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Global Transnationalisation and Democratisation Compared
Section 2: Transnational Governance, Deliberative Supranationalism and Constitutionalism

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Cosmopolitanism or Cosmo? The WTO and NAFTA as Canada's External Constitution

It is both heartening and alarming that this conference is using Canada as the case with which to explore the normative potential for the democratization of globalization and the spread of cosmopolitanism. Heartening, because what we might call the bright Canada, the subject of my colleague -- Will Kymlicka's – reflections, was a post-national state long before that term was invented. Never fully sovereign politically, economically, culturally, militarily, or technologically, it has always been highly open to economic and demographic flows. Notwithstanding the intolerance and racism of its early 20th-century anglophone and francophone populations, it has become in the last fifty years -- at least in its big cities -- a highly multicultural, largely tolerant, generally inclusive, surprisingly successful post-modern society.

But it is also alarming when I consider the object of my analysis -- what we might call the dark Canada -- which represents the underside of the uplifting version which my political theory friends dissect. Normatively, my Canada has less to do with cosmopolitanism than with *Cosmo* magazine. The social actors it includes are the representatives of transnational corporations. Those it excludes are all the rest of civil society. Its ideology is not one of global democracy but of corporate economic growth and global greed which are institutionalized, legalized, sanitized, and mediatized under the label of "free trade."

I was invited by Jon Fossum to analyze Canada's external constitution. While I am happy to comply with this request, I can only relate my argument to the thrust of this conference by presenting it as an anti-model, an explication of the legal-institutional context into which Canada's economic and political elites have inserted their country over the last twenty years explicitly to restrict the sway of democratic norms in the interests of liberating big capital from domestic controls. My text will be primarily descriptive. In the first part it will explain the meaning of the external constitution by analyzing the legal-institutional framework created for Canada by its federal government's negotiation and signature of the Canada-United States Free Trade Agreement (CUFTA, 1988), the North American Free Trade Agreement (NAFTA, 1994), and the World Trade Organization (WTO, 1995). With this background, the second part will return to the normative issues raised by this conference in order to assess the obstacles that this anti-model places in the way of the project to democratize globalization and spread cosmopolitanism.

I External Constitution: the Concept

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

and imagination (Held 1995).

At the other pole, the prime consequence of economic liberalization was seen in its power-constraining effects on the world's nation states. Environmental non-governmental organizations, for instance, took to attacking the WTO or NAFTA as powerful forces sapping the capacity of national policy regimes to achieve ecological sustainability (Shrybman 2002). In the minds of the identifiable political minority that is overtly hostile to globalization, a deep distrust of global institutions segues to a sense that they release transnational corporations (TNCs) from democratic control (Klein 2000).
This section takes Canada as exemplary of states in the middle of the power hierarchy that can be called semi-peripheral since they are neither completely dominant nor completely dominated. To understand how the special characteristics of semi-peripheral countries such as Canada have been affected by the intergovernmental economic agreements that transformed the meaning of global governance in the 1990s we first have to differentiate the old from the new in the international political economy.

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

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

With this sketch of the post-World War II order as context, the "new" experienced by Canada during the 1990s can be understood as a transnational mode of regulation put in place by governments which were responding to the perceived needs of their economic actors in a regime of capital accumulation that was becoming increasingly global. The basic template for Canada's position in this new regulatory regime was forged in tough negotiations with Washington in 1987 and came into force on January 1, 1989 as CUFTA, a document with a broad constraining impact on the kinds of policies that Canadian governments, provincial as well as federal, could adopt thereafter (Rotstein 1988, 401). Given that TNCs in North America were increasingly taking advantage of Mexico's low labour costs when redeploying the various facilities in their production processes, it was but a small step to expand a bilateral CUFTA into a trilateral NAFTA which came into effect on January 1, 1994 and extended "free trade" and Mexico as a continental mode of regulation for what was becoming a continental regime of accumulation.

NAFTA was just a stopgap in a process with a much broader horizon, because corporations were not simply transnationalizing in North America. Whether involved in producing physical goods or less tangible services, those TNCs, which had developed a global regime of accumulation, had

expressed an urgent need for a global mode of regulation. These global corporate players were not intellectually isolated. Their desire for freedom from national regulations was theorized and articulated by an epistemic community of neoclassical trade economists, international trade lawyers, and business-financed think tanks in the major capitalist economies arguing for deregulated national economies within a re-regulated global economy that would generate greater efficiencies and so promote greater global welfare.

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

For this argument, I want to explore the governance implications for Canada of the WTO and its continental counterpart, NAFTA by analyzing the various powers that have been devolved to these international economic regimes in terms of the notion of "external constitution." In the main, the political-science use of "constitution" has been reserved for the rule book prescribing the internal organization of territorial states. It has also been applied to such international organizations as the United Nations. This paper links these two usages by showing how international regimes restructure their member states' domestic legal orders. Specifically it will describe how NAFTA and the WTO impinge on the Canadian polity. I argue that these continental and global manifestations of global governance are so substantial that they constitute an external constitution that has significantly reorganized the Canadian state by adding external tiers to certain aspects of its legal order. If in this logic Canada remains semi-peripheral, it is because its legal order has neither been totally transformed (as is the case in heavily indebted third world countries on whom the IFIs have imposed radical structural adjustment programs) nor left virtually untouched (as is the case with the United States., because, as chief international rule maker, the rules that it has caused to be made tend to universalize such US domestic norms and institutions as intellectual property rights and administrative law processes).

Generally understood, an organization's constitution lays out a set of principles that prescribes how it is to function and assigns rights plus obligations to its members. A constitution in a contemporary liberal democracy generally demonstrates seven principal attributes.

1- It may entrench certain *norms* that are inviolate, that is above the reach of any politician to alter. Following a civil or foreign war, the victorious side often tries to lock in rules to defend their interests by embedding them in a constitution.
2- A liberal constitution also establishes *rules* that limit what governments can do in exercising their powers.
3- As the corollary to limiting government, a state's constitution establishes specific *rights* for its citizens, whether individual or collective.
4- Norms, limits, and rights are dead letters unless there is a *judicial system* to interpret the constitution's texts in the light of conflicts over their meaning.
5- Legal judgments are in turn dead letters unless the constitution provides mechanisms for the *enforcement* of the courts' judgments to ensure the observance of all laws and regulations.
6- A constitution structures the political game by establishing decision-making (executive) and law-making (legislative) *institutions* that will have authority over the territory and establishes the government (administrative) structures needed to apply the laws and regulations they create.
7- Finally constitutions, which are initially legitimized by some form of *ratification*, need

procedures for *amending* or abrogating them in response to systemic changes.

This is not the place to analyze the constitutions of the WTO and of NAFTA seen as organizations in their own right. My objective is rather to explain how membership in these global and continental economic regimes adds an extra, external constitutional matrix to Canada's domestic constitution.

Canada's participation in NAFTA required it to accept limits on its internal autonomy but gave its corporations certain rights in the United States and Mexico, rights which are supraconstitutional in those jurisdictions. Membership in the WTO gave a state's companies in 147 other countries supraconstitutional rights that parallel the limits it accepted for itself. Following this section I will lay out the value abroad of Canada's supraconstitution for its companies. But first I will examine how these continental and global trade regimes act constitutionally in Canada's domestic legal order.

1. Norms

The norms in the WTO and NAFTA establish principles such as *national treatment* that are not necessarily incorporated into domestic legislation. There is no Canadian law saying that the federal government must treat foreign-owned furniture companies at least as well as it treats Canadian-owned furniture firms. But since the trade agreements extended the national treatment principle from goods to investments and even to services, if any federal or provincial or municipal government subsidizes a nationally or provincially owned firm without offering these benefits to foreign companies as well, Canada is liable to legal attack by another government belonging to NAFTA or the WTO that deems one of its companies in Canada to have suffered from that discriminatory treatment.

Practically speaking, national treatment for investment spelled the end to a whole generation of industrial development policies centred round the promotion of domestic corporations or sectors to improve their competitiveness in order to boost their exports. National treatment also called into question the capacity of the Canadian state to bolster its cultural industries through favouring, for example, domestic publishers. In this way supraconstitutional norms have had direct impacts on Canada's domestic legislative and administrative order.

NAFTA's and the WTO's trade principles are thus supraconstitutional because they give legal grounds to foreign corporations -- which, for instance, might consider a northern territory's demands on investors in the Arctic to be too onerous or the subsidization of only Canadian firms unfair. If they do, they can press their home government to launch a suit against the federal government of Canada through NAFTA's dispute settlement panels or the WTO's dispute settlement board.

2. Limits on government powers

By the very act of signing CUFTA, NAFTA, and the WTO, Canada undertook to make immediate changes in a wide range of legislation and regulations. CUFTA's investment chapter raised the minimum size of a corporation whose takeover by a foreign corporation is under review from $5 to $150 million. Canadian implementation legislation made the appropriate amendment to the Investment Canada Act. The WTO's and NAFTA's rules are so comprehensive that, in their implementation legislation, their members had to change hundreds of existing laws.

These changes to laws and regulations mandated by the WTO and NAFTA were

supraconstitutional not just because they had to be made but because they were irreversible. Unlike normal amendments to statutes made by legislatures, which can further amend or revoke their acts in response to changing electoral considerations, statutory amendments incorporating international trade norms can only be amended 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 accepting regulatory changes over which Parliament no longer exercises sovereignty. This is what defenders of free trade allude to when they described NAFTA as "locking in" the neoconservative policy paradigm (Clark 1997). As another example, CUFTA prohibits Canada from charging US importers of Canadian oil a price higher than what Canadians pay domestically.

To be precise, these standards do not actually *prevent* governments from imposing performance requirements on foreign investors or subsidizing domestic firms. But any federal or provincial government that violates a NAFTA or WTO rule is vulnerable to a partner state initiating a legal action that could result in economic sanctions to restore the damage from which its corporations claim they have suffered. When Brazil lodged a complaint at the WTO on behalf of its regional airplane builder, Embraer, the WTO dispute panel in Geneva found Canada to have acted illegally by providing state aid so that its regional jet manufacturer, Bombardier, could export more competitively. Ottawa was obliged to mend its ways.

3. Rights

The corollary of a limit on government may be a right for its citizens. Whereas the EU created direct rights for citizens in member states – for instance to sue their own governments before the European Court of Justice -- the only 'citizens' whose rights in Canada were expanded under NAFTA were corporations based in the United States or Mexico. Under the WTO, rights were also created for corporations, not citizens. National treatment and the right of establishment made it easier for firms owned in one country to do business throughout the world. What makes NAFTA supraconstitutional in this regard was its creation of corporate rights through NAFTA Chapter 11's provision for foreign corporations to take member governments to international commercial arbitration in alleged cases of expropriation (Levin and Martin 1996).

Many of the WTO's agreements also contained rights for international corporations but none for citizens. Its agreement on Trade Related Aspects of Intellectual Property Rights required that all member states amend their intellectual property legislation and change their judicial procedures in conformity with the stipulated norms (Kent 1994). The external and constitutional quality of these rights can be seen in their giving transatlantic pharmaceutical firms the legal justification to have the EU successfully take a case to the WTO against Ottawa because its drug legislation did not give European firms the full patent benefits that they claimed were now their due (WTO 2000).

4. Adjudication

A constitution's norms, limits, and rights are of little value unless it also establishes arbitral processes so that its texts can be interpreted in case of conflicts over their meaning.

The judicial capacity of global governance -- the ability on the part of one state to discipline another of violating some supraconstitutional norm -- varies widely depending on the IO's own constitution. Global *environmental* governance is notably bereft of adjudicatory muscle. The superior strength of inter-governmental *economic* agreements that establish limits and create rights is due to their more effective dispute settlement mechanisms. Whereas the WTO was endowed with an impressive apparatus for adjudicating intergovernmental disputes, NAFTA was

created without a supranational judiciary. Instead , North American governance is distinguished by some precarious dispute settlement processes whose supraconstitutional impacts vary from minor (for general disputes between member states) to negligible (for trade disputes between exporting and importing states) to substantial (for disputes between transnational corporations and host states).

NAFTA

General Disputes

Continental dispute settlement was meant to depoliticize conflicts between the three governments by having their differences resolved by neutral arbitrators applying common rules. In this spirit, NAFTA's Chapter 20 provides for binational panels to be struck when the member-states have been unable to resolve their differences related to issues arising out of the agreement. Although "Chapter 20" dispute settlement was considered expeditious at first, (Davey 1996, 65) later decisions have proven unable to settle conflicts without resort to power politics (Loungnarath and Stehly 2000, 43). For example, when it lost a panel decision to Canada in a wheat case (CDA-92-1807-01), Washington responded by threatening to launch an investigation into Canadian wheat exports. Closure was only achieved when US pressure caused the Canadian government to give way by agreeing to limit wheat exports during 1994/95 to 1.5 million tons (Davey 1996, 56). If such Chapter 20 rulings are unable to constrain the continental hegemon so that it becomes futile to submit general issues to NAFTA arbitration, continental governance appears judicially unable to deliver for its weaker members the rights for which they "paid" when negotiating the original compact. In this respect the judicial function of NAFTA is faulty as a constitution for North America by failing to have supraconstitutional effect in the US legal order.

Trade disputes

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

NAFTA's chapter 19's putatively binding judicial expedient turned out to be as disappointing as its critics had predicted. When the United States' CVD against Canadian softwood lumber exports was remanded for incorrectly applying the notion of subsidy as defined in US law, Congress simply changed its definition of subsidy to suit the Canadian situation. Beyond softwood lumber's long-lasting evidence (Howse 1998, 15), Canada has had an unsatisfactory experience in using Chapter 19 to appeal other American trade determinations. In 1993, for instance, there were multiple remands in five cases, which led the panels to surpass their deadlines significantly. Further problems have arisen over the lack of consistency in Chapter 19 panel decisions, which have shown widely differing degrees of deference to agency decisions (Trebilcock and Howse 1999, 83).

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

Thus Chapter 19 confirms the experience of Chapter 20, that NAFTA's judicial function is asymmetrical in its impact. On the one hand it does not have supraconstitutional clout over the hegemon's behaviour. On the other it is used to enforce NAFTA rules in the periphery but has some effect on Canadian administrative justice. When these processes do not satisfy Washington, it can still exercise its raw power to achieve its objectives.

Investor-state disputes

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

Beyond shrinking the scope of the Canadian judicial system, Chapter 11 arbitrations overlay it with a supraconstitutional process that conflicts with many of its historic values. *Transparency* is the first victim in this secret world of commercial arbitration whose hearings are held behind closed doors. *Neutrality* is the second legal value that falls by the wayside. Since the plaintiff investor has the right to appoint one of the three arbitrators, the defending government already faces a bench that is substantially weighted in favour of corporate rather than public values. *Judicial sovereignty* is a third victim of this extraordinary addition to the Canadian legal order. As the corporate plaintiff and the defendant state choose the panel's chair by consensus, it is likely that there will be just one Canadian in tribunals adjudicating suits launched against Canadian governments. This suggests that, when a norm of international corporate law comes into conflict with a Canadian legal standard, it is the latter which is likely to be overridden.

The WTO

In contrast with NAFTA's judicial processes, which are weak at the governmental level and strong at the corporate level, the WTO's dispute settlement body excludes corporations from directly using its services and gives member governments a powerful tool with which to enforce the global regime's economic rules even against the most powerful non-compliant state. Indeed, the key to the WTO's unprecedented importance lies in the power and neutrality of its dispute-settlement mechanisms. Unlike NAFTA's Chapter 19 and 20 panels, WTO panellists are chosen from countries other than those involved in a particular dispute. Their rulings are not based on the contenders' own laws, as they are in NAFTA's AD and CVD cases, but on the WTO's international rules. They make their judgments quickly on the basis of the WTO's norms that they interpret in the light of the international public law developed by prior GATT jurisprudence.

The sociology of its dispute panels enhances the WTO's legalistic rigidity (Weiler 2001, 194). Panellists adjudicating WTO disputes are either trade lawyers and professors of international law who tend to stick very close to the black letter of the WTO's texts they are interpreting, or they are middle-level diplomats who take their cues from the Secretariat's legal staff. In either case they know full well that their judgment will be appealed by the losing side and that the judges on

the Appellate Body will be responding to highly refined legal reasoning (Bhala 1999, 847; Palmeter and Mavroidis 1998, 405). Under these conditions, "soft" arguments defending cultural autonomy or environmental sustainability hold little weight against the "hard" logic of the WTO's rules.

The WTO's supraconstitutional norms create considerable uncertainty for member governments. In referring to one contentious concept in trade law, the WTO's Appellate Body memorably compared the notion of "likeness" to "an accordion, which may be stretched wide or squeezed tight as the case requires." This conceptual flexibility did not guarantee cultural sensitivity, as Canadians discovered when the WTO ruled that *Sports Illustrated Canada* was "like" *Maclean's* magazine (WTO 1997). This case resulted in several key policy instruments, which had successfully promoted a Canadian magazine industry for several decades, being declared illegal (Schwanen 1998). Facing such a broad approach to the adjudication of the WTO's rules, national policy makers can only be sure that they will never know what this supreme court of commercial law will decide until a trade dispute concerning this policy is heard (Howse and Regan 2000, 268).

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

Conflict can also be anticipated between the global and continental orders. The United States, for instance, challenged in a NAFTA panel Canada's tariffication of its agricultural quotas as a violation of its NAFTA obligations (Trebilcock and Howse 1999, 267). The panel ruled that the WTO's tariffication imperative prevailed (CDA-95-2008-01). Other conflicts between the two regimes' norms are bound to occur, complicating their constitutionalizing impact on their members. The WTO may be superior to NAFTA in many respects, but multilateralism does not necessarily present Canada with a real escape from US-dominated continentalism. Indeed much of the constraint that the WTO has imposed on the Canadian state in the first few years of its existence has been an application of US-driven demands that Canada comply with US-inspired WTO rules on behalf of US-based pharmaceutical and entertainment oligopolists.

5. Enforcement

As with other trade treaties, NAFTA has no enforcement capacity other than the parties' sense of their long-term self-interest. If one member state does not comply with the judgments of disputes that it loses, it cannot expect its partners to do the same. Under the extreme asymmetry prevailing in North America, the hegemon is largely unconstrained by prudential considerations. The United States remains able to flout the trade agreements' rules as interpreted by its judicial processes. Washington has repeatedly done this with both Canada and Mexico.

Like NAFTA, the WTO has no police service capable of implementing its judicial decisions. But unlike NAFTA, the enforcement provisions supporting its dispute settlement rulings are significantly stronger. Once the final decision on a trade dispute has been handed down in which a signatory state's laws or regulations have been judged in violation of a WTO norm, the offending provisions are supposed to be changed or compensation paid. A non-compliant state is much more likely to be brought to "justice" by a litigant state because failure to abide by a WTO

dispute ruling gives the winning plaintiff the right to impose retaliatory trade sanctions against the disobedient defendant. This retaliation can block any exports of the guilty state. The amount of the damage inflicted by the retaliation can equal the harm caused to the complainant by the violation. Although compliance is far from universal, this self-enforcement system works better in the WTO where there is greater symmetry among the major powers. This confirms that the WTO has a far more substantial supraconstitutionality for its members in its judicial dimension than does NAFTA (Howse 2000).

Enforcement is contingent on foreign complaints being adjudicated. Without legal attacks from foreign governments on behalf of their corporations, the prohibition of governments from imposing performance requirements on foreign investors, to make export commitments, to find local sources for their manufacturing needs, to transfer technology to domestic partners, or to guarantee set levels of employment would remain a dead letter (Chang 1998).

6. Institutions

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

By causing federal and provincial governments to amend the legislation in various policy fields, NAFTA and the WTO may also have altered Canadian federalism's distribution of powers between the two levels of government. Having made Ottawa responsible for ensuring the provinces' conformity to its provisions, NAFTA may have restored to the Canadian constitution a federal power of disallowance that had fallen into disuse. In this way it may possibly alter -- to a potentially dramatic degree -- the country's delicate constitutional balance (Petter 1988, 141-7). For example in the Doha round of WTO negotiations, should the federal government agree to let education and health care be brought under the General Agreement on Trade in Services (GATS) rules on services, it would be taking a step that affects the provincial constitutional order more than the federal. This action might also be of questionable constitutional validity, since it would lead to a change in the norms governing the provinces without the appropriate amendment having been made in the Canadian constitution. Provincial government powers are already affected by NAFTA and the WTO. For instance, because only the federal government may launch a trade dispute and appear in its hearings, even when a provincial grievance or measure is the issue, Ottawa has considerable discretion in deciding whether and how the province's problem is addressed.

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

7. Amendment

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

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

The WTO's principal legislator is its biennial ministerial council meeting which can alter the organization's institutions (Krajewski 2001, 167-186). It can also mandate negotiating rounds, which can create whole new sets of limits on governments and rights for corporations. The Uruguay Round was dominated by the triad of the US, the EU, and Japan, with Canada playing a booster role in the wings. With the Third World having successfully blocked the launch of the putative Millennial Round at the 1999 ministerial meeting in Seattle, the Doha Round will give the South far greater voice.

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

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

Informal change in state constitutional systems can be brought about through a number of channels, chief of which is through the adjudication function. Decisions by judges "make" law and in practice amend constitutional meaning through their rulings. In NAFTA, it is Chapter 11 tribunals which have shown the greatest supraconstitutional capacity for making law in Canada. More accurately, the cases launched by Ethyl and S.D. Myers Corps. resulted in *un*making legislation that had been passed. In the first instance Ottawa settled privately by withdrawing the law forbidding the trade of the alleged neurotoxin MMT when Ethyl initiated an investor-state dispute process. In the second Chapter 11 affair, the tribunal ruled that a federal law banning the export of PCBs expropriated the waste disposal company's property (even though its processing plant was in the United States). In affirming the notion that S.D. Myers had suffered action tantamount to expropriation, the tribunal was both invalidating a federal law and amending the notion of expropriation previously employed in the Canadian legal order.

Another kind of informal amendment derives from pressure exerted from other countries or global governance institutions themselves over member states' regulatory behaviour. This external oversight keeps the Canadian state's behaviour under transnational scrutiny. The United States Trade Representative's Office makes regular reviews of federal and provincial policies, reporting annually to Congress about Canadian compliance with the obligations it assumed in NAFTA and the WTO.

The WTO's Trade Policy Review Mechanism also reviews Canada's policies every two years. This surveillance mechanism presses governments to ever greater transparency before the

epistemic community of trade liberalizers. At these encounters Canada's trading partners cannot force it to make changes, but they ask about governmental measures that interfere with their investments or trade and so put Canada's governing elite on the defensive if it is caught practicing discrimination.

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

The WTO's asbestos judgment, which allowed the French public's concerns about health to weigh in the balance, may herald an incorporation of civil society's values into the trade adjudication process. Moreover in making its Shrimp/Turtles decision the Appellate Body adopted what Barfield calls a "dynamic interpretation" of Article XX, arguing that it must look at the text in light of "contemporary concerns of the community of nations about the protection and conservation of the environment (Barfield 2002, 92). The point for our analysis is that neither constitutional nor supraconstitutional elements are fixed in stone. They can evolve through the informal alteration of the trade arbitrators' normative framework.

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

Exercising supraconstitutional rights abroad

In transnational global governance the super constitution's norms, rules, rights, and institutions have external as well as internal implications. When Sweden joined the EU it accepted an array of limitations on its government's internal autonomy. By the same token, it joined fourteen other members whose governments were limited by identical constraints and in whose economies the EU gave Swedish corporations and citizens new external capacity. These limits on other members can be seen as external rights belonging to the citizens of the trade regimes' member states.

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

In principle, participating in a rules-based system should have given the semi-peripheral state the capacity to have the hegemon play by the same book. In practice it was the hegemon that played the major role in writing the new rules which it has respected only when it suits its interests. When Canada, along with the EU prepared to invoke the WTO's dispute settlement system to

overturn the extra-territorial implementation of the US Helms-Burton law on Canadian and European assets in Cuba, Washington threatened to boycott the proceedings by invoking the higher norm of national security. When the game was going to go against it, the USA refused to play.

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

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

II Normative Implications for Cosmopolitanism of the External Constitution

Canada's external constitution has more relevance for the debate about extending cosmopolitanism to the global stage than to the discussion about reconstituting democracy at the European level.

Canada, NAFTA and the European Union

Far from sustaining a national democracy, global economic governance systems have diminished and may diminish further the scope of domestic government -- the sphere over which Canadian citizens once exerted exclusive control through their representatives. This is threatening Canadians' sense of national identity and cohesion which is highly dependent on their publicly funded health system. If the commercialization of publicly provided services is the product of the services provisions in NAFTA and GATS, Canadian society may risk losing a prime social institution that has played a major role in defining its identity and so sustaining its cohesion. Should the impact of continental and global free trade norms cause the accelerated privatization of health care with consequent increases in inequality of treatment between the rich and the poor, a central element of Canadian political culture would be jeopardized and its domestic democracy weakened.

Its external constitution has already had distorting effects on Canada's political system. Take the country's two geographically determined types of agriculture. To the extent that the prairie provinces are exporters of grains and livestock, their farmers can expect to benefit from the WTO's agreement on Sanitary and Phyto-Sanitary (SPS) standards whose supraconstitutional norms affect *other* member states' capacity to use health regulations to impede imports. As the North American dispute with the European Union over its refusal to allow the import of beef raised with a growth hormone illustrates, the SPS norms, if successfully applied, should make it

easier for Canadian cattle ranchers to find export markets. In contrast, farmers in central Canada, who supply a protected market of national consumers thanks to government-enforced marketing boards for eggs, milk, and poultry, can be expected to suffer as their quantitative barriers are turned into tariffs, which are subsequently cut to allow more competition from abroad in the Canadian market.

Although NAFTA has no capacity to act as a protective shield, intermediating between the forces of globalization and the nation state, it corresponds most closely to the first Fossum model, "Delegated Democracy." With neither collective symbolism; nor common currency; nor flag; nor parliamentary legislature, executive, or administration; nor sense of membership, citizenship or "we feeling"; nor a common foreign policy, North America has little positive sense of community. It does have something of a common security policy, but this has been imposed as a result of Washington's antiterrorism obsession since 2001. As a result, its member states are the sole sources of whatever the legitimacy it may claim.

Indeed, the reinforcement of each state's police and border surveillance powers in the wake of the U.S.-led reaction to al-Qaeda's coup of September 11, 2001 against the Pentagon and New York City's trade centre reconstituted some of the state's steering power, at least in security measures. New domestically monitored limits on financial flows that might support terrorist groups, new controls on immigration, new authority for surveillance of the internet are indications -- in particular -- that the three nation states have recaptured some of their powers and -- in general that the external constitution is not immutable.

Canada's External Constitution and a World Wide Cosmopolitanism

In the light of this conference's optimistic view of an expanded cosmopolitanism that extends democratic norms to the level of global governance, Canada's external constitution must be considered a dystopia, an anti-model that acts as a warning beacon for global democrats.

Take, to start with, the notion of democratic legitimacy which requires the public justification of results to those affected by decisions. Instead of developing its social and community cohesion, Canada appears to be polarizing into a society of those who can succeed in the globalized system and a society of those left behind. If this perception is linked to the norms and practices of the global economic governance regimes, serious repercussions may be felt in the legitimacy not just of neoconservative globalism but of the country's own representative system (McBride and Shields 1997). If global institutions have 'hollowed out' the Canadian state to the point that it risks being seen as incapable of defending its citizens' interests, (Arthurs 2000) the Canadian political system will lose credibility at the same time as NAFTA and the WTO lose legitimacy.

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

Accountability is central to this legitimacy in the sense that decision-makers should be held responsible for their decisions by giving reasons for their actions. Apart from a federal election in 1988 which focused on CUFTA and in 1993 when NAFTA was involved peripherally, the ongoing application of the external constitution proceeds with virtually no accountability. Rhetorical praise for NAFTA and the WTO by their proponents does little to paper over the democratic deficit that cannot help but grow. For instance, the WTO has the capacity to be developed much further in successive multilateral negotiations, such as the WTO's Doha Round launched in 2001. The United States is pressing for public services such as health and education to be included in states' commitments under the General Agreement on Trade in Services so that the global market can be broadened by their privatization and the scope of TNC investment expanded accordingly (Sinclair 2000). Expanding the role of transnational capital in its public health and public education systems could seriously delegitimize the Canadian state.

Congruence -- another central component of democratic legitimacy -- demands that those affected by a law should make it. In the case of the external constitution, it is those who benefited from the new norms who took part in negotiating the treaties, big business representatives famously monitoring negotiations from the "room next door." In the failed negotiations for a Free Trade Area of the Americas, the steel industry was overtly engaged in the preliminary negotiations, and the Canadian government consulted various interest groups through its consultative mechanisms. Outside these privileged interests, the secrecy required by diplomatic norms for international negotiations kept all other civil society groups and citizens in the dark.

One result was CUFTA's Article 1605, which provides that no government may "directly or indirectly expropriate or nationalize", or take "a measure tantamount to expropriation or nationalization" except for a "public purpose," on a "non-discriminatory basis," in accordance with "due process of law and minimum standards of treatment" and on "payment of compensation". NAFTA contained an identical provision. In the face of Canada's constitution, which had been amended in 1982 to incorporate a Charter of Rights and Freedoms that deliberately excluded property rights (on the grounds that they would excessively enhance corporate power), this provision created a property right for foreign corporations that neither the government nor the public had at first understood. Unlike rights in their internal constitution, this right was not available for Canadian corporations in Canada where it could only be exploited by American and Mexican companies.

It is not surprising that, in contrast with a national constitution, the empowerment accorded by NAFTA to transnational corporations subjects them to no balancing obligations enforced by continental-level institutions with the clout to regulate, tax, or monitor the newly created continental market that has proceeded to emerge (Blank and Krajewski 1995). NAFTA's Chapter 11 expanded the scope of investment rights without requiring TNCs to promote the public interest by protecting the environment or public health. In other words NAFTA supported a regime of continental accumulation less by creating a new institutional structure for it than by reducing civil society's capacities to control corporations which were given both greater freedom to operate transcontinentally and a means to discipline governments that stood in their way.

The new global governance regimes of the 1990s had another effect on the domestic democratic deficit due to their being constructed without even their designers fully understanding the consequences of their creations. Necessarily, their publics had little knowledge of the WTO's or NAFTA's contents, let alone a capacity to understand their implications. As the passing years revealed these implications, civil society discovered that there is nothing neutral about rules which reflect the demands of the continental hegemon and transnational capital.

The discourse on cosmopolitanism emphasizes inclusion and democracy. NAFTA was acclaimed by its negotiators for having "locked in" the neoconservative norms and rights which were *ipso facto* immunized from partisan political reversal. In this light, NAFTA and the WTO can be understood as enabling their negotiators to exclude not just present but also future generations who have been disenfranchised preëmptively from pursuing certain legislative goals through the democratic process (Schneiderman 1996). Even if more activist political parties were to win power, they would find their hands tied by these internationally negotiated and domestically implemented political limits to which their predecessors had committed them.

The hope for uploading democracy to the global level resides in the notion of deliberative supranationalism and a supranational democracy that could handle the problems of interdependence. But NAFTA has no legislative capacity to deal with these externalities, and the WTO's largely secretive negotiations are aimed at liberating corporations further from governments, not liberating people from economic exportation. With the decrease in the scope for participating nation states' policymaking, decisions are taken elsewhere, generally in secret. A new North American steering mechanism, the Security and Prosperity Partnership (2005) gave big business organizations from the three countries privileged access to the three executives. Opposition to the SPP by left-leaning nationalists in Canada and by right-wing extremists in the United States coincided with the vilification of NAFTA by the Democratic presidential candidates in 2008 -- two recent examples of the external constitution's legitimacy deficit which has attenuated the SPP's legitimacy as a trilateral decision-making innovation.

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

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

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

How the global supraconstitution evolves will depend on the continuing international struggle of interests, among which Canada's role will continue to be of some interest. In this situation, it remains a classic power in the middle. Semi-peripheral in its partly hegemon-owned, partly resource-based, partly manufacturing, and partly service economy, it is also semi-peripheral in remaining suspended somewhere between the powerful centre as rule maker and the weak periphery as rule taker. Its interest in the evolution of a multi-tiered system is clear from its active negotiation stance in all trade organizations. Whether it will shift from endorsing a continual expansion of neoconservative economic norms cannot yet be known. Neoconservatism may be locked in but it is not cemented in. The development of a more humane form of globalizing capitalism and the resultant reorientation of Canada's external constitution will depend on the action of its global partners and conflicting domestic forces which are also organized transnationally.

I hope I have demonstrated that the external constitution created by new forms of global economic governance has become something of an anti-model that seriously challenges the bright model represented by the multicultural, postmodern reality that can still be discerned in Canada. Indeed, under the most right-wing government in Canadian history, the dark is encroaching on the light as can be seen from much toughened restrictions on the acceptance of refugees, the increase of temporary migrant labour bereft of citizen rights, and the general securitization of the state.

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