Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-Legal Series, v. 3, n. 4 (2013) - Law, contestation and power in the global political economy
ISSN: 2079-5971

Legal Pluralism as the "Common Sense" of Transnational Capitalism

A. CLAIRE CUTLER*

Cutler, A.C., 2013. Legal Pluralism as the "Common Sense" of Transnational Capitalism. *Oñati Socio-legal Series* [online], 3 (4), 719-740. Available from: http://ssrn.com/abstract=2327501

Abstract

This article analyzes the relationships between law, power, and contestation in the global political economy. Drawing upon critical theories of political economy, the analysis advances a radical critique of dominant understandings of the distinction between international and transnational law. It argues that transnational law operates dialectically as the "common sense" of contemporary global capitalism to subordinate national politico-legal orders and societies to the discipline of hard, enforceable corporate trade and investor rights, whilst limiting corporate social responsibilities to soft, voluntary and unenforceable standards. However, the study also suggests that these dialectical tensions are not hegemonic in nature or operation, but in fact give rise to openings for contestation and re-imagining capitalist legality as "good sense" through a praxis conception of transnational law.

Key words

Transnational and international legality; critical global political economy; new informality; praxis conception of transnational law

Resumen

En este artículo se analiza la relación entre el derecho, el poder y la impugnación de la economía política global. Basándose en las teorías críticas de la economía política, el análisis avanza una crítica radical de la comprensión dominante de la distinción entre el derecho internacional y transnacional. En este trabajo se sostiene que el derecho transnacional opera dialécticamente como el "sentido común" del capitalismo global contemporáneo para subordinar las órdenes y sociedades político-jurídicos nacionales a la disciplina de los derechos del duro, exigible

Article resulting from the paper presented at the workshop *Law, Contestation and Power in the Global Political Economy* held in the International Institute for the Sociology of Law, Oñati, Spain, 7-8 June 2012, and coordinated by Edward S. Cohen (Westminster College) and A. Claire Cutler (University of Victoria).

* A. Claire Cutler is Professor of International Relations and Law in the Political Science Department at the University of Victoria, Victoria, BC, Canada. She holds graduate degrees in Political Science from and London School of Economics and Political Science (MSc International Relations) and the University of British Columbia (PhD Political Science) and a law degree from McGill University (LLB). She is currently involved in a project on The Legitimacy of Private Transnational Governance through Contract as the Visiting Morris Tabaksblat Chair on Private Actors and Globalisation, Hague Institute for the Internationalisation of Law (HiiL), The Netherlands. Political Science Department. University of Victoria. PO Box 3060. STN CSC Victoria. BC Canada V8W 3R4 ccutler@uvic.ca

comercio libre y corporativo y a los derechos de los inversores, a la vez que limita la responsabilidad social corporativa a suaves, voluntarias e inaplicables normas. Sin embargo, el estudio también sugiere que estas tensiones dialécticas no son hegemónicas en la naturaleza o el funcionamiento, sino que de hecho dan lugar a impugnar y re-imaginar la legalidad capitalista como "sentido común" a través de una concepción de la praxis del derecho transnacional.

Palabras clave

Legalidad transnacional e internacional; economía política global crítica; nueva informalidad; concepción del derecho transnacional

Table of contents

1. Introduction

The nature of the relationships between law, power and contestation in the global political economy is increasingly at the forefront of studies of international relations and international law and is reflected in the ubiquity of conceptions of "global governance," "global constitutionalism," and "global administrative law" (Hewson and Sinclair 1999, Kingsbury *et. al.* 2005, Dingwerth and Pattberg 2006, Krisch 2006). A common thread running through many of these diverse works is that the global political economy is experiencing increasing pluralism in and transnationalization of the institutions and processes of regulation, in which law has a central and specific part. Whether one considers binding dispute resolution under the World Trade Organization and under bilateral and multilateral investment treaties, or the softer discipline of corporate social responsibility norms embodied in environmental, human rights, and labour agreements, law is the mediating mechanism. In a proliferating number of dispute settlement institutions and regimes law mediates political, economic, and social relations amongst contesting social forces. How and why law is the mechanism mobilized by diverse social forces in a multiplicity of legal forums is disputed. Some argue that increasing legal pluralism and the transnationalization of law are welcome by-products of the functional development and differentiation of the global political economy (Zumbansen 2010), which may well herald the emergence of a global rule of law (Berman 2007). Others fear that these developments spell fragmentation and embody an undemocratic shift of authority and power to private actors, legal technicians, and experts who are unaccountable as governors (Koskenniemi 2006, 2007, Schneiderman 2008).

This paper examines what Michel Foucault (1997) refers to as the "how of power," by which he means an exploration of the mechanisms that constitute, reproduce, and justify claims to power as authoritative. Foucault contemplates a nexus between dominant knowledge structures and claims to truth and right that together constitute and reproduce power. This may be referred to, analytically, as the knowledge/power nexus as a means to isolate the ways by which power is constituted, mobilized, and justified through claims to truth and right. Foucault describes the "how of power" as the triangular relationship between power, right, and truth. This he describes as:

> … trying to understand its [power's] mechanisms by establishing two markers, or limits; on the one hand, the rules of right that formally delineate power, and on the other hand, at the opposite extreme, the other limit might be the truth-effects that power produces, that this power conducts and which, in their turn, reproduce that power. So we have the triangle: power, right, truth….. What type of power is it that is capable of producing discourses of truth that have, in a society like ours, such powerful effects? (1997, p. 24)

This paper posits that law is deeply imbricated in the knowledge/power nexus as a very specific regulatory mechanism. Law produces discourses of truth by mediating conflicting claims to power, to knowledge, and to right. Drawing upon critical political economy, the paper argues that the specificity of legal regulation today is not accidental, but is an organic result of dominant structures, patterns of power in, and dominant conceptions of the global political economy. These sources and influences have been aptly described as a 'new constitutionalism' that is reshaping the terrain of legality in the world (Gill 2008, Gill and Cutler forthcoming). The new constitutionalism comprises ideological, institutional, and productive forces and structures that govern local societies and political economies according to the demands and legal disciplines of global capital accumulation. These disciplines are producing multiple, fragmented, and often contradictory legal regimes that defy easy general classification. However, this paper argues that that there are two sets

Oñati Socio-Legal Series, v. 3, n. 4 (2013), 719-740
ISSN: 2079-5971

of contradictions that characterize the contemporary historical bloc[1] and that give rise to increasing legal pluralism. The first set concerns the dialectical tension between international and transnational legality, while the second concerns the dialectical operations of hard and soft law. The growing significance of non-state actors in governance, such as transnational corporations and individuals, is being recognized in multiple fields of study, including law, political science, and sociology. There is also growing recognition of increasing pluralism concerning the sources of legal regulation and laws, with particular emphasis on private, self-regulatory regimes and soft legal standards. This paper will examine these two tensions, arguing that they form dialectics that inhere in the very fabric of and, indeed, form the "common sense" of transnational capitalist legality.

This paper maintains that the global political economy may be usefully analyzed through a critical conception that links the advancement of legal pluralism and of transnational law as *the* political projects, and indeed, *the* common sense of our time. But it submits that neither project is complete, totalizing or hegemonic, because there is a "mutual constitution" of "relations of governance/resistance at work in the production of global politics" that opens up space for "transformative politics" (Rupert 2003, p. 181). As Mark Rupert (ibid., 184-5) notes, Karl Marx left us with theorizations of capitalism that reveal its "core relations and inner tensions," but it was Antonio Gramsci who provided "a conceptual vocabulary with which to enable processes of transformative politics." Gramsci understood that the power of the dominant social forces, as articulated in common sense understandings and practices, is "a critical terrain of political struggle" (Rupert 2003, p. 185), contested, fraught with contradictions and containing within seeds of transformative political practices. This paper argues that fractures and ruptures in common sense provide exciting opportunities for exploring the transformative potential of transnational law as *praxis*, uniting progressive political practices with the political projects of legal pluralism and transnational law.

The analysis begins with an examination of the "transnational" as a disputed ontological field of action, a disputed epistemological category, and a disputed normative aspiration and political project, situating it in the broader context of new constitutional governance through legal pluralism. The analysis then moves to consider the tension between hard and soft legality in the context of dominant trends in transnational capitalism. The following section illustrates transnational capitalist law at work in the contrasting fields of the hard law of investor-state legal regimes and the soft law of corporate social responsibility. The conclusion then suggests an alternate, emancipatory reading of transnational legality and asks the important question of *cui bono* from legal pluralism and the new constitutionalism.

2. Theorizing the "transnational"

In a series of lectures delivered at Yale Law School almost sixty years ago Philip Jessup (1956) articulated a conception of transnational law that in many ways anticipated legal developments now associated with globalization that "break the frames" of the historical unity of law and state (Teubner 2002). Jessup identified changes in practice that we today associate with a paradigmatic shift in the legal relations between states and supra-state, sub-state, and non-state actors involved in transboundary social relations and economic transactions. In areas as diverse as the peaceful settlement of disputes, the use of force, international criminal law, the law of treaties, recognition of states and governments, the protection of foreign investment, international legal subjectivity, and the legal regulation of the global commons, Jessup identified developments that pushed beyond traditional conceptions of *international* law, giving rise to a conception he identified as *transnational law.* This recognition was both analytical/empirical and

[1] An historical bloc is the complex of productive, institutional, and ideological structures that constitute world order today (see Cutler 2003, Cox and Sinclair 1996).

normative/ideological/political. It was analytical in the sense of recording empirical developments in practice, but it was also normative in that it was inspired by an aspiration and ideological and political commitments to the capacity for international law and institutions to contribute to a better world by developing and expanding international cooperation. While serving as a Judge on the International Court of Justice, Jessup ruled in a famous case that all states possess legal obligations to the international community as a whole.[2] The principle of obligations to the international community or *erga omnes* ("against everyone") obligations is today relied upon to root international humanitarian, human rights, environmental, and labour laws, as well as the emerging "responsibility to protect." While the *erga omnes* principle appears unproblematic in its simplicity, it is easy to miss its potential subversiveness. This is because it embodies the marriage of analytical with normative/political concerns that challenges the foundations of analytical jurisprudence and the concern of separating the empirical (*is*) from the normative/political (*ought*). The recognition of *erga omnes* obligations is both a factual recognition of international legal developments, as well as an aspirational political project that shares much with other progressive, liberal projects associated with international law and organization (Koskenniemi 2007, p. 2). The principle challenges the formalistic association of international law and the state, for it contemplates the existence of "community interests" (Villalpando 2010) and imputes greater purposes for international law than the summation of the interests and purposes of states. Indeed, the principle contemplates ideological and constitutional purposes that may well extend, transnationally, beyond the boundaries of state sovereignty, involving the agency of non-state actors, and raising the vexing problem of establishing the legitimacy of transnational purposes in a world that lacks a universal referent and hinges legality on state consent.[3]

Although there is growing recognition of transformations in the politico-legal universe, there is little consensus amongst scholars concerning the precise nature and implications of the transformations that are taking place. For some, transnational law constitutes a dimension of a much broader phenomenon of transnational legality and pluralistic governance in which the regulatory activities of a diversity of actors are eclipsing international law, empowering a multiplicity of sites and forms of authority and governance, including increasingly authoritative private actors and institutions that demand new analytical methods and models (Koh 1991).

While some lament the turn away from state and law as "the end of law" and accountability as "governance without government" becomes the order of the day, others emphasize legal pluralism as a new beginning and "the evolution of law in relation and response to the development of a 'world society'" (Zumbansen 2010, p. 147). The resulting increase in normative pluralism is thus regarded as opening up exciting new avenues for enhancing the reflexivity and legitimacy of legal regulation. Notions of the development of global administrative law suggest the emergence of a new *jus gentium*, knitting the world together through multiple connections and networks, while the autonomous *lex mercatoria* is said to signal growing informality in law-making (Slaughter 2004, Kingsbury *et. al.* 2005, Cassese 2005).

Importantly though, many question progressivist understandings of contemporary developments and worry that new patterns of authority are empowering some at the expense of others (Dezalay and Garth 1996, Marks 2005, Chimni 2005), are

[2] *Barcelona Traction, Light and Power Company Ltd.,* (Belgium v. Spain) *ICJ Reports* (1970) (Judgment of February 5), paras 33 and 34.

[3] David Kennedy once said that ever since international law lost its natural law origins it has been searching for a universal. This is a major concern in the alleged move to constitutionalism in international law scholarship inspired by what are said to be globalizing developments in administrative and constitutional law, as well as in adjudication. For a review and critique of this literature see Anderson 2005.

producing fragmentation, not unification, and delivering authority to unaccountable experts and non-state actors (Koskenniemi 2006, Cutler 2010). There is talk of the "move from institutions" as international organizations recede in importance and informal arrangements developed by ad hoc coalitions of powerful states and transnational governance networks give rise to a new informality in governance (Álvarez 2006, Christiansen and Neuhold 2012, Pauwelyn *et. al.* 2012).

Similar debates are currently occurring in the fields of international relations and international political economy. The emergence of private authority as a challenge to state sovereignty is associated with the globalization of capitalism and the increasing significance of private business corporations and industry associations in the governance of international trade, investment, finance, security, human rights, and the environment (Cutler *et. al*. 1999, Hall and Biersteker 2002, Djelic and Sahlin-Anderson 2006). In these fields, as well, there is contestation over the purposes and interests served by private transnational governance and the normative implications of transformations in the public and private spheres in the name of "global governance" (Hewson and Sinclair 1999, Cutler 2003). Proponents of private transnational governance, for example, identify speed, efficiency, and adaptability as benefits flowing from governance through informal means, whereas critics point to significant costs in terms of democratic accountability (Graz and Nölke 2008).

For yet others, much integrity remains in the concept of international law, for states and national laws are regarded as having a continuing, albeit greatly altered, legal significance (Higgins 1994, Brownlie 2008). One author cautions against "Panglossian Transnationalism," observing that "[p]ut simply, transnational law for all of its glamour, is often little more than national law applied to cross-border events" (Dibaj 2008, p. 255).

These disputes reflect disagreement over fundamental ontological and epistemological assumptions about the nature and function of international law and its role in the governance of international relations and the global political economy. For many there is much left in "the international" as the dominant paradigm, while for others it has been eclipsed by "the transnational." The apparent conflict between the resilience of "the international" in the face of the emergence and expansion of "the transnational" may be understood as a tension inhering in the dialectical operation of contemporary capitalism. There are very real conceptual and empirical tensions between and amongst the social forces that are promoting the authority of knowledge-based experts and private transnational legality as the way forward out of the current global economic crisis and those seeking to reassert the authority of states. The new constitutionalism seeks to subordinate local and national interests and goals to the service of transnational business interests. Indeed, the new constitutionalism reorients and subordinates local political economies and societies to the logic of transnational capital formation, creating dialectical tensions between local and global social forces.

The next section reviews some of the central developments in international relations and the global political economy that are altering the terrain of legality. This is a terrain where the international and transnational coexist dialectically as a dominant modality of contemporary capitalism.

3. Locating "the transnational"

Common to many analyses of transnational law is a recognition that transnational legality involves a twofold transformation in legal actors and in legal processes. Harold Koh (1991, p. 2349, note 9, 2006, p. 745), like Jessup, conceives of transnational law as a "hybrid of private and public, domestic and international law" involving a multiplicity of public and private legal actors and sources of law. Koh notes that transnational legality melds together the claims of private actors with the public claims of states:

> What makes transnational public law litigation unique, however, is its melding of two conventional modes of litigation that have traditionally been considered distinct. In traditional domestic litigation, private individuals bring private claims against one another based on national law before competent domestic judicial fora…. In traditional international litigation, nation-states bring public claims against one another based on treaty or customary international law before international tribunals of limited competence (1991, p. 2348).

The melding of the two modes creates a distinctive dynamic between transnational law, international law, and national law which is crucial to understanding the ontology and epistemology of "the transnational" and to locating "the transnational" as a legal order. While this will become clearer when we later consider the hard law of investor-state arbitration, Koh elegantly captures the nature of the interactions between the transnational, international, and national legal orders in the changes in legal processes and sources of law that are taking place:

> Perhaps the best operational definition of transnational law, using computer-age imagery, is: (1) law that is "downloaded" from international to domestic law: for example, an international law concept that is domesticated or internalized into municipal law…; (2) law that is "uploaded, then downloaded": for example, a rule that originates in a domestic legal system…; and (3) law that is borrowed or "horizontally transplanted" from one national system to another….(2006, p. 745-6).

Boaventura de Sousa Santos similarly characterizes transnational legality as form of postmodern law that is characterized by "interlegality," as a variety of global, regional, and national legal orders intersect and give rise to the globalization of local legal forms (globalized localisms) and the localization of global legal forms (localized globalisms) (Santos 2002, p. 179). Postmodern law takes on a form that is specific to late capitalism, which may be defined in terms of increasingly competitive and transnational capital formation, as well as related forms of flexible accumulation and accumulation through dispossession (Harvey 1990, Cutler 2003). As we shall see later the legal regimes governing global trade and investment operate in a delocalized and denationalized setting, but exercise far-reaching discipline by extending deep inside states to subordinate local social and politico-legal orders to the logic of transnational capitalism. They are giving rise to a transnationalization of the legal field and globalizing legal forms that are creating supraterritorial relations among people by delocalizing and denationalizing the law, removing its creation, interpretation, and application from the constraints of territorial or physical location or place, whilst simultaneously subjecting local societies and economies to its discipline. This process binds lawyers and other professionals together into a transnational class with an increasingly unified understanding of the world and how it should be governed that is capable of exercising considerable autonomy from the state (Cutler 2008a). Indeed, the institutions forming the transnational legal field, such as transnational legal forms, lawyers, law firms and related private business and industry associations, as well as international organizations engaged in the unification and harmonization of international commercial law, shape the contours of the contemporary historical bloc. They provide the material conditions, the normative framework, and the organization that governs the global political economy and enables the further transnational expansion of capitalism. The transnational legal field forms the infrastructure of what Manuel Castells (2000) refers to as the "space of flows" or productive relations that are disconnected from territorial place through processes of globalization. Transnational lawyers create delocalized commercial laws, customs, and dispute settlement and arbitration procedures, which are then globalized through the offices of transnationally organized law firms, operating in key commercial centers and global cities (Sassen 1998). Transnational lawyers and law firms also work with governments and international institutions to create regional and global trade and investment regimes that impose binding legal obligations on governmental and business activities, restricting local autonomy in

matters ranging from environmental and safety regulations to labour, property, and cultural rights.

Importantly though, and possibly one of Saskia Sassen's most significant insights, is that globalization is not producing "the transnational" as a territorially defined physical space located somewhere above or beyond the state. Rather, globalization results in the creation of new forms of association or "global assemblages" that are constituted very much within the "national" and with the participation of local social forces, but possessing global orientations and agendas. Sassen (2006, p. 1) notes that "[t]he epochal transformation we call globalization is taking place inside the national to a far larger extent than is usually recognized. It is here that the most complex meanings of the global are being constituted, and the national is also often one of the key enablers and enactors of the emergent global scale." Others too recognize that "the transnational" as very much a construct connected to the national, albeit in complex ways involving territorialization, de-territorialization and re-territorialization, as well as nationalization, de-nationalization and re-nationalization (see Trubeck *et al.* 1994, Santos 2002, Wai 2002, Cutler 2005b).

Institutionally and ideologically, postmodern and late capitalist formulations of law inform the activities of central international and regional governmental organizations, such as the United Nations (UN), International Monetary Fund (IMF), World Bank (WB), the Organization for Economic Cooperation and Development (OECD), the United Nations Commission on International Trade Law (UNCITRAL), the North-American Free Trade Agreement (NAFTA), the World Trade Organization (WTO), and the European Union (EU). These institutions provide crucial sites for generating the material and ideological foundations for the continuing global expansion of capitalism. They are significant in generating perceptions of the legitimacy of the disciplines that these institutions impose upon states as common sense.

In addition, less visible but increasingly authoritative private associations, such as the Trilateral Commission (TC), International Law Commission (ILC), the International Chamber of Commerce (ICC), transnational business corporations (TNCs), cartels and private business, banking, accounting, tax, finance and legal associations participate in the constitution of laws and procedures that govern the global political economy, creating forms of private transnational legality. They are globalizing commodified forms of law through their private regulatory frameworks that assess legality according to criteria of economic efficiency and effective market discipline (Cutler 2005a, 2008b). These criteria contribute discursively and ideologically to international law's role in the creation of the mythology and common sense understandings that both constitute and legitimate a transnational market civilization as a defining feature of the contemporary historical bloc. This mythology formalizes and constitutionalizes neoliberal market discipline, global competitiveness, and economic efficiency as the fundamental principles of an increasingly transnationalized historical bloc.

But at the same time we see the development of contradictory impulses in de-formalization and soft-law, as inter-legality opens up more avenues and mechanisms for flexible regulation. Indeed, the proliferation of non-state actors and non-state law is generating a new informality that is largely unrecognized in international legal studies, so transfixed are many analysts on functional approaches to legal evolution that regard transnational regulation as a response to functional imperatives generated by "governance gaps" in the contemporary global political economy and society (see Álvarez 2006, García-Salmones 2009). As the comparative legal scholar Günter Frankenberg observes, "[f]unctionalism has no eye and no sensitivity for what is not formulated and not regulated under a given legal regime:"

> By stressing the production of 'solutions' through legal regulations, the functionalist dismisses as irrelevant or does not even recognize that law also produces and

> stocks interpretive patterns and visions of life which shape people's ways of organizing social experience, giving it meaning, qualifying it as normal and just or deviant or unjust (1985, p. 438).

This paper argues that the contemporary transnational historical bloc is empirically and conceptually distinctive from prior examples and theorizations of transnationalism in international relations. Indeed, it is precisely the constitutionalization through the new constitutionalism of the dialectical tensions between hard and soft law (formalization and de-formalization) and between "the transnational" and "the international" (de-localization and re-localization) that mark the current moment as historically and materially distinctive.

Earlier studies in the 1970s analyzed the activities of non-state actors, such as transnational corporations and civil society organizations (Keohane and Nye 1972) and by the 1980s gave way to a focus on international regimes involving both formal and informal cooperative arrangements amongst a variety of state and non-state actors (Krasner 1983). By the turn of the century the focus was on transnational civil society organizations (Keck and Sikkink 1998) and the multiplicity of private actors exercising "governance without government" (Rosenau and Czempiel 1992). The dominant definition of transnational relations concentrated on the key actors and transnational relations was defined as "regular interactions across national boundaries when at least one actor is a non-state agent or does not operate on behalf of a national government or of an intergovernmental organization" (Risse-Kappen 1995, p. 3). Empirical and analytical concerns with the authority of non-state and corporate actors finally was recorded by a number of analysts (Cutler *et. al.* 1999, Hall and Biersteker 2002) and culminated in the celebration by some of the emergence of a transnational public domain: "a new global public domain - an increasingly institutionalized transnational arena of discourse, contestation, and action concerning the production of global public goods, involving public as well as private actors" (Ruggie 2004, p. 504). Ruggie offers a progressivist account of the steady march to global governance, constitutionalism, and formalism through "embedding" states "in broader frameworks of sociality" (ibid., 521). Such frameworks are said to supply much needed "public goods" through a plurality of governance mechanisms, ranging from formal, hard law to soft, voluntary corporate social responsibility initiatives of private corporate and civic society actors. This account echoes the earlier story of the "move to institutions" and the progressive institutionalization of law through formalization and legalization told of twentieth century developments in international law and organization (Kennedy 1987, Koskenniemi 2002). However, these accounts obscure more than they clarify. This is because they reflect a liberal, "actor-centered perspective" and a structural-functional logic that fail to identify or conceptualize the embeddedness of international relations in deeper transnational historical and material structures. Liberal analysis tends to flatten out deep conflicts of interest and value, particularly when informed by structural-functional analytical and the theoretical assumptions (Cutler 2011a). The transnational is, ontologically and epistemologically, not a level of analysis, distinct from the national or domestic levels, but rather "*extends across, and thereby links as well as transcends, different (territorial) 'levels'* (Van Apeldoorn 2004, 144 original italics).

The subtlety of the evolving relationships between national, international, and transnational legality is challenging to capture analytically. The influences of private actors, transnational corporations, private business associations, and corporate laws are not exercised at some level above the state and other entities, but rather impact directly on individuals, groups, local and national governments at multiple levels of activity, conditioning and setting limits under new constitutionalist economic laws and policies. Moreover, Ruggie's progressivist account overstates the publicness of the goods resulting from transnational governance and fails to account for contestation over the sort of goods that both can and should result from private transnational governance (Cutler 2010). Indeed, the structural functional

Oñati Socio-Legal Series, v. 3, n. 4 (2013), 719-740
ISSN: 2079-5971

theoretical and analytical foundations of much of this work obscures deep-seated conflict between local and global politico-legal orders (Cutler 2005b, p. 198) and dialectical tensions between formalization and de-formalization that reflect the contradictory social forces that are driving the transnational political economy. This work fails to record Sassen's injunction that the transnational is located within the national, imbricated as it is within national social forces.

4. The "new informality"

The dialectic between formalization and de-formalization is a modality of contemporary transnational capitalism, although similar tensions characterized earlier historical periods. Indeed, Max Weber (1956, p. 811 and p. 883) long before now recognized the elective affinity between law and capitalism in the tendency in capitalist systems to develop towards rationality through the development of formal legal regulation. He noted (ibid., p. 811) that "[j]uridical formalism enables the legal system to operate like a technically rational machine. Thus it guarantees to individuals and groups within the system a relative maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their actions" establishing rules of the game to pacify conflicts of interest in private matters. These "rationalizing tendencies" he further noted were driven by "powerful interest-groups" with whom the rulers were allied and "to whom substantive law and procedure constituted an advantage, as for instance the bourgeois class of Rome, or the late middle Ages, or of modern times" (ibid., p. 809). Weber attributed one of the major determinants of legal formalization and rationalization to the alliance of monarchical and bourgeois interests (ibid., p. 847). He (ibid., p. 847) also noted that the bourgeois classes had an interest in "unambiguous and clear legal systems, that would be free of irrational administrative arbitrariness as well as of irrational disturbance by concrete privileges, that would also offer firm guarantees of the legally binding force of contracts." However, as Weber also noted, not all bourgeois interests were served by legal rationality. The bourgeoisie, in particular, were suspicious of the guarantee of rights that might interfere with their property interests and openly opposed their formalization. The law could thus "be drawn into antiformal directions" by opposing social forces, while anti-formal tendencies were "promoted by the ideologically rooted power aspirations of the legal profession itself" (Weber 1956, p. 894).

In the fields of international law and international relations, the development of formal legal arrangements by international organizations in the form of the hard law of international treaties has historically been regarded as a method for regularizing and rationalizing international relations. This is part of the progressivist story of the "move to institutions" mentioned earlier. Informal arrangements were in this view a failure of international law and organization or at best a step on the way to increasing formalization in hard law. However, there is also growing recognition that legal pluralism and the increasing heterogeneity of actors on the international stage have diversified and expanded efforts to create governance mechanisms, whether it be international organizations experiencing "mission creep" or non-governmental organizations lacking legal capacity to create legally binding arrangements (Álvarez 2006, p. 328).

However, informal regulation is being recognized as a governance strategy in its own right. Charles Lipson (1991, p. 500) argues that "[i]nformality is best understood as a device for minimizing the impediments to cooperation, at both the domestic and international levels." It offers the advantages of being more flexible, speedier, less public and politically contentious, and less constraining on freedom of action. Others similarly emphasize that actors deliberately choose informal means to regulate activities because of their relative ease to achieve, lower costs, flexibility in the face of changing circumstances and uncertainties, and less significant implications for state sovereignty (Abbott and Snidal 2000). Some go even further to posit the existence of a "new informality" that is linked to the

exigencies of governance in a climate where the management of risk has become the central focus of governance (Dasse 2010, Cutler 2010).

It is here argued that the tension between formal and informal governance constitutes a defining characteristic of contemporary capitalism. Moreover, tendencies toward formal and informal modes of regulation operate dialectically, securing private rights though formal, hard, legal disciplines, but framing corporate duties in soft, unenforceable terms. Transnational corporations, their private business associations, and laws are very successful in securing corporate rights through hard law, but framing corporate duties as soft and unenforceable. They resist the formalization of corporate social responsibilities that threatens to undermine the structural power of capital. This is quite consistent with the past, where the bourgeoisie secured its rights to private property through binding laws and resisted the claims to social justice that threatened to interfere with their rights. The discussion will turn to contrast the formalism of investor-state arbitration with the informality of soft corporate social responsibility norms.

5. Hard corporate rights versus soft corporate responsibilities

Martti Koskenniemi (2007, p. 8 and p. 15, note 34) associates expert-led legal regimes with anti-formalism and the substitution of politics by technocratic management, reflecting the turn "from formal government to informal 'governmentality'," as presented in the late works of Michel Foucault. While there is much to commend in this analysis, it overlooks the simultaneity of these contradictory tendencies and their dialectical relationship. Here the formulation of Nicos Poulantzas of "legality shot through with illegality" is apposite:

> Every juridical system includes illegality in the additional sense that gaps, blanks, or 'loopholes' form an integral part of its discourse. It is a question here not merely of oversights or blind spots arising out of the ideological operation of concealment underlying the legal order, but of express devices that allow the law to be breached (1978, p. 84-5).

For Poulantzas, who cites Karl Marx, the legal system is a single functional order comprised by the coexistence of and dialectical relationship between legality and illegality. And like Gramsci, Poulantzas (ibid.) argues that the law both negatively, deceives and conceals capitalist relations of exploitation and positively, organizes consent. Recalling Foucault's analysis, law produces discourses of truth that legitimate certain practices as the common sense of the day. I have argued elsewhere (2005a) that capitalism needs law. But it requires a particular kind of law that is able to bite hard to protect capital, but not so hard that capital flees. Law must thus be capable of biting both hardly and softly, depending upon the circumstances. Law must be able to blow hot and cold. Law operates like a safety valve for capitalism by ordering consent, but allowing exceptions, exemptions, and breaches of the law when accumulation so requires. Law is thus constitutive of the structural power of capital. This is at the core of the dialectical operation of the hard and soft disciplines of transnational law as mechanisms of accumulation: soft law injects a measure of flexibility, while at the same time appearing to be law. This is also at the core of the dialectical tension between international and transnational legality: international legality maintains the myth of state sovereignty through the enforcement of a fundamentally private system of transnational law.

First consider the binding nature of investor-state dispute resolution under Chapter 11 of the North American Free Trade Agreement (NAFTA) and under the myriad bilateral investment treaties that knit the world together into a powerful transnational investment regime (see Schneiderman 2008). Indeed, the contemporary trade and investment regimes differ distinctly from the previous multilateral regime - the General Agreement on Tariffs and Trade (the GATT) - in terms of their much broader scope and stronger enforcement mechanisms. These changes amount to a fundamental reconstitution of the governance of the global

political economy. They are not concerned with regulating the actions of global firms or investors, but instead focus exclusively on restricting government actions. Since almost any government law or policy may be argued to affect cross-border trade or foreign investment, their reach is far broader than that of the earlier GATT, which was mainly concerned with reducing tariffs and other border measures affecting trade in goods. Moreover, they extend the dispute resolution system to include non-state actors, such as investing individuals and business corporations.

The NAFTA is the first agreement to combine investment protection guarantees with comprehensive rules on cross-border trade in services. Its investment and services rules include *relative* standards to ensure non-discriminatory treatment of foreign investors and service suppliers. At the same time, its investment chapter establishes *absolute* standards of protection, such as expropriation compensation provisions, minimum standards of treatment and performance requirements prohibitions. It is also the first comprehensive trade agreement to include investor-to-state dispute settlement. The investor-state dispute resolution regime was modeled on that developed for bilateral investment treaties (BITs) by the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).[4] These investor-state regimes recognize the right of a foreign investor to take a legal action against a host state when the former believes that its investment has been impaired by the conduct of the host state. This is a revolutionary development under international law for it transforms the concept and practice governing international legal personality to include non-state entities. Foreign investors and investing corporations are granted hard legal rights that are enforceable against the host state.

The ability for a foreign corporation to sue a host state directly has been described as a "revolutionary innovation" that has caused a "paradigm shift" in and "profound transformation" of international law, which was unprecedented (Braun 2011, p. 46, note 175). This is because the rules of public international law governing international legal personality identify states as the "subjects" of international law. Only subjects are capable of taking claims before international legal tribunals. Private persons and corporations have no inherent legal rights, save for those granted to them by states (Cutler 2001). Even in the World Trade Organization (WTO), which possesses one of the most developed dispute settlement systems, private actors do not have legal standing—only states may bring actions. The granting of the right for foreign investors to sue states directly is thus a revolutionary development. In fact, investor-state arbitration is described by a leading arbitration lawyer, Jan Paulsson, as "not a sub-genre of an existing discipline. It is dramatically different from anything previously known in the international sphere" (Paulsson 1995, p. 256). It is difficult to overemphasize the significance of the institutionalization of investor-state arbitration. Prior to this, foreign corporations had basically two options if they had a dispute with the host country. They could take a legal action under the local laws of the host state or they could approach their home state to make a claim for them and depend upon politics and diplomacy. Neither option was adequate. The first did not guarantee an impartial hearing, while the second did not guarantee compensation. States are under no duty to take claims of behalf of their citizens and in any case the customary international law governing standards of compensation was uncertain. Most BITs provide that the parties do not have to exhaust local remedies, which is a standard rule in other areas of international law, such as international human rights law. The provision of a direct legal action against the host state thus raised foreign investors to the legal status of states for the purposes of investor-state proceedings. This is indeed revolutionary for the statist foundations of public international law.

[4] Álvarez (1996-1997, p. 104) notes that NAFTA Chapter 11 is "a much strengthened version of prior U.S. bilateral investment treaties" …. "a U.S. bilateral investment treaty on steroids - a dream come true for the U.S. foreign investor."

Investor-state dispute resolution thus significantly delocalizes the proceedings by removing them from the jurisdiction of the local legal system. BITs identify international arbitration as the method for dispute settlement and usually identify the institution to be utilized, such as ICSID, or other private arbitration tribunals. Often the arbitration rules to be utilized will also be specified, such as those of the International Chamber of Commerce (ICC) or the United National Commission on International Trade Law (UNCITRAL). NAFTA provides for ICSID or UNCITRAL as the dispute settlement rules available to the parties under the Chapter 11 investor-state provision.

What is important to note is that this delocalization of investor-state dispute settlement through binding dispute resolution in specialized tribunals tends to stabilize and legitimize the status quo by enabling foreign corporations to enforce their BIT or NAFTA rights into the future without regard for changing circumstances. BITs and NAFTA lock states into accepting limitations on their policy autonomy, a crucial function of new constitutional discipline (Gill 2008). Most BITs give *general consent* to delocalized, binding arbitration, as opposed to specific consent in a contract to arbitrate where the parties will be governed by the domestic rules of contract under the applicable system of private international law. The general consent given by a host state in a BIT "is general because it authorizes the arbitration of *any* future dispute with *any* foreign investor [of the state party] in the state's territory" and operates like "blank cheque which may be cashed for an unknown amount at a future and as yet unknown, date," transforming "investor-state arbitration from a modified form of commercial arbitration into a system to control the state's exercise of regulatory authority with respect to investors as a group" (Van Harten 2005, 607-8).

In addition to delocalizing investment disputes, the investor-state regime privatizes dispute settlement by identifying specialized arbitration institutions that operate like a private justice system, quite autonomously from national legal systems (Cutler 2003). The disputes are delocalized for settlement proceedings in these private proceedings, but then relocalized when the awards are subsequently enforced in national legal systems (Wai 2002). States agree in advance to enforce the decisions of these arbitration tribunals and to accept limitations on their ability to review the awards when they agree to be bound by the New York Convention on the Enforcement of Foreign Arbitral Awards. Thus, states are using their enforcement powers to support and sustain a fundamentally private justice system that extends significant corporate rights under international law.

As mentioned above, NAFTA identifies ICSID and UNCITRAL rules as the dispute settlement mechanisms available to foreign investors. These rules are modeled on the principles governing private commercial arbitration between two parties where secrecy and confidentiality have been driving concerns. The origins of the investor-state dispute resolution system in the laws and culture of private international commercial arbitration have proved very challenging for democratic forces seeking to gain access to and information about their proceedings. Indeed, in many ways this extension of international commercial arbitration to the settlement of disputes involving public authorities is producing a clash of legal cultures between public international law traditions, emphasizing the protection of human rights, the environment, and other matters of public concern, and private international law emphasizing the autonomy of commercial actors to conduct their private affairs as they see fit.

Many believe that the general consent to delocalized and privatized dispute resolution produces a "democratic deficit":

> State parties to investment agreements can no longer legislate at will in the public interest without concern that an arbitral tribunal will determine that the legislation constitutes interference with an investment. Thus investment arbitration may result

Oñati Socio-Legal Series, v. 3, n. 4 (2013), 719-740
ISSN: 2079-5971

> in an overall loss of state independence and sovereignty, which has implications for democratic governance….
>
> ….the question arises whether state exercises of public authority should be adjudicated by foreigners, largely on the basis of commercial principles, when the adjudicators are unconcerned with the wider effects of their decisions (Choudhury 2008, p. 779).

The development of this investor-state regime that imposes hard legal disciplines on the conduct of host states stands in stark contrast to the development of corporate social responsibility (CSR) under international law. Although the term CSR was used in the 1950s, it emerged in its current form in the 1990s, largely as a corporate response to the anti-globalization movement and to civil society discontent with corporate behavior (Carroll 2008, Levy and Kaplan 2008). Failed past efforts to regulate transnational corporations under international law through binding, hard law gave way under the influence of neoliberal market fundamentalism to soft law initiatives that aimed at voluntary, self-regulation and the reliance on market mechanisms to address corporate human rights, labour and environmental activities. The CSR movement engages corporations and private business associations in developing codes of conduct as well as voluntary and self-regulatory standards. These initiatives range from private arrangements, within and among firms and industries, like Responsible Care and the Code of Pharmaceutical Marketing Practices, to global initiatives such as the Global Compact and the *Guiding Principles* on Business and Human Rights, sponsored by the United Nations. There is an expanding literature that disputes the net benefits and costs of CSR initiatives and many argue that soft law can over-time transform into hard law (Kirton and Trebilcock 2004). This suggests that the boundaries between hard and soft legal disciplines, between mandatory and voluntary regulation, between public and private or state and non-state laws "cannot always be sharply drawn" but are fluid and change over time (Vogel 2009, p. 155). Accordingly, private industry standards may emerge as customary international law (INCOTERMS), while food standards developed by a private industry body, the Codex Commission, may be granted legal recognition, and the standards developed by the Forest Stewardship Council and ISO are recognized in many national legal systems.

However, there is also growing recognition that the commitment to voluntary and market-based approaches often thwarts more meaningful public interest regulation and accountability (Braithwaite and Drahos 2000) and there is much debate over the democratic legitimacy of CSR regimes based upon private industry interests and concerns. Indeed, CSR initiatives may be conceptualized in Gramscian terms as engaging in *trasformismo* by diffusing and absorbing civil society dissent. Insofar as these initiatives do impose some but not too much limitation on corporate behavior, we see postmodern and late capitalist law working as a safety valve for capitalism: corporate rights are framed in hard enforceable legal forms, but corporate duties are cast predominantly in soft legal forms that may or may not harden into enforceable legal norms.

6. Transnational law as praxis

Tensions between the formalization and de-formalization of law, between hard and soft legal regulation, and between international and transnational legality suggest the existence of deep incongruities in world order. However, these incongruities are only apparent, for a critical analysis of transnational law reveals a deeper unity of purpose and design that is obscured by presumptions of legal pluralism. This is because "the transnational" is at once a political project, an aspiration and a complex of material productive, institutional, and ideological structures that serve transnational capital accumulation.

Conceptualizing transnational legality as a political project can however, play out rather differently if one recognizes the open-ended character of the dialectical

processes at work and the potential for reformulating the ideology and institutions of capitalist accumulation. One might frame transnational law as *praxis: as a form of immanent critique and a source of emancipatory practices*. In the words Boaventura de Sousa Santos (2002) one might think of transnational law as an alternate paradigm of legality; as "a new common sense capable of devolving to law its emancipatory potential." This "new common sense" has more in keeping with Gramscian understandings of "good sense." According to the latter formulation, good sense is self-reflexive understanding accompanying transformative political praxis (Cutler 2011b, p. 69). Such understanding is capable of creating "a new culture, a new form of state and a new global society," displacing the culture of possessive individualism and predatory state capitalism (Gill 2011, p. 253). This involves posing the critical question of "who benefits" from transnational legality—whose interests do these legal regimes, both hard and soft, serve? It involves reflection on alternate more just formulations of "constitutionalism" that do not seek to subordinate the local to the global or the needs and interests of society to transnational capitalist accumulation.

There is some evidence of the gradual development of a new common sense. Some states, such as Bolivia, Ecuador and Nicaragua, have withdrawn from the investor-state regime. In others, contestation over the secrecy, privacy, and elitist nature of investor-state proceedings has resulted in reforms of procedures. This is the case in Canada, the United States, and Mexico under NAFTA Chapter 11, while Australia has indicated that it will no longer include investor-state clauses in its agreements with developing countries (Cutler 2012). Transparency and public participation have been broadened through publication requirements and the expansion of participation of non-parties as *amicus curiae* or "friends of the court." The WTO and ICSID have modified their rules providing for *amicus* participation, while UNCITRAL is studying the matter.

There is growing recognition that arbitration proceedings under NAFTA Chapter 11 and bilateral investment treaties often raise matters of public policy of relevance to a broader cast of characters than the parties to these agreements. Many states, like Canada and the United States, have modified their Model Investment Treaties to include GATT-like general exceptions for matters raising public interest issues.

In the area of CSR, there have been efforts to address the expansion of private, corporate power. However, their significance is ambiguous, reflecting as they do the continuing dialectical tension between hard and soft legalities. John Ruggie (2011), as the Special Representative of the former United Nations Secretary General on the issue of human rights and transnational corporations, produced *Guiding Principles on Business and Human Rights.* They articulate a "Protect, Respect and Remedy" Framework that calls for stronger state action in protecting people from human rights abuses committed by business corporations and in ensuring the availability of judicial and non-judicial remedies. This has been heralded as very significant in terms of "bringing the state back" into debates over the social responsibilities of corporations "and for shifting the primary focus of norm making from the international to the domestic realm" (Mantilla 2009, p. 292). It is also regarded by Ruggie as a crucial step in imposing legal duties upon states to manage the conduct of foreign corporations operating in their jurisdiction. However, the implications of the *Guiding Principles* for reigning in corporate power remain to be seen. This is because the *Guiding Principles* reproduce the lopsided relationship between hard corporate rights and soft corporate responsibilities. Indeed, the legal *duty to protect* against human rights abuses by investing corporations is imposed only upon often unwilling governments, whilst corporations are not assigned legal duties but rather the *responsibility to respect* human rights. This distinction between the state's legal duty to protect and a corporation's responsibility to respect of course reflects the rules governing international legal personality and the very limited legal personality and responsibility of business corporations under international law. The *Guiding Principles* (Ruggie 2011, I B. 9, 12) do recommend

that states "maintain adequate domestic policy space to meet their human rights obligations" in their investment treaties and contracts, suggesting that it might be more difficult for corporations to use trade and investment agreements as shields against regulatory state measures designed to meet public policy objectives in the human rights arena. However, as a mere recommendation, enforcement is problematic. Moreover, the standard to which the *Guiding Principles* (Ruggie 2011, II A 15, 15) hold business corporations is not a strict standard but one of "due diligence" to respect human rights. But due diligence is a neoliberal standard emerging from transformations in capitalism associated more generally with flexible accumulation. It is not a certain standard, but rather one that relativizes corporate conduct according to standards of reasonableness, rendering the standards governing corporate responsibility adjustable and flexible depending upon the state of practice and common sense of the sector or industry (Maurer 2005).

This "Protect, Respect and Remedy" Framework has been widely endorsed by the United Nations Human Rights Council, individual governments, business enterprises and associations, civil society, workers' organizations, human rights groups, and investors. However, effective enforcement will be a challenge and the *Guiding Principles* remain precisely that, soft law principles that may or may not inform corporate conduct and agreements. Indeed, the soft and flexible approach to corporate social responsibility taken in the *Guiding Principles* simply reinforces private corporate power and authority and the asymmetry of hard corporate rights and soft corporate responsibilities as the common sense of the time.

While the potential effectiveness of hardening corporate social responsibilities through the *Guiding Principles* remains doubtful, the fact that the issue of corporate conduct under trade and investment agreements is being addressed internationally cannot be ignored. In addition, states efforts to bring greater transparency to the activities of foreign business corporations and to limit encroachments on national policy autonomy are also significant efforts to re-imagine the relationship between transnational and international legality, as well as between hard and soft laws. These developments reveal fissures in common sense that may well give rise to opportunities to increase the reflexivity of national politico-legal orders to transnational processes and new constitutional disciplines. Indeed, good sense is required to challenge the common sense of legal pluralism and the skewed relationships between the national and transnational and between hard and soft legalities.

Bibliography

Abbott, K., and Snidal, D., 2000. Hard and Soft Law in International Governance. *International Organization,* 54 (3), 421-456.

Álvarez, J., 1996-1997. Critical Theory and the North American Free Trade Agreement's Chapter Eleven. *Miami Inter-American Law Review*, 28, 303-312.

Álvarez, J., 2006. International Organizations Then and Now. *American Journal of International Law*, 100 (2), 324-347.

Anderson, G., 2005. *Constitutional Rights after Globalization*. Oxford and Portland: Hart Publishing.

Barcelona Traction, Light and Power Company Ltd., (Belgium v. Spain) *ICJ Reports* (1970) (Judgment of February 5).

Berman, P., 2007. Global Legal Pluralism. *Southern California Law Review*, 80, 1155-1237.

Brathwaite, J., and Drahos, P., 2000. *Global Business Regulation*. Cambridge University Press.

Braun, T., 2011. Investors as Subjects of Public International Law. *In*: J. Bering, *et al*., eds. *General Public International Law and International Investment Law: A Research Sketch on Selected Issues* [online]. ILA German Branch Working Group. Halle: Martin-Luther University Halle-Wittenberg, 43-47. Available from: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20105.pdf [Accessed 15 August 2013].

Brownlie, I., 2008. *Principles of Public International Law.* 7th ed. Oxford University Press.

Carroll, A., 2008. A History of Corporate Social Responsibility. Concepts and Practices. *In:* A. Crane, *et al.,* eds. *The Oxford Handbook of Corporate Social Responsibility*. New York: Oxford University Press.

Cassese, S., 2005. Administrative Law without the State? The Challenge of Global Regulation. *New York University Journal of International Law and Politics*, 37 (4), 663-694.

Castells, M., 2000. *The Rise of the Network Society*. Oxford: Blackwell.

Chimni, B.S., 2005. Co-option and Resistance: Two Faces of Global Administrative Law. *New York University Journal of International Law and Politics*, 37 (4), 799-827.

Choudhury, B., 2008. Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit? *Vanderbilt Journal of Transnational Law* [online], 41 (3), 775-832. Available from: http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Choudhury-edits-entered-ARJ-final.pdf [Accessed 12 June 2013].

Cohen J., and Sabel, C., 2005. Global Democracy? *New York University Journal of International Law and Politics*, 37 (4), 763-796.

Cox, R., and Sinclair, T., 1996. *Approaches to World Order*. Cambridge University Press.

Christiansen, T., and Neuhold C., eds., 2012. *International Handbook on Informal Governance*. Cheltenham: Edward Elgar Publishing.

Cutler, A.C., Haufler, V., and Porter, T., eds., 1999. *Private Authority and International Affairs*. Albany: SUNY Press.

Cutler, A.C., 2001. Critical Reflections on Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy. *Review of International Studies*, 27 (2), 133-50.

Cutler, A.C., 2003. *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*. Cambridge University Press.

Cutler, A.C., 2005a. Gramsci, law and the culture of global capitalism. *Critical Review of International Social and Political Philosophy*, 8 (4), 407-98.

Cutler, A.C., 2005b. Critical Globalization Studies and International Law under Conditions of Postmodernity and Late Capitalism. *In:* R. Applebaum and W. Robinson, eds. *Critical Globalization Studies*. London and New York: Routledge, 197-205.

Cutler, A.C., 2008a. Transnational Law and Privatized Governance. *In:* L. Pauly and W. Coleman, eds. *Global Ordering: Institutions and Autonomy in a Changing World*. Vancouver: UBC Press, 144-165.

Cutler, A.C., 2008b. Toward a Radical Political Economy Critique of Transnational Economic Law. *In:* S. Marks, ed. *International Law on the Left: Revisiting Marxist Legacies*. Cambridge University Press, 199-219.

Cutler, A.C., 2008c. Problematizing Corporate Social Responsibility under Conditions of Latecapitalism and Postmodernity. *In:* M. Nettesheim and V. Rittberger, ed. *Authority in the Global Political Economy*. Houndmills, Basingstoke: Palgrave Macmillan, 189-216.

Cutler, A.C., 2010. The legitimacy of private transnational governance: experts and the transnational market for force. *Socio-Economic Review*, 8 (1), 157-185.

Cutler, A.C., 2011a. The Privatization of Authority in the Global Political Economy. *In:* G. Teeple and S. McBride, eds. *Relations of Global Power: Neoliberal Order and Disorder*. University of Toronto Press, 41-59.

Cutler, A.C., 2011b. Private transnational governance and the crisis of global leadership. *In:* S. Gill, ed. *Global Crises and the Crisis of Global Leadership*. Cambridge University Press, 56-70.

Cutler, A.C., 2012. Public and Private Authority in Transnational Dispute Resolution: International Trade and Investment Arbitration. *In:* G. Ziccardi Capaldo, ed. *Global Community Yearbook of International Law and Jurisprudence*. Oxford University Press.

Daase, C., 2010. The New Informality in International Relations. Paper presented at *the Annual Meeting of the International Studies Association: Theory vs. Policy? Connecting Scholars and Practitioners, New Orleans Hilton Riverside Hotel, The Loews New Orleans Hotel, New Orleans*.

Dezalay, Y., and Garth, B. 1996. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. University of Chicago Press.

Dibaj, R., 2008. Panglossian Transnationalism. *Stanford Journal of International Law*, 44 (2), 253-299.

Dingwerth, K., and Pattberg, P., 2006. Global Governance as a Perspective on World Politics. *Global Governance*, 12 (2), 185-203.

Djelic, M. and K. Sahlin-Anderson, eds., 2006. *Transnational Governance*. Cambridge University Press.

Foucault, M., 1997. *Society Must be Defended*. Lectures at the Collège De France 1975-1976. New York: Picador.

Frankenberg, G., 1985. Critical Comparisons: Re-thinking Comparative Law. *Harvard International Law Journal*, 26 (2), 411-455.

García-Salmones, M., 2009. Taking Uncertainty Seriously: Adaptive Governance and International Trade: A reply to Rosie Cooney and Andrew Lang. *European Journal of International Law* [online], 20 (1), 167-186. Available from: http://www.ejil.org/pdfs/20/1/1786.pdf [Accessed 23 October 2013].

Gill, S., 2008. *Power and Resistance in the New World Order*, 2nd rev. ed. Houndmills, Basingstoke: Palgrave Macmillan.

Gill, S., 2011. Global leadership and progressive alternatives. *In:* S. Gill, ed., *Global Crises and the Crisis of Global Leadership*. Cambridge University Press,

Gill, S. and Cutler, A.C., eds. (forthcoming). *New Constitutionalism and World Order*. Cambridge University Press.

Graz, J. and Nölke, A., eds., 2008. *Transnational Private Governance and its Limits*. London and New York: Routledge.

Hall, R. and Biersteker, T., 2002. *The Emergence of Private Authority in Global Governance*. Cambridge University Press.

Harvey, D., 1990. *The condition of postmodernity: An enquiry into the origins of cultural change*. Cambridge, MA: Blackwell Publishers.

Harvey, D., 2003. *The New Imperialism*. Oxford and New York: Oxford University Press.

Hewson, M. and Sinclair, T. eds. 1999. *Approaches to Global Governance Theory*. New York: SUNY Press.

Higgins, R., 1994. *Problems & Process: International Law and How We Use It*. Oxford: Clarendon Press.

Jessup, P.C., 1956. *Transnational Law*. New Haven: Yale University Press.

Keck, M. and Sikkink, K., 1998. *Activists Beyond Borders: Transnational Advocacy Networks in International Politics*. Ithaca, NY: Cornell University Press.

Kennedy, D., 1987. The Move to Institutions. *Cardozo Law Review*, 8, 841-988.

Keohane, R. and Nye, J., eds., 1972. *Transnational Relations and World Politics*. Cambridge, MA: Harvard University Press.

Kingsbury, B., Krisch, N., and Stewart, R., 2005. The Emergence of Global Administrative Law. *Law and Contemporary Problems* [online], 68, 15-61. Available from: http://scholarship.law.duke.edu/lcp/vol68/iss3/2/ [Accessed 13 September 2013].

Kirton, J., and Trebilcock, M., eds. 2004. *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*. Aldershot and Burlington: Ashgate Publishing.

Koh, H., 1991. Transnational Public Law Litigation. *Yale Law Journal*, 100 (8), 2347-2402.

Koh, H., 2006. Why Transnational Law Matters. *Pennsylvania State International Law Review,* 24, 745-753.

Koskenniemi, M., 2002. *The Gentle Civilizer of Nations: The Rise and fall of International Law 1870-1960.* Cambridge University Press.

Koskenniemi, M., 2006. *The Fate of Public International Law: Constitutional Utopia or Fragmentation? Chorley Lecture* [online]. London School of Economics. Available from: http://www.helsinki.fi/eci/Publications/Koskenniemi/MKChorley%20Text-06a.pdf [Accessed 15 October 2013].

Koskenniemi, M., 2007. The Fate of Public International Law: Between Technique and Politics. *The Modern Law Review*, 70 (1), 1-30.

Krasner, S., ed., 1983. *International Regimes*. Ithaca: Cornell University Press.

Krisch, N., 2006. The Pluralism of Global Administrative Law. *European Journal of International Law* [online], 17 (1), 247-278. Available from: http://www.ejil.org/pdfs/17/1/70.pdf [Accessed 20 October 2013].

Levy, D., and Kaplan, R., 2008. Introduction: the Rise of Corporate Social Responsibility in Global Issue Arenas. *In*: A. Crane, *et al*., eds. *The Oxford Handbook of Corporate Social Responsibility*. New York: Oxford University Press.

Lipson, C., 1991. Why Are Some International Agreements Informal? *International Organization*, 45 (4), 495-538.

Mantilla, G., 2009. Emerging International Human Rights Norms for Transnational Corporations. *Global Governance*, 15 (2), 279-298.

Marks, S., 2005. Naming Global Administrative Law. *New York University Journal of International Law and Politics*, 37 (4), 995-1001.

Maurer, B., 2005. Due Diligence and "Reasonable Man" Offshore. *Cultural Anthropology*, 20 (4), 474- 505.

Paulsson, J., 1995. Arbitration Without Privity. *ICSID Review Foreign Investment Law Journal*, 10 (2), 232-257.

Pauwelyn, J., Wessel, R., Wouters, J., 2012. *Informal International Lawmaking*. Oxford University Press.

Poulantzas, N., 1978. *State, Power, Socialism*. Trans. P. Camiller. London: Verso.

Risse-Kappen, T., ed., 1995. *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures, and International Institutions*. Cambridge University Press.

Rosenau, J., and Czempiel, O., 1992. *Governance Without Government*. Cambridge University Press.

Ruggie, J., 2004. Reconstituting the Global Public Domain: Issues, Actors and Practices. *European Journal of International Relations*, 10 (4), 499-531.

Ruggie, J., 2011. *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other businesses: Guiding Principles on Business and Human Rights; Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN A/HRC/17/31 [online]. Available from: http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf [Accessed 20 October 2013].

Rupert, M., 2003. Globalising common sense: a Marxian-Gramscian (re)vision of the politics of governance/resistance. *In*: D. Armstrong, T. Farrell and B. Maiguashca, eds. *Governance and Resistance in World Politics*. Cambridge University Press, 181-222.

Santos, B. de Sousa, 2002. *Toward a New Legal Common Sense: Law, Globalization, And Emancipation*. 2nd ed. London: Butterworths LexisNexis.

Slaughter, A-M., 2004. *A New World Order*. Princeton University Press.

Sassen, S., 1998. *Globalization and its Discontents: Essays on the Mobility of People and Money*. New York: New Press.

Sassen, S., 2006. *Territory, Authority, Rights: From Medieval to Global Assemblages*. Princeton University Press.

Schneiderman, D., 2008. *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise.* Cambridge University Press.

Teubner, G., 2002. Breaking frames: economic globalization and the emergence of *lex mercatoria*. *European Journal of Social Theory*, 5 (2), 199-271.

Trubeck, D., *et al*., 1994. Global Restructuring and the Law: Studies in the Internationalisation of the Legal Fields in Transnational Arenas. *Case Western Law Review*, 44 (2), 407-98.

Van Apeldoorn, B., 2004. Theorizing the transnational: a historical materialist approach. *Journal of International Relations and Development*, 7 (2), 142-176.

Van Harten, G., 2005. Private authority and transnational governance: the contours of the international system of investor protection. *Review of International Political Economy*, 12 (4), 600-623.

Villalpando, S., 2010. The Legal Dimension of International Community: How Community Interests are Protected in International Law. *European Journal of International Law* [online], 21 (2), 387-419. Available from: http://www.ejil.org/pdfs/21/2/2011.pdf [Accessed 23 October 2013].

Vogel, D., 2009. The Private Regulation of Global Corporate Conduct. *In*: W. Mattli and N. Woods, eds. *The Politics of Global Regulation*. Princeton University Press, 151-188.

Wai, R., 2002. Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization. *Columbia Journal of Transnational Law*, 40 (2), 209-274. Available from: http://ssrn.com/abstract=1596732 [Accessed 14 June 2013].

Weber, M., 1956. *Economy and Society: An Outline of Interpretive Sociology*. Guenther Roth and Claus Wittich eds. Berkeley and London: University of California Press.

Zumbansen, P., 2010. Transnational Legal Pluralism. *Transnational Legal Theory*, 1 (2), 141-189.