Stephen Clarkson

Canada's External Constitution: From Empire to Hegemony

Zusammenfassung

Das Konzept der Staats-Verfassung kann sich nicht länger nur auf die internen Dokumente beziehen, in welchen die normativen Grundlagen eines Staates festgelegt werden. Vor dem Hintergrund weltweiter ökonomischer Märkte und Regime mit ihren das Verhalten der Staaten mitbestimmenden Regeln und Vorschriften sollte man von einer zweiten, nämlich einer externen Verfassung sprechen. Kanada kann diese Annahme empirisch erhärten, denn hier hat es mehrere externe Verfassungen gegeben – vom britischen Nordamerika-Akt von 1867 bis hin zum Abschluss des Nordamerikanischen Freihandelsabkommens (NAFTA) 1994 und der Welthandels-Organisation 1995.

Der Aufsatz verfolgt diese Entwicklung vom 19. Jahrhundert bis zur Gegenwart und analysiert die verschiedenen Normen, Regeln und Rechte sowie die verschiedenen Institutionen (u. a. zur Regelung von Konflikten) und ihren Einfluss auf die entsprechenden nationalen Ordnungsvorstellungen in Kanada. Ob die Security and Prosperity Partnership of North America *aus dem Jahr 2005 zu einer Milderung des Einflusses der externen Verfassung(en) führen kann, wird am Schluss untersucht.*

Résumé

Le concept de constitution ne peut plus se réserver exclusivement pour les documents domestiques qui définissent les traits institutionnels et normatifs d'un État nation. Les nouveaux régimes de gouvernance économique mondiale doivent aussi se prendre au sérieux à cet égard parce qu'ils créent une deuxième constitution, celle-ci externe, qui ajoute normes, règles, droits, et institutions à l'ordre légal de chaque état-membre. Canada est une bonne illustration de cette hypothèse, car on peut facilement observer l'évolution de sa constitution externe depuis l'Acte de l'Amérique du Nord Britannique de 1867 jusqu'à l'Accord de Libre Échange de l'Amérique du Nord (ALÉNA) de 1994 et l'Organisation Mondiale de Commerce (OMC) de 1995.

Cet article trace la diminution de la constitution externe formelle britannique durant les premières décennies du 20ième siècle, l'élargissement de la constitution externe informelle américaine durant les décennies suivantes, et la mise en vigueur de la présente constitution externe constituée par l'ALÉNA et l'OMC. L'analyse se termine par une éva-

luation de l'impact constitutionnel du Partenariat pour la Sécurité et la Prospérité de l'Amérique du Nord (2005).

Constitutions have long been recognized as seminal elements in the construction of the modern nation state. After all, they define citizens' rights and establish the norms, rules, and institutions – executive, legislature, bureaucracy, courts, and coercive agencies – which set the parameters for every political system. Whether written down in the form of a published document which is elaborated and amended by subsequent judicial interpretations (as in the United States) or whether produced more incrementally by conventions that have evolved over the centuries (as in the British case), constitutions are overwhelmingly understood to be domestic documents which structure a state's institutions and political processes.

Great Britain in the 19th century and the United States in the 20th may be ideal types for understanding the Westphalian state in its – respectively – unitary or separation-of-powers modes but, as dominant powers in their heydays, they do not set the norm for the myriad smaller states that, often having emerged from various forms of external control, are not solely constituted by their own internal processes.

Historically, the domestic institutions of colonial states were primarily created by the imperial centre. As autonomist pressures grew, the mother country devolved powers until, at the moment of independence, the subordinate state took control of its constitutional destiny. This is the textbook view, but the Canadian experience provides instructive qualifications to this narrative of abrupt national liberation. Instead, it offers strong evidence to support the hypothesis that *all* states have a second, if seldom analyzed, *external* constitution.

Part I of this article will show how the United Kingdom controlled significant formal – though diminishing – elements of Canada's constitutional regime. But this thesis maintains that, while Canada's made-in-Great-Britain statutory external constitution was being whittled down to zero over the decades, a made-in-the-USA, largely informal external constitution was gradually constructed as the Dominion moved ever further under the United States' political, military, economic, and cultural sway. Once this case has been made in Part II, the text will develop the argument that Canada's participation in global and continental governance regimes adds further, more powerfully constraining layers to its external constitution, formally reconstituting the Canadian state.

1. Canada's external constitution under British rule: formal but diminishing

While the British North America (BNA) Act is generally understood to have comprised Canada's constitution until its 'patriation' in 1982, the important point for this argument is that it did not define Canada's entire legal regime. In some important respects, Canada lived with the colonial version of what can be called an 'external' constitution, even if it was never so labeled. As Article 132 of the BNA Act states:

> [T]he Parliament and Government of Canada shall have all Powers necessary or Proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.[1]

This somewhat obscurantist phraseology suggested unequivocally that the new Dominion's foreign policy remained the prerogative of the Crown, a power that had sometimes decisive implications for the norms and rules that defined its legal order.

Norms

Ottawa had established its own military and naval forces, but their deployment in action remained an imperial prerogative. When Parliament in Westminster changed the British Empire's norm of peace into the norm of war, the Dominion was ipso facto at war: Canada was engaged in hostilities with Germany the moment in 1914 that London declared war on the Kaiser.

Rules

Initially, Westminster retained the executive function of negotiating and signing treaties on Ottawa's behalf and the legislative function of ratifying them – typically with the United States. On more than one occasion, it literally shaped Canada's contours – giving up vast territories to Yankee control without the nominally autonomous Canadian politicians' endorsement.

Although a foreign service was established when Canada's Department of External Affairs was founded in 1909, it was only with the Statute of Westminster in 1931, when the Dominions were declared to be autonomous members of the British Commonwealth, that the Canadian government formally assumed the functions relating to its foreign relations:

> [A]nd whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that

1 U.K. Statutes, 1867, 30 Vic, c. 3, sec. 9 (132).

> Dominion otherwise than at the request and with the consent of that Dominion.[2]

Institutions

The Dominion's entire institutional corpus was defined by the British North America Act, with one notable exception. Once the BNA Act transformed the colonial courts into a domestic judicial system, Ottawa had duly proceeded to set up a Supreme Court in 1875. But the ultimate function of deciding appeals in disputed cases remained in the hands of the Judicial Committee of the British Privy Council – until the BNA Act was amended to devolve the function of criminal appeals to Ottawa's Supreme Court in 1933. Under the prime ministership of Louis St. Laurent, the Supreme Court of Canada became the court of last resort for all other appeals in 1949, with the last decisions of the Judicial Committee being made in the mid-1950s.

Amendment

The last, and symbolically most powerful, element of Canada's legal order that remained in its external constitution was the power to amend the domestic constitution – the rules for changing the rules. For the federal government to receive jurisdiction to legislate unemployment insurance in the 1940s it had required the British government, upon Ottawa's request, to amend the British North America Act in that respect. This power of constitutional amendment, the ultimate symbol of national sovereignty, only ended in 1982 when the British Parliament passed a resolution to incorporate in the BNA Act the amending formula, which the Liberal government of Pierre Trudeau had negotiated with the provinces. Rechristened the Constitution Act, 1982 (into which was spliced Trudeau's vaunted Charter of Rights and Freedoms), the new British legislation finally vested the federal and provincial governments with this capacity. In a legalistic sense Canada had become fully sovereign, but by this time Canada's external constitution had a far more powerfully American than British table of contents.

2. Canada's external constitution within the US imperium: informal but increasing

If we accept that a constitution is also made up of unwritten conventions that, when practised over time, gradually gain the status of behaviour-governing rules, then we can recognize how Canada's third imperial power relationship fostered a different – because largely informal – external constitution. While constantly evolv-

2 U.K. Statutes, 1931, 22 Geo, V c. 4.

ing, the conventions of the US-Canada relationship defined certain rights and incorporated norms and rules, and, in some cases, actual institutions.

Norms and Rules

Civil servants and politicians responsible for managing the relationship between two highly unequal but closely allied states during the Cold War came to agree that Canada should not overtly criticize American foreign policy. As a quid pro quo, the United States was not to bully Canada. This norm was actually elaborated into a doctrine dubbed 'quiet diplomacy' to indicate that Canadian-American conflicts were to be mediated to the extent feasible by bureaucrats who would consult in advance about all issues behind closed doors in order to keep political tensions at bay (Merchant/Heeney 1965).

A rule derived from the quiet diplomacy norm had to do with not 'linking' issues: every bilateral conflict should be dealt with in its own terms and not be allowed to affect other items on the two countries' mutual agenda. On occasion, the linkage rule was observed in the breach: when Ottawa proposed legislating the Canadian edition of the American *Time* magazine out of business, the State Department let it be known that President Lyndon Johnson might not be inclined to ratify the US-Canada Auto Pact that was then being prepared for his signature.

'Exceptionalism' was another notion that the Canadian political elite came to take as a governing norm in their vulnerable relationship with the neighbouring giant. The idea was that if, when pursuing its international economic interests, Washington enacted a regulation with negative implications for its neighbouring economy, Canada should be granted an exemption. The rationale maintained that, because US corporations owned and controlled so many leading sectors of the Canadian economy, actions that hurt Canada would depreciate US assets there at the same time. Under this logic, Ottawa gained exemptions from such measures as the Interest Equalization Tax of 1963. The IET was adopted by the U.S. Government to stem the outflow of capital and improve its balance of payments by increasing the cost of foreign borrowing in the US capital market by 1 percent but was seen as a threat to a Canadian dollar convalescing from the 1962 exchange crisis. In order to regain the confidence of the world's financial community, the Canadian authorities obtained an exemption from the IET for Canadian new issues in America. Constitutionally speaking, there were costs to making special arrangements with the Americans who insisted Ottawa accept a new rule known as the Exchange Fund Ceiling which limited its monetary-policy autonomy.

Amendment

Norms get violated and rules get broken. On August 15 1971, under a balance of payments strain caused by its war in Vietnam, President Richard Nixon detached the U.S. dollar from the price of gold and imposed a surcharge on all imports. This unilateral act produced shockwaves round the world, but closer to home it was seen as

a cataclysm. Not only would the import surcharge threaten Canada's voluminous exports to the United States. That 'Nixonomics' had not been the subject of *quiet,* behind-closed-doors consultations broke the bilateral conventions that had developed. When the Nixon administration refused to comply with Canadian entreaties for exemption from the import surcharge, it was clear that Washington had unilaterally amended the bilateral relationship. Indeed, Nixon made this explicitly clear when he told the Canadian parliament in 1973 that Canada should be more independent.

Rights

While constitutional rights are normally associated with citizens, corporations are no less interested in their entrepreneurial prerogatives. When the Liberals' notorious National Energy Program (NEP) was announced in the budget of October 1980 to repatriate control over the Canadian oil and gas sectors, US transnational corporations protested that their Fifth Amendment property rights had been violated. The enormous pressure that the administration of Ronald Reagan consequently exerted over Ottawa was based on the notion that, by their very presence in the Canadian economy, US corporations had acquired rights not to have the value of their assets diminished. But the high level of public involvement in the energy crisis and the considerable consensus that had developed outside the industry about what to do – controlled prices and state intervention through a crown corporation, for instance – gave the last Trudeau government the resolve to introduce and defend its National Energy Program despite fierce resistance emanating both from the corporate headquarters of the transnationals and from the administration in Washington. However, recognizing the limit that the US-Canada relationship imposed on its capacity to intervene in its own economic affairs, Ottawa ultimately unwound most of the NEP's regulatory framework. In short, changes of consciousness led to major shifts in the Canadian state's resistance to or acceptance of its external, if informal, supraconstitutional restrictions.

Institutions

While political scientists conceptualize institutions mainly in terms of formally structured organizations, Canada's position in the immediate periphery of the US sphere of dominance created institutional realities that were manifested largely on an ad hoc and occasional basis. For the purposes of this analysis, they can be documented according to the main functions of the conventional constitutional order – legislative, executive, and bureaucratic; coercive; and judicial.

Legislative, executive, and bureaucratic

On some Canadian policy issues of major concern to the United States' government and business, US executive, administrative, and corporate players have periodically contributed to Canadian rule-making. When, for instance, the Progressive

Conservative government of John Diefenbaker set up a commission to recommend a national strategy for the petroleum industry, the major US oil companies along with the US Department of State took a direct part in the process, offering their advice. In this case, overt power was in the hands of the transnational corporations, there being few Canadian players with clout. These US companies controlled the sources of supply, the production facilities, the pipeline transportation network, the refining and storage facilities and, finally, marketing and price strategies. As a result, they exerted firm control over the energy agenda on behalf of their own interests and that of their national state. It was in the US TNCs' interest to pump cheaper oil out of their Venezuelan holdings at maximum speeds in anticipation of their ultimate nationalization by Caracas. Cheaper Alberta sources should be kept for the continent's northwest market.

Strongly influencing the public's consciousness, the political institutions, and the political agenda, it is not surprising that the American transnationals effectively wrote the Diefenbaker government's National Oil Policy of 1961. Ottawa agreed to split its petroleum economy in two. Western Canadian oil would supply the northwestern US states, while oil for Eastern Canada would come by sea. The government's National Oil Policy forewent the promotion of a Canada-wide petroleum economy and accepted energy insecurity for its eastern petroleum market.

Such direct participation in the processes of the Canadian polity may seem abnormal but was and remains merely the visible part of the larger iceberg. Thanks to its large, often monopolistic, dominance in major segments of the Canadian political economy, it is only natural that US enterprise plays a substantial and continuing role through the various channels of Canadian governance providing information and advice in every policy domain that affects it.

Another example of Canada's external constitution incorporating an American rule-making presence would be the stock market whose brokerage regulations have been formulated over the years in close collaboration with such US bodies as the Securities and Exchange Commission and the New York Stock Exchange itself.

Regular meetings between the New England Governors and Eastern Canadian Premiers are the tip of another iceberg which permits an executive, legislative, and bureaucratic presence for bordering states in the processes of provincial government. The Pacific Northwest Economic Region incorporates elements from business and civil society in a form of cross-border governance that mediates US influences through the political processes of the western Canadian provinces. The Conference aims to advance the interests of the eleven jurisdictions through promoting collaboration with the private sector, and, since the early 1980s, it has addressed many topics including economic development, the environment, energy, fisheries, agriculture, and trade. These semi-formalized institutions provide forums for discussion which can result in executive, legislative, and bureaucratic actions in the participating sub-central jurisdictions. (The obverse reality also inserts a Canadian presence in the United States' external constitution – but this is a matter for a separate study.)

Coercive

Beyond a common commitment to resisting the threat of Soviet aggression during the Cold War, a poorly-recognized reality governed Canada's defence relationship with the United States. "Defence against Help" was shorthand for Ottawa being obliged to establish defence forces and doctrines to the satisfaction of the Pentagon. The clear understanding was that, if Canadians did not establish the military structures and orientation deemed necessary in Washington, the American forces would do the job, but on their own terms. Canadians take this implicit coercive reality for granted without dwelling on its constitutional significance.

Judicial

When it came to actual conflicts between the two governments, their resolution was, with one notable exception, achieved through the normal diplomatic processes of intergovernmental negotiation so cannot be seen as having a constitutional function. The obvious exception is the International Joint Commission, which had a mandate to resolve bi-national conflicts over boundary waters. The IJC brings us to the institutionalized parts of Canada's external constitution within the US imperium.

Institutions

During the Keynesian era, some important bilateral institutions were set up to provide more robust regulatory frameworks for managing major common issues.

The North America Air Defense Command (NORAD, 1957) is the most visible and lastingly significant of those institutions that formally incorporated an aspect of the hegemon's decision-making system into the northern periphery's polity. More than eighty other treaty-level defence agreements, 250 memoranda of understanding, and 145 bilateral defence discussion forums (Morton 1999, 182) enabled the North American hegemon to achieve its military objectives in its periphery with little public deliberation – or notice.

Involving as it did Canada's principal coercive power – US-made nuclear weaponry – on an issue in which Washington had a paramount interest, NORAD can be seen as a precursor for the institutionalization that was to follow in economic spheres where Washington and its chief industrial lobbies had interests that transcended the international border.

The Canada-U.S. Automotive Products Agreement (Auto Pact) of 1965 was not the first economic integration agreement which introduced an externally controlling element in a Canadian policy area. The Defence Production Sharing Arrangements of 1963 and free cross-border trade in agricultural equipment were precursors of broader economic integration by formal agreement. But the Auto Pact was far more consequential because it transformed one of Canada's biggest nationally organized, tariff-protected industries into a continentally rationalized sector that guaranteed a minimum level of Canadian participation in U.S.-owned assembly plants.

While these bilateral economic agreements can be seen as formal increments to Canada's growing US-made external constitution, they paled in comparison to the major innovations in continental and global governance that were to follow. Once the Keynesian paradigm of economic development by national industrial strategies gave way to the neoconservative approach to growth through market autonomy, a new generation of global economic governance institutions emerged which formally introduced significant external components to their signatories' legal orders.

3. Canada's external constitution under continental and global economic governance

This section will not consider the various instances of continental governance – the Canada-United States Free Trade Agreement (CUFTA, 1989) and the North American Free Trade Agreement (NAFTA, 1994) – or global governance, most particularly, the World Trade Organization (WTO, 1995) in terms of their own constitutional structures. Instead, the analysis focuses on how, by signing these treaties, Canada has taken on norms, rules, rights, and, in a few cases, institutional requirements that add formal -- and formidable -- components to its already considerable external constitution.

Norms

NAFTA and the WTO established principles such as *National Treatment* that do not have to be incorporated into Canada's domestic legislation to be binding. For example, no Canadian law requires federal or provincial or municipal governments to treat foreign-owned furniture companies at least as well as they treat 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 discriminates in favour of a nationally or provincially owned firm, the government of Canada is liable to legal attack by another government belonging to the WTO that deems one of its companies in Canada to have suffered unequal treatment.

National Treatment for investment spelled the end to a whole generation of industrial development policies centred on providing subsidies to domestic corporations or sectors in order to improve their competitive performance and/or boost their exports. It also called into question the capacity of the Canadian state to bolster its cultural industries through favouring domestic entities in the private sector. In this way, supraconstitutional norms have had direct impacts on the domestic legislative and administrative order. 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 norm is vulnerable to a partner state initiating a legal ac-

tion that could result in economic sanctions to restore the damage from which its corporations claim they have suffered.

Contingent supraconstitutional norms are only one pressure that the external trade regimes exert over member states' regulatory performance. There is also a process of external oversight that keeps the Canadian state's behaviour under transnational scrutiny. The United States Trade Representative's Office keeps federal and provincial policies under regular review, reporting annually to Congress about Canadian compliance with the obligations it assumed in NAFTA and the WTO. This American monitoring can be understood as the administrative surveillance function of Canada's external continental constitution, a normative system that can be expanded unilaterally by Congressional decision. Under the 'Super 301' Section of the Trade and Competitiveness Act of 1988, the United States Trade Representative's office (USTR) has the right to investigate countries that have "a history of violating existing laws and agreements dealing with intellectual property rights" (Destler 2005, 318). In other words, Canada's obligations may extend beyond those it has formally accepted to those that Congress may deem it ought to respect.

The global corollary of USTR's administrative monitoring can be found in the WTO's Trade Policy Review Mechanism, which reports on Canada's policy performance 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 practising what may be considered discrimination.

Constitutional regimes may coexist, but not necessarily without conflict. For instance, norms in the external constitution may create abnormalities in the internal constitution. NAFTA's and the WTO's trade principles give legal support for foreign corporations – which, for instance, might consider demands on investors in the Arctic to be too onerous or the subsidization only of Canadian firms unfair. If they feel aggrieved, they can press their home government to launch a suit against Canada through NAFTA's dispute settlement panels or the WTO's dispute settlement board.

The application of the National Treatment norm to sub-central governments creates the anomaly in Canada that provinces, territories, and municipalities have to give NAFTA investors non-discriminatory treatment, whereas they may still discriminate against Canadian investors from other provinces or cities. How such discrepancies between the external and internal constitutional systems get resolved remains an open question. Whether NAFTA or the WTO's supraconstitutional superiority over the Canada Constitution Act will be accepted by Canadian courts remains to be seen. No case has yet been brought to the Supreme Court to test whether a global or continental norm necessarily has precedence over a Canadian norm.

There are also conflicts between different levels of the external constitution. In one case, a NAFTA dispute panel determined that Canada's WTO obligation to change its quantitative restrictions on the import of agricultural products into tariffs trumped its NAFTA commitments not to increase its tariff levels.

Rules

CUFTA constitutionalized Washington's concern that Ottawa might again introduce nationalist energy policies by prohibiting such NEP-like practices as pricing petroleum sold at home below the level of the price charged for oil exported to the United States. Other rules prevented Ottawa from screening foreign takeovers below a much higher minimum firm size than had been established by Canadian law.

Rights

The only 'citizens' whose rights in Canada were expanded under NAFTA were corporations based in the United States or Mexico. What makes NAFTA supraconstitutional in this regard is its Chapter 11's creation of a judicial process that gives non-Canadian NAFTA corporations the power to take federal or provincial or municipal governments to international commercial arbitration in alleged cases of expropriation. This corporate power to overturn democratically enacted laws designed to secure the citizenry's health or safety shows how the external constitution changes the dynamics of domestic government (Levin/Marin 1996, 90).

Similarly, the WTO only created rights for global corporations, not global citizens. TRIPS, the WTO's agreement on Trade Related Aspects of Intellectual Property Rights, required Canada and all member states to amend their intellectual property legislation and change their judicial procedures (Kent 1994, 711-733). The external and constitutional quality of these rights can be seen in their giving trans-Atlantic 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).

Institutions

While each forum of global governance has its own constitution – some weak like NAFTA, some much stronger like the WTO – these agreements' institutional role in the external constitution of their signatories is generally slight. Neither NAFTA nor the WTO impinge directly on the Canadian executive or legislative function. Administratively speaking, the committees and working groups set up by a NAFTA have proven to be of minor, merely consultative significance.

Although neither has a direct legislative capacity, the rulings of their dispute settlement processes have the same kind of rule-making function as do domestic courts. NAFTA's Chapter 19 establishes dispute settlement panels that may be invoked when a partner state challenges a domestic anti-dumping or countervailing-duty determination. Since appeals of these protectionist rulings are displaced from

the domestic judicial system to supranational review, this innovation can be seen as an external addition to the Canadian judicial system. However, 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 until, in 2006, the Canadian government decided that capitulation was the better part of valour and gave in to Washington's demands.

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 more quickly than NAFTA panels deliberating on the basis of the WTO's norms that they interpret in the light of the international public law developed by prior GATT jurisprudence. In a clear example showing how the external constitution reduces the dominion of the domestic constitution, the United States government successfully used WTO adjudication to invalidate the policy architecture that Ottawa had put in place over several decades to buttress the domestic magazine industry in the face of overwhelming US dominance of the Canadian market (Madger 1998).

NAFTA's Chapter 11 withdrew an even more significant element from Canada's domestic judicial order, the power to review government actions. Instead of using national courts to protest governmental measures which they consider injurious to their corporate interests, US and Mexican firms can now invoke Chapter 11's provisions to activate binding international commercial arbitration. In effect, NAFTA reconstitutionalized North America less by creating a new institutional structure for it than by giving corporations legal processes with which to discipline member governments that stood in their way.

In its own terms, Chapter 11's privatization of judicial power represented a substantial change to the domestic political order. But this contingent subordination of Canadian public policy to the transborder business strategies of US – and, in theory, of Mexican – corporations was overshadowed, as an addition to the external constitution, by an actual deepening of North America's institutional structure – a development that was triggered by the contradiction between the pressure for easy transboundary flows (that had been intensified by NAFTA) and the impediments to border crossings (that resulted from US antiterrorism preoccupations).

4. The Security and Prosperity Partnership of North America (SPP)

Paradoxically, a historic move towards institutionalizing trinational regulatory co-operation was born in the White House at the very moment – March 2003 – when

the Bush administration was as angry as it had ever been with President Vicente Fox and Prime Minister Jean Chrétien. Notwithstanding the public discord due to their resisting the US President's determination to declare war on Iraq, a meeting at 1600 Pennsylvania Avenue with senior officials from the Fox and Chrétien governments agreed that border bottlenecks caused by US security concerns should not be allowed to jeopardize the transboundary flows of goods and people that were the life blood of the three economies' high levels of interdependence and crucial to their hopes for global competitiveness.[3]

The formalization of this executive consensus took two years to materialize, but by March 2005 in Waco Texas, Canadian Prime Minister Paul Martin, US President George Bush, and Mexican President Vicente Fox finally signed a document of uncertain legal status called the "Security and Prosperity Partnership of North America" (SPP). Three months later, the three countries' trade ministers and secretaries met in Ottawa to endorse as the SPP's program some 300 proposals for regulatory changes that had been cobbled together within the three countries' security, agricultural, industrial, and transport bureaucracies (SPP 2005).

This trilateral process did not take place in a vacuum. Dismayed that a wide range of regulatory issues were being discussed without their input, business representatives from the three countries met in Louisville, Kentucky under the auspices of the Council of Americas, a business think tank, and the sponsorship of United Parcel Services to consider institutionalizing their involvement in SPP.

When in March 2006, the newly elected Canadian Prime Minister Stephen Harper joined his two continental counterparts in Cancún to celebrate the SPP's first anniversary, two further decisions were made. First, the leaders agreed to meet on an annual basis. Next, they established a North American Competitiveness Council (NACC) that was to plug the three business communities into their governments' consultative and decision-making process.

Institutionally speaking, these two innovations changed the face of North American governance. Whereas there had been no meeting of the three countries' leaders after the United States had unilaterally blockaded its borders following the terrorist attacks of September 11, 2001, there was now to be an annual North American summit that would address common concerns. While easy to dismiss as yet another occasion for mediatized photo opportunities, this regular get-together could have substantial potential. For one thing, it regularly puts the hegemonic US president on a par with the periphery's two heads of government, intrinsically reducing the power asymmetry between the former and the latter who ipso facto get guaranteed regular access to the White House. For another, the impending trinational summit

3 This analysis is based on confidential interviews carried out in Mexico City in 2006 and 2007 primarily in the Secretariats of External Relations and the Economy and in Washington in 2006 and 2007 in the Mexican and Canadian embassies, the National Security Council and Department of Commerce as well as with officers in the US Chamber of Commerce, the Council of the Americas, and the Canada-US Business Council.

energizes the senior reaches of each country's bureaucracy impelling them to co-operate with their partners in order to put together an agenda and then produce results that will, in turn, be evaluated at their next meeting.

More intriguing by far is the NACC's insertion into the three countries' institutional order. Following a meeting in Washington in August 2006, when priorities for a work program were approved, the NACC's next gathering took place in Ottawa on February 23, 2007. On that day, representatives from each country's business community presented their recommendations on how to reconcile border security with continental prosperity to the US Secretaries of State, Condoleezza Rice; Commerce, Carlos Gutierrez; and Homeland Defense, Michael Chertoff; the Mexican Secretaries of External Relations, Patricia Espinosa; the Economy, Eduardo Sojo; and the Interior, Francisco Ramírez Acuña; the Canadian Ministers of Foreign Affairs, Peter MacKay; of Industry, Maxime Bernier; and Public Safety, Stockwell Day (NACC 2007).

Not only did NACC create a continental business trialogue at the highest level; it gave this three-headed corporate powerhouse direct access to a trilateral cabinet subcommittee. This step towards more formalized continental governance not only gave the Canadian business community privileged access to its own national executive and bureaucracy but presented the corporate and political leadership from the other two NAFTA partners with similar access. Should this corporate forum survive and grow, it will mark a notable addition to the external constitution which could facilitate a new form of transborder business governance isolated from the three countries' democratically elected legislatures.

Beyond its institutional novelty, the SPP's impact in creating new norms and rules for the Canadian legal order is likely to be modest initially. Informally, its normative banner could be inscribed with the slogans "Security does not trump trade" and "Trilateral dialogue is mandatory." Since its programmatic thrust focuses on such measures that can be implemented quickly and without legislative approval as the preparation for emergencies and the harmonization of certain standards in the periphery with those of the United States, changes in Canadian regulations will be limited. Should the experiment be deemed a success so that the SPP subsequently becomes more ambitious, its impact on the domestic legal order in Canada could become much more intrusive.

5. Conclusion

This text is not arguing that Canada is unique in having an external constitution. On the contrary, all countries take on formal normative and institutional obligations when participating in institutions of transnational governance. Through their international intercourse, all countries also develop informal norms, rules, and principles that can be considered informal elements of their external constitution. How consequential this supraconstitution may be in constraining a country will depend on

its power and its leadership. The global hegemon may defy the norms of global governance, as the George W. Bush administration has done time and again. Rare is the weak state in the Third World that can claim the luxury of practising non-compliance with its international obligations, Néstor Kirchner's Argentina providing the recent exception that proves the general rule.

Canada exists in the semi-periphery of the global hierarchy – neither so weak that it can have no influence abroad nor so strong as to be able to defy its international partners with impunity. As a middle power with a strong interest in a liberal multilateral order, it must take its international obligations very seriously, not the least because its corporations abroad enjoy the same norms and rights in other countries' external constitution that foreign TNCs enjoy in Canada. For instance, the Canadian regional jet manufacturer Bombardier used the WTO's subsidy code to have Ottawa launch a suit in Geneva to attack Brazil's subsidization of its competitor Embraer. For its part, Embraer induced the Brazilian government to challenge Ottawa's subsidies to Bombardier.

While reframing global governance as external constitutions for its signatory states provides more analytical subtlety than simply looking at these changes in terms of subtractions to national sovereignty, the analysis adds substance to the concerns expressed throughout much of civil society about a growing democratic deficit. Seeing to what extent their external constitution has power to shift the defining of norms, rules, rights, and institutions away from their internal constitutions can help citizens strategize whether, if they cannot roll back the growth of global governance, they should act proactively to try to affect its evolution. For scholars, the acceptance of a constitutional pluralism may suggest that more research be devoted to studying the clash between external and internal constitutional orders that promises to bedevil the politics of all countries. In this, as in so many other respects, the study of Canada provides much grist for the academic mills.

References

Destler, I.M., 2005, *American Trade Politics,* 4th ed., Washington, DC: Kirby.

Kent, Christopher, 1994, "The Uruguay Round GATT, TRIPS Agreement and Chapter 17 of the NAFTA: A New Era in International Patent Protection", *Canadian Intellectual Property Review* 10.3, 711-33.

Levin, Richard C./Susan Erickson Marin, 1996, "NAFTA Chapter 11: Investment and Investment Disputes", *Law and Business Review of the Americas* 83.2.

Magder, Ted, 1998, *Franchising the Candy Store: Split-Run Magazines and a New International Regime for Trade in Culture*, Orono: University of Maine (Canadian-American Public Policy Working Papers Series #34).

Merchant, Livingston T. /A.D.P. Heeney, 1965, "Canada and the United States – Principles of Partnership", *Department of State Bulletin* (August 2, 1965).

Morton, Desmond 1999 [1985], *A Military History of Canada: From Champlain to Kosovo, 4th Edition*, Toronto: McClelland & Stewart.

North American Competitiveness Council (NACC), 2007. *Enhancing Competitiveness in Canada, Mexico, and the United States. Private-Sector Priorities for the Security and Prosperity Partnership of North America. Initial Recommendations of the North American Competitiveness Council* (http://www.uschamber.com/publications/reports/0702nacc.htm), 11.06.2007.

The Security and Prosperity Partnership of North America (SPP), 2005, *Report to Leaders* (http://www.spp.gov/report_to_leaders/index.asp?dName=report_to_leaders), 11.06.2007.

World Trade Organization (WTO), 2000, *Canada – Term of Patent Protection. Report of the Panel*, Geneva.