence in the face of the WTO's or NAFTA's constitutionalized principles and rights remains to be seen. If the better the external constitution is understood, the less it is liked, the new system will lose its legitimacy and come under pressure for amendment. This paper does not argue that global governance is wrong in principle but it does suggest that a rebalancing of the current global institutions is urgently needed. Canadians convinced of this logic could press their politicians to have their country take the lead in pushing for this redesign .

Endnotes

1 When a UN committee censured the government of Ontario for not extending to all religious schools the state funding that it gives Catholic public schools, it was challenging a key element of the 1867 confederal bargain that guaranteed Roman Catholics in the provinces the preservation of their educational system.

2 Scott Sinclair, *GATS: How the World Trade Organization's New 'Services' Negotiations Threaten Democracy* (Ottawa: Canadian Centre for Policy Alternatives, 2000), 44.

3 Ibid., 45.

4 Ibid., 53.

5 Thomas Grennes, 'Toward a More Open Agriculture in North America,' in Steven Globerman and Michael Walker, eds., *Assessing NAFTA: A Trinational Analysis* (Vancouver: Fraser Institute, 1993), 148-71.

6 Barry Appleton, *Navigating NAFTA: A Concise User's Guide to North American Free Trade Agreement* (Toronto: Carswell, 1994), 126.

7 North American Free Trade Agreement, Article 1106.

8 Richard C. Levin and Susan Erickson Marin, 'NAFTA Chapter 11: Investment and Investment Disputes,' *NAFTA: Law and Business Review of the Americas* 83, no. 2 (summer 1996), 90.

9 NAFTA, Article 1110.

10 Susan Goodeve, 'Canada Commits to Trade Liberalization,' in Peter Haydan and Jeffrey Burns, eds., *Foreign Investment in Canada* (Scarborough: Carswell, 1996), 280-6.

11 David Schneiderman, 'NAFTA's Takings Rule: American Constitutionalism Comes to Canada,' *University of Toronto Law Journal* 46 (1996), 499-537.

12 Ibid., 536.

13 Of course, Canadian firms operating in the United States and Mexico would benefit from this right to attack American or Mexican regulations that they allege 'expropriated' their property.

14 NAFTA, article 1138. An example occurred in 1993, when newly elected Liberal Prime Minister Jean Chrétien kept his electoral promise to cancel the former Conservative government's contract to privatize the Toronto airport. Since the U.S. company Lockheed was a partner in the consortium planning to take over the airport, it used the threat of a Chapter11 suit to force Ottawa to pay substantial compensation for foregone profits on an investment that it had not even made.

15 Howard Mann, *Assessing the Impact of NAFTA on Environmental Law and Management Processes*, Working Paper, First North American Symposium on Understanding the Linkages between Trade and Environment (autumn 2000), 29.

16 Stephen Blank and Stephen Krajewski, 'U.S. Firms in North America: Redefining Structure and Strategy,' *North American Outlook* 5, no. 2 (Feb. 1995).

17 Christopher Kent, 'The Uruguay Round GATT, TRIPS Agreement and Chapter 17 of the NAFTA: A New Era in International Patent Protection,' *Canadian Intellectual Property Review* 10, no. 3 (1994), 711-33.

18 Canada, The Canada-U.S. Free Trade Agreement Synopsis, 1987, 1.

19 L. Trakman, *Dispute Settlement under the NAFTA* (New York: Transnational Publishers, 1997), 277.

[20] William J. Davey, Beatriz Leycegui, William B.P. Robson, and Dahlia Stein, eds., *Trading Punches: Trade Remedy Law and Disputes under NAFTA* (Mexico City: ITAM; Toronto: C.D. Howe Institute; Washington, DC: NPA, 1995).

[21] Charles Doran, 'Trade Dispute Resolution "On Trial": Softwood Lumber,' *International Journal* 51, no. 4 (autumn 1996), 712.

[22] Robert Howse, 'Settling Trade Remedy Disputes: When the WTO Forum Is Better than the NAFTA,' *C.D. Howe Institute Commentary* 111 (June 1998), 14.

[23] Robert E. Burke and Brian F. Walsh, 'NAFTA Binational Panel Review – Should It Be Continued, Eliminated or Substantially Changed?' *Brooklyn Journal of International Law* 20, no. 3 (1995), 560.

[24] Doran, 'Trade Dispute Resolution,' 718.

[25] Howse, 'Settling Trade Remedy Disputes,' 9.

[26] CDA-91-1904-02. Certain beer originating in or exported from the United States by G. Heilman Brewing Company, Inc., Pabst Brewing Company, and the Stroh Brewery Company for use or consumption in British Columbia.

[27] Subsection 18.1(4) of the Federal Court Act amendment provides that the Canadian International Trade Tribunal's decisions will be reviewed on these grounds.

[28] Chapter 11 disputes are governed and administered by one of three multilateral conventions: the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID); the Additional Facility Rules of ICSID (provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID convention); or the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). Horlick and DeBusk, 'Dispute Resolution under NAFTA,' 52.

[29] 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. Mann, 'Assesing the Impact of NAFTA,' 31.

[30] Richard Dearden, 'Arbitration of Expropriation Disputes between an Investor and the State under the North American Free Trade Agreement,' *Journal of World Trade* 29, no. 1 (Feb. 1995), 127.

[31] 'The term "expropriation" includes, but is not limited to, any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, where such abrogation, repudiation or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project.' United States Foreign Assistance Act of 1969, section 238, cited in Richard C. Levin and Susan Erickson Marin, 'NAFTA Chapter 11: Investment and Investment Disputes,' *NAFTA: Law and Business Review of the Americas* 83, no. 2 (1996), 97.

[32] Article 1502 (3) (b) cited in Appleton, *Navigating NAFTA*, 114.

[33] Schneiderman, 'NAFTA's Takings Rule,' 535.

[34] Article 2013. See J. Holbein and D. Musch, *NAFTA : Final Text, Summary, Legislative History and Implementation Directory* (New York: Oceana, 1994), 480.

[35] Trakman, *Dispute Settlement*, 7.

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

[37] CDA-92-1807-01, Interpretation of Canada's Compliance with Article 701.3 with respect to Durum Wheat Sales.

[38] Davey, *Pine and Swine,* 56.

[39] *Puerto Rican Restrictions on Ultra-High Temperature (UHT) Milk Case.*

[40] Davey, *Pine and Swine,* 61-2.

[41] David S. Huntington, 'Settling Disputes under the North American Free Trade Agreement,' *Harvard International Law Journal* 34 (spring 1993), 418.

[42] Davey, *Pine and Swine,* 71.

[43] The procedures found in Chapter 20 apply to the areas dealt with in the agreement's various chapters – National Treatment and Market Access for Goods (Chapter 3), Rules of Origin (4), Customs Procedures (5), Energy and Basic Petrochemicals (6), Agriculture and Sanitary and Phytosanitary Measures (7), Emergency Action (8), Standards-Related Measures (9), Cross-Border Trade in Services (12), Government Procedures (10), Investment (11), Telecommunications (13), Financial Services (14), Competition Policy, Monopolies, and State Enterprises (15), and Temporary Entry for Business Persons (16), Intellectual Property (17) – but only where the actual or proposed measures themselves are inconsistent with the provisions in NAFTA. Trakman, *Dispute Settlement*, 5.

[44] Howse, 'Settling Trade Remedy Disputes.'

[45] Joseph Weiler, University of Toronto, Faculty of Law, paper; and Robert Howse, personal communication.

[46] Robert Howse and Donald Regan, 'The Product/Process Distinction: An Illusory Basis for Disciplining "Unilateralism" in Trade Policy,' *European Journal International Law* 11, no. 2 (2000), 268.

[47] Amparo en revisión 1475/98: Sindicato nacional de controladores de transito aereo, 76: 'international treaties are situated on a second level immediately *below* the Fundamental Law [the constitution] but above federal and local law,' (My translation and emphasis).

[48] '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.

[49] Robert Howse, 'The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times,' *Journal of World Intellectual Property* 3, no. 4 (July, 2000), 493-508.

[50] Stephen Clarkson, 'Reform from Without versus Reform from Within: NAFTA and the WTO's Role in Transforming Mexico's Economic System,' in Joseph S. Tulchin and Andrew D. Selee, eds., *Mexico's Politics and Society in Transition* (Boulder: Lynne Rienner, 2002).

U.S. Trade Representative Robert Lighthizer has been explicit that the goal of the NAFTA talks is to negotiate a â€œrebalancedâ€ agreement that will do more to favor the United States. President Trump last week told Chinese President Xi Jinping that the large U.S. trade deficit with China is â€œnot sustainable.â€ It is easy to deride the administrationâ€™s narrow focus on bilateral trade deficits, and the facile notion that new trade rules alone can do much of anything about the problem. But it is much harder to reject the central premiseâ€”that large and growing imports of manufactured goods from China Possible Cures for NAFTAâ€™s Investor-State Dispute Processâ€ (2002) 36 Canadian Business Law Journal 1-20, and Canadaâ€™s Secret Constitution: NAFTA, WTO and the End of Sovereignty (Ottawa: Canadian Centre for Policy Alternatives, 2002). 5. As a political economist, I try to understand the relations between states and markets in order to locate specific issues of public policy within their power systems. The constitution of Canada provides the rules that Canadaâ€™s government must follow â€” both in terms of how the government operates politically, as well as what it can and cannot do to its citizens. What is the Canadian Constitution?Â It outlines Canadaâ€™s system of government, including the structure of Parliament, the way elections work, the role of the monarchy and the division of powers between the federal government and the provinces. The second key piece is the Constitution Act of 1982, which is dominated by a long section called the Canadian Charter of Rights and Freedoms, which outlines the civil rights of each Canadian citizen. The 1982 Act also describes the process for changing (amending) constitutional laws.