RESISTING ECONOMIC GLOBALIZATION

CRITICAL THEORY AND INTERNATIONAL INVESTMENT LAW

David Schneiderman

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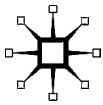

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To Pratima,
who knows a little something about resistance

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Acknowledgments

It might not be all that unusual for a book to have been prompted by feelings of dissatisfaction. What precipitated my unease was an apparent detachment from the affairs of the world in some of the literature on economic globalization, a veiled separation from the lived experiences of those subject to the disciplines of its legal framework. This book, a conjoining of critical theorists with case studies drawn from the domain of international investment law, aims to bring those experiences to bear on law and globalization studies. I am also prompted to write things that I would like to read. Some might view this as a highly self-indulgent mode of scholarship. My hope (and intuition) is that others will want to read this sort of thing too.

The book had its origins while I was a Visiting Professor at Georgetown University Law Center. I continued to pursue the project upon return to my home institution, the Faculty of Law at the University of Toronto. I am heavily indebted to former Dean Alex Aleinikoff (at Georgetown) and Dean Mayo Moran (at Toronto) for their support and encouragement and for the lively intellectual communities that they both have nurtured. They also generously provided funds for student research which ensured that I had the benefit of the research assistance of Rob Ginsburg, Kyle Gooch, Mike Johnston, Mauricio Salcedo, Chava Schwebel, Ana Turgeman and Jenny Yoo.

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I was blessed to have my mother Rose nearby while I completed the manuscript. My wonderful children, Kiran and Anika Mala, contributed to the happy home environment that continues to sustain me. Pratima Rao has been supporting my scholarly endeavours for a couple of decades. I am happy to be able to dedicate this book to her.

Introduction

Is economic globalization irresistible? Its agenda of insulating markets from politics, associated with the rise of neoliberal politics, has taken root in almost every part of the world. It is not that states simply have disintegrated under the excessive weight of market ideology. States continue to perform critical functions in maintaining public infrastructures, facilitating economic flows, and policing dangers of various sorts. Rather, the principal aim of economic globalization appears to have been to establish mechanisms of security for property, financiers and investors, shielding them from consequences issuing out of democratic processes deemed out-of-sync with the imagined or expressed interests of powerful economic interests. Democratic processes yielding results inconsistent with those interests are labelled extreme or declared out of bounds. Democratic processes, moreover, must get out of the way where markets fail and business firms require backstopping by states, as happened in the wake of the 2008 global financial crisis.

Legal forms, operating both inside and outside of territorial states, are important markers in establishing and enforcing these thresholds of tolerable behaviour. For these reasons, transnational legality[1] – the ensemble of rules and institutions ordinarily associated with economic globalization – pre-eminently has been a political project. The defenders of these legal ramparts mostly deny this. Consider the ensemble of treaties, rules and personnel that withdraw disputes between states and foreign investors from national contexts and deposit them in a new transnational legal arena called international investment law. By reason of the worldwide spread of bilateral investment treaties (BITs), investment disputes, it is claimed, are now 'depoliticized' (Shihata,

1 This is a derivation of Beck's term 'translegality' (Beck, 2005, pp. 71ff.). On the idea of transnational law, I follow Zumbansen (2006) who describes 'transnational law' as reconnecting the domestic with the international and public with private law domains (pp. 741–2). This is in contrast to Vertovec, (2009, p. 3), who prefers to confine the 'transnational' to the activities of non-state actors.

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1986, p. 4; Vandevelde, 1992: p. 535). Investors have direct access to dispute resolution processes to challenge the measures of rogue states that significantly diminish the value of investment interests. Investor–state disputes, it is said, are resolved without reference to power, but only to the rule of law as applied by an impartial and independent group of lawyers (Schneiderman, 2011).

Claims about depoliticization, however, largely obfuscate the distributional effects of international investment law (Hale, 1923) – distributing power and resources as between citizens, states and investors – and elide the suppression of politics under rule by lawyers (Weiler, 2001). Such claims, furthermore, falsely universalize idealized versions of the domestic legal arrangements of powerful capital-exporting states that bear little relationship to their own paths to economic development (Schneiderman, 2008). We should understand the regime of international investment law, instead, as a means of perpetuating inequalities in wealth and power between North and South (Sornarajah, 1997). This is not to say that citizens and states previously were unhindered in regard to the regulation of economic subjects. Economic interests together with the political power of the North Atlantic economies have long sought to tame the politics of others – despite considerable diversity among nations and states – and have done so with some success (Lipson, 1985). Only the most powerful states have been able to dodge the constraints of the modern trade and investment system, shaping those disciplines in ways most beneficial to their economies (Weiss, 2005a). Rather, what is distinctive about recent trends is the way in which novel rules and institutions, like the investment rules regime, have been framed so as to obscure the operation of political power over subordinate states and peoples.[2] Following these legal lineages that make economic globalization material enables us to determine how economic globalization is being made and might even be rolled back (Rittich, 2006, pp. 249–50).

This book is an inquiry into the ways and means by which citizens and states may be able to undo some of the constraints of transnational legality. Though much of the domain of global law has been described as fragmented and pluralistic (Koskenniemi, 2007; Walker, 2008), transnational legality here refers to the compendium of rules and institutions associated with the spread of the political project of neoliberalism worldwide, having its principal object the subsumption of politics to markets. A key arena in which transnational legal norms are being simultaneously generated and contested, and which

2 I have explained some of the novel features of the investment rules regime elsewhere (see Schneiderman, 2008). I adopt the descriptor 'regime' from those working in international relations (Krasner, 1983; Schneiderman, 2008, pp. 26–7). I do so not for the purpose, however, of valorizing regimes (see Salacuse, 2010, p. 471) or conscripting them into a strategy for global governance (see Habermas, 2006a, p. 181). This is discussed further in Chapter 3.

provides substance for much of the book's argument, is the regime of rules to protect and promote investment, represented by over 2800 BITs and a smaller number of regional trade and investment agreements (UNCTAD, 2012, p. 84). A focus on this particular rules regime is instructive in so far as it represents the legal response of powerful economic actors and capital-exporting states intended to pre-empt and punish acts of resistance. The object is to inquire into the extent to which the investment rules regime is revisable if not reversible.[3]

The inquiry is undertaken, however, not only through episodes drawn from the arcane world of international investment law. A variety of critical theorists are also conscripted with a view to determining the degree to which theory can assist in this enterprise. It is not that theory alone is important, rather, it is that theory itself is a form of practice (Spivak, 1988, p. 275). Theory assists in identifying the 'tasks which at any given period are to be mastered' with its help (Horkheimer, 1972, p. 20). Critical theory, moreover, will have the advantage of steering us in an emancipatory direction (Guess, 1981, p. 2) where settled understandings and expectations can usefully be upset (Held, 1980, p. 5). What theorists have to say about resistance, then, is of some significance to strategies for social change. These are theorists who, it could be said, collectively are preoccupied with lessening human suffering and exploitation in the contemporary world. Lured, perhaps, by the mobility and abstract quality of global capital, many critical theorists elide the role of states in constructing transnational legality. They consequently abandon states as the locus for securing change that will countervail the deleterious effects of the free movement of goods, persons and capital. As the episodes taken up in this book reveal, however, states are critical to the maintenance and legitimacy of transnational legality and so remain salient locales for resistance. Giving up on states also seems compatible with transnational legal edicts that state actors do no more than provide security for markets. Motivating this inquiry, then, is a worry that theorists obfuscate potential pressure points operating at national levels by which transnational legality might legally be resisted or rolled back. If the book's argument urges recourse to national political systems as a means of advancing effective resistance, the book also attends to the difficulties associated with securing that sort of change. Invariably there will be blockages, setbacks and ambivalent victories. The object is to instil a 'pessimistic activism' that encourages resistance in response to recurring patterns of domination while attentive to reality that danger lurks everywhere (Foucault, 1983, p. 104).

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3 Arguments denying globalization's reversibility are made by a variety of authors from across the political spectrum. See, for example, Castells (1997, p. 268), Hardt and Negri (2000, p. 336), Moore (2003, pp. 38ff.), Beck (2005, p. 93) and Wolf (2004, p. 96).

Methods

The book is structured as a series of discrete encounters between critical theory and practice, as a means of bringing transnational theory and legality into contact. In each chapter, the work of leading social and political theorists is contrasted with a recent episode in resisting transnational legality. The choice of theorists – Michael Hardt and Antonio Negri, Gunther Teubner, Jürgen Habermas, Boaventura de Sousa Santos, Sheldon Wolin and Michel Foucault – admittedly is diverse (there is even disagreement amongst them) but there remains an important cohering theme: they mostly view national states as marginal if not anachronistic.[4] One could say that each theorist is in search of agents – some agents will operate supranationally, others subnationally – to precipitate a Polanyian 'countermovement' of certain proportions. They are drawn variously to a restless and mobile multitude (Hardt and Negri), a plurality of self-constituting legal orders (Teubner), enlightened publics of the North Atlantic (Habermas), counter-hegemonic movements of the global South (Santos), episodic local movements that promote commonality (Wolin), and strategic resistance embedded within power relations that is perpetually in danger of being reversed (Foucault). They are also all northern theorists (Connell, 2006) and, though their theoretical orientations privilege northern history and epistemologies, this is not uniformly the case.[5] Admittedly, the selection reflects to some degree my own preoccupations and proclivities, indeed, I have learned much from each of them. Nor are they intended to exhaust the field of interesting authors worthy of discussion in this context. Rather, they each shed light on aspects of the operation of transnational legality, unsettling its presuppositions, even if that might not have been the direct object of their theoretical inquiry. The work of each can be considered a provocation to think critically along the lines that promote critical resistance.

I interrogate the work of these theorists so as to examine current conjunctures in light of their theoretical diagnoses. I contrast their theorizing with thick descriptions of particular disputes taking place within transnational legality's operative framework. A series of case studies – 'local episodes' one might say (Gordon, 1980, p. 256) – is drawn from the arena of international

4 Among the theorists here under consideration, Habermas is the most enthusiastic about citizens of major powers acting through formal state legal institutions. As I describe in Chapter 2, he has hopes that a new global domestic politics will emerge, operating under the auspices of a world organization such as the United Nations and intermediate regional institutions, which can overtake elements of territorial state politics.

5 Boaventura de Sousa Santos stands out as an exception in this regard (see Chapter 3).

investment law. This is a new and constantly evolving area of law that was the subject of an earlier book (Schneiderman, 2008). Though not the only area in which law is implicated in processes of economic globalization,[6] it can be said that the investment rules regime is tangible evidence of the spread of globalization (IMF, 2007). Its rules provide a particularly apt expression of the power of law to institutionalize distributive choices that impact on the ability of citizens and states to respond to economic exigencies. The case studies draw on episodes having to do with the negotiation of free trade and investment treaties, the decisions of international investment tribunals, and the responses that investor–state disputes have generated. The methodology employed in each case study varies from in-depth review of legal arguments and documentation, scrutinizing legislative debates and media reports, to unstructured interviews with key actors. The object is not to map out paths of resistance but to identify how this particular legal code operates to shrink policy space and to envisage how its structures might be undone. The principal mission is not to 'humanize transnational economic governance' (Wai, 2003) but to envisage a world without an investment rules regime. It is intended to take law to account to the extent that it contributes to the production of social and economic suffering (Baxi, 2006; Veitch, 2007).

It is not my object merely to adjust theory in light of facts. Though deepening the accounts provided by these theorists is one of my principal aims, it is, more importantly, to portray the possibilities for political change in the realm of transnational law. I would not go so far as to claim that these theorists are guilty of 'careless generalizations', deriving theory with little or no basis in empirical fact (Wickham, 1990, p. 122). After all, as Horkheimer warns, 'judgments which embrace all reality are always questionable and not very important' (1972, p. 20). Various of the theorists attempt to support their generalizations with reference to some indicia, detailed case study, or immanent critique of contemporary legal forms. They are mostly all culpable, however, of deliberately disregarding the possibility that resistance takes route via the media of state action. By denying an ability either to direct state authority, or even to ally with it, theorists disable citizens and movement actors from a means of securing meaningful, if not modest, resistance that only states can facilitate.

Nor is it, in my view, sufficient merely to imagine a different world. The prospects of advancing resistance with reference to idealism alone – by imagining that there is a direct correlation between '[k]nowing and the known'

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6 Typically, the Uruguay-Round General Agreement on Tariffs and Trade enforced by the WTO and *lex mercatoria* are cited as instances. See Jackson (1997) and Teubner (1997a), respectively.

(Horkheimer, 1972, p. 27) – are doubtful. The case studies are intended to illuminate precisely the circumstances in and the means by which transnational legality operates. It is not enough, for instance, to show that neoliberalism plays a powerful discursive and limiting role in the contemporary world. To show, by contrast, how transnational legal norms effectively institutionalize pathologies associated with neoliberalism, thereby legally constraining alternative paths to development, is to ground the ideational within real socio-economic and political circumstances. It is to reveal the points by which change can be achieved, even if such 'victories' will be rare.

Investment rules

Change is not easily achieved. Elsewhere, I have described the investment rules regime as constitution-like, establishing limitations on the capacity of states to take measures that may, directly or indirectly, significantly diminish the value of a foreigner's investment (Schneiderman, 2008). International investment rules prohibit a wide range of state behaviour that has the effect of substantially depriving investors of the value of their investment interest. Measures equivalent to an expropriation (in whole or in part), measures preferring local nationals over foreign ones, or measures that deny investors 'fair and equitable treatment', among other disciplines, can provide ground for damages against a host state in the range of tens to hundreds of millions of dollars.

Significantly departing from traditional international law practice, which was primarily a law only for states, investment disciplines entitle individual investors to enforce treaty norms before investment arbitration tribunals. The regime has the effect of removing disputes from local courts and elevating them to what is considered a depoliticized form of dispute resolution. Yet investor–state dispute panels adjudicate issues that determine the proper boundaries of state intrusion into markets, questions that often are crucial to citizens and their well-being. Foreign investors thus are able to thwart policy directions taken by states in circumstances where, in the past, the inter-state system would have managed disagreement via diplomacy or simply would have looked the other way. Investment tribunals exhibit their own embedded preferences, staffed by lawyers drawn almost exclusively from the cramped confines of commercial and investment arbitration, preoccupied with preserving and enhancing the economic security of commercial actors (Van Harten, 2010). As the practice area is a lucrative one, arbitrators have an incentive to grow and expand the market for their legal services (Sornarajah, 2011).

The regime can be viewed as laying down tolerable limits to state regulatory behaviour in the same way as do national constitutional rules: regulatory policy that moves beyond the threshold of what might be considered normal

or acceptable is legally prohibited. The regime places legal limits, intended to last for generations, on state capacity to implement policies dissonant with the regime's embedded preference for the protection of foreign propertied interests.

There is evident disenchantment with transnational legality and this is giving rise to what can be described as resistance. This arises not only because of the decline in the power and influence of the world's leading hegemon, the US, following the debacle in Iraq and the subsequent collapse of housing and financial markets, though these likely have contributed to the atmosphere of distrust and scepticism about the benefits flowing from the investment rules regime. Disenchantment can be traced, in part, to the fact that there are over 120 investment disputes launched by investors against states currently pending before the World Bank-based facility, International Center for the Settlement of Investment Disputes (ICSID) – one of the premiere arbitration facilities in the world. Over 40 disputes alone were filed against the Republic of Argentina as a consequence of the economic meltdown of the Argentinian peso in 2001. A number of disputes against Argentina have already resulted in awards worth hundreds of millions of dollars. Investment disputes have also been filed as a consequence of big public infrastructure contracts gone awry, generating skyrocketing consumer prices and fierce local opposition, or following upon the opening of hazardous waste facility sites giving rise to public health concerns and protests from municipalities and *campesinos*. This combination of events, some of which are described in detail in the chapters that follow, together with the ambivalent evidence regarding the utility of investment rules in attracting new inward direct investment (cf. Neumayer and Spess, 2005; Yackee, 2008), has precipitated what might be called investment-rules blowback.

Countermovement?

In the wake of ongoing global fiscal calamities, it might seem impertinent to ask whether transnational legality's strictures might be undone. After all, states all over the world are taking measures in response to unregulated markets, going so far as to practically nationalize financial institutions and some factors of production; measures previously considered inconceivable (Wolf, 2009). What better evidence, then, of the capacity of states and movements to enter into a countermovement, described some time ago by Polanyi (1944), to take measures for societal self-protection in response to the operation of purportedly free markets?

Polanyi famously described a 'double movement' in the late nineteenth and early twentieth centuries, the first movement generating 'economic liberalism, aiming at the establishment of a [utopian] self-regulating market' and, the second, enhancing 'social protection … of those most affected by

the deleterious action of the market ... using protective legislation, restrictive associations, and other instruments of intervention' (Polanyi, 1944/2001, pp. 138–9). Not only was intervention required, in this second movement, to salvage social and natural life but also, paradoxically, 'the organization of capitalistic production itself had to be sheltered from the devastating effects of a self-regulating market' (Polanyi, 1944/2001, p. 138). Unlike the establishment of so-called free markets – which were not free and unplanned but required the deliberate intervention of states to facilitate – the countermovement against free markets was spontaneous: 'Laissez faire was planned; planning was not', Polanyi famously wrote (Polanyi, 1944/2001, p. 147). Nor did the countermovement give expression to any particular 'intellectual fashion', rather, it was precipitated by a 'broad range of vital social interests affected by the expanding market mechanism' (Polanyi, 1944/2001, p. 151). Demands for social protection, it has been said, 'were very nearly universal' (Ruggie, 1998, p. 69). 'The legislative spearhead of the countermovement against a self-regulating market as it developed in the half century following 1860', writes Polanyi, 'turned out to be spontaneous, undirected by opinion, and actuated by a purely pragmatic spirit' (Polanyi, 1944/2001, p. 147).

Whatever the merits of Polanyi's genealogical account,[7] many have returned to Polanyi's analysis of the double movement as presaging collective responses to the current phase of economic globalization (e.g. Cox, 1992; Gill, 1995b; Birchfield, 1999; Habermas, 2001a; McMichael, 2003; Evans, 2008). For the organizers of the 2008 annual meeting of the Society for the Advancement of Socio-Economics, Polanyi's *Great Transformation* provided an organizing framework. They observed that the 'current era of globalization mirrors the era of the late 19th and early 20th centuries in many ways' and that, consequently, the 'reaction emerging today recalls the politics and policies of the Great Depression and the immediate post-war period, when the second half of Polanyi's double movement came into effect' (Piore, 2009, p. 162). At the height of the current global recession, the prospects of the double movement were made even more conspicuous. It is in this context, it was said, that the 'pendulum seems to be moving towards the interventionist pole' (Hettne, 2010, p. 48; Stewart, 2009, p. 770). The breadth of the crisis suggested, in light of the failure of existing economic models, the 'likelihood of a new paradigm' emerging (Milberg, 2009, p. 3). This could generate an 'array of standards and institutions' – a pluralism of 'economic and financial alternatives to the system-wide prescriptions of neoliberalism'

7 Halperin rejects Polanyi's characterization of protectionism as having universal appeal, rather, specific class interests promoted and fought for state intervention. Not all groups within society felt equally threatened by expanding markets and not all sought protection from them, she claims (Halperin, 2004, p. 265).

(Wade, 2008, p. 21) that would 'strengthen the diversity of ideas' (United Nations, 2009, p. 20).

The response of states to the current global recession, with the fiscal capacity to do so (principally those of the North Atlantic), might be characterized as fitting hand-in-glove with the Polanyian countermovement. In the US, for instance, massive government intervention focused on the financial sector (i.e. bank bailouts), subsidies to specific sectors (i.e. auto sector bailouts) and public infrastructure expenditure, and indicated a similarly pragmatic response to economic crisis. Nevertheless, in light of the breadth of programmes for social protection undertaken in the period covered by Polanyi's double movement, contemporary recovery plans look somewhat anaemic.[8]

It appears that the animating force behind recent 'rescue' plans was to return things to the *status quo ante*, that is, to restore liquidity into financial markets and profitability into key sectors of the North Atlantic economy. It was not, for the most part, about reversing course but about restoring order where there had been disorder (Summers, 2009) – which makes one mindful of Polanyi's insight that markets need states. To take one notorious instance, in the wake of the decision of US regulators to forestall the meltdown of financial markets, the Obama administration announced plans to overhaul the financial regulatory system. These plans were described initially as 'little more than an attempt to stick some new regulatory fingers into a very leaky financial dam rather than rebuild the dam itself' (Nocera, 2009). The subsequent financial reform bill, the Dodd–Frank Wall Street Reform and Consumer Protection Act, though wide-ranging, turned out not to be very far-reaching. 'Will it prevent another meltdown and future government bailouts?' asked the *New York Times*' Joe Nocera – 'probably not', he reluctantly concluded (Nocera, 2010). The Act gives regulators some power to oversee troubled financial institutions, imposes modest capital reserve requirements and some restrictions on proprietary trading by banks (the so-called Volcker rule), together with an oversight bureau for consumer financial protection. The resulting Volcker rule represents well the chastened regulatory agenda that emerged out of a US$300 million bank-lobbying campaign. Rather than reflecting its original objective, which was to bar commercial banks from speculative and risky trading activities and thereby separate out commercial banking (which would be backstopped by government guarantees) from investment banking (which would not), the resulting legislation leaves things, as Volcker puts it, 'pretty much in a holding pattern' (Cassidy, 2010,

8 By way of comparison, see Kennedy (1999) who summarizes President Franklin Delano Roosevelt's achievements in the first 100 days of his administration as 'impressive' by any standard (p. 153). Alter, however, describes Roosevelt and Obama as responding 'to their predicaments in similar ways' (2010, p. xvi).

p. 30). If the Act goes some distance to limiting the capacity of risk-taking by large financial institutions, it leaves the levers of control with financial regulators. These are the very same folks who were not so reliable overseers in the lead-up to the current crisis (Krugman, 2010; Stiglitz, 2010a). By providing massive funds for bank bailouts without conditioning access to these funds on fundamental reforms to the system that generated the crisis (a strategy that international financial institutions like the International Monetary Fund perfected in the 1990s), governments in the US have resigned themselves to restoring the *status quo ante* which may have little effect in reversing similar failures and bailouts in the future.[9] The Polanyian countermovement in contemporary times amounts to little more than getting the 'system back on track', as President Obama put it (Walsh and Hulse, 2009) – 'Let the comprehensive structural solution await calmer days', advises Judge Richard Posner (2009, p. 303) – a response which does little to escape the neoliberal frame that precipitated the crisis (Harvey, 2005, p. 176). Frustration with the oligarchical power of banks in stemming more meaningful reform (Johnson and Kwak, 2010) helps to explain the rise of the Occupy Wall Street movement and its diffusion to national capitals around the world (New York City General Assembly, 2011). That no further more meaningful reform was precipitated by these highly publicized remonstrations, however, affirms the durability of that neoliberal frame.

Previously colonized states, according to Polanyi, could not be expected to benefit from the countermovement against the 'backwash' of international capital. 'The protection that the white man could easily secure for himself, through the sovereign status of his communities was out of reach of the colored man', advised Polanyi (1944/2001, p. 183). Likewise in the global South, the restoration of economic order today is a goal well out of reach for some, not for reasons having to do with access to democratic institutions (as Polanyi suggested) but by reason of fiscal incapacity. Though a handful of states have weathered recent financial storms better than others (Sen, 2011) – some by pursuing developmental strategies at odds with strategies for development promoted by institutions of the global North (Ugarteche, 2012) – it seems impossible to halt the spiral of uncontrollable decline in many places around the world. According to World Bank estimates, the current global downslide will trap 'an additional 53 million people on less than $2 a day this year, a rise in absolute poverty' and this is in addition to the 130–155 million increase caused by 'soaring food and fuel prices' (Giles and Barber, 2009). The fallout from the global recession persists as high and volatile global food prices continue to vex vulnerable populations (World Bank, 2011).

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9 For fuller discussions of the paths not taken by Congress, see Johnson and Kwak (2010) and Stiglitz (2010b).

So it is not the case that two decades of an unrelenting refrain to 'let markets do their work' has rendered citizens and states entirely incapable of responding to the exigencies of so-called free markets. Rather, there is an unevenness in the ability of states and citizens to respond and a mildly reformist mindset that tends to dominate the discourse.

Resistance

Rather than addressing appropriate responses to ongoing economic crises, this book takes up another question: by what paths might resistance to economic globalization be pursued beyond the 'restoration of order'? I do so by investigating challenges to the regime of international investment rules initiated principally by states and social movements in the 'periphery'. Despite claims that there is a virtual global consensus in support of this regime, the removal of options from the policy toolkit of states – options that were available to powerful states, such as the US and UK early on in their history (Chang, 2002; Schneiderman, 2008, ch. 9) – has given rise to recent expressions of resistance in various locales around the globe. Developing and less-developed states in the global South, in collaboration with social movement actors in both the North and South, are calling into question the utility of entering into investment treaties. There is a potential movement to revise, if not roll back, some of the strictures of transnational legality.

The concept of resistance has a ubiquitous presence in the globalization literature (Chin and Mittelman, 2000, p. 29). In the field of cultural studies, the term has an allure that is 'positively shimmering' and so is 'easily appropriated' in an indiscriminate fashion (Slemon, 1990, p. 31). My usage here is not intended to be as broad and diffuse as found elsewhere (e.g. Falk, 1999). Certainly, as transnational legality operates on various terrains, I make no effort to confine potential sites of resistance to one locale or level though, as mentioned, the case studies focus principally on states and places in the global South. For the most part, the case studies do not concern resistance at the micro-political level (cf. Drache, 2008, p. 6). Grievances against the powerful often take form via quotidian acts of resistance (Guha, 1983, p. 75; Scott, 1985, p. 290) and, while these practices of insubordination are important and worthy of study, they are not the focus here. Nor is my preoccupation with resistance focused exclusively on social movement activism or other forms of contentious politics (Keck and Sikkink, 1998; Tilly and Tarrow, 2007). Social movements play, however, an important role in the narratives I describe and remain key actors in a viable politics of resistance. Indeed, we should envisage multiple actors, including territorial states, operating in various locales that assist both in sustaining the regime and generating resistance to it.

Though state functions have been significantly fragmented and even diminished (Strange, 1996, p. 82), states play ambivalent roles in maintaining this balance of power. States nevertheless are critical agents in the structuration of transnational legality. They are, as international law's edicts dictate (see Statute of the International Court of Justice, s. 38(1)), the principal authors of the binding constraints that constitute the orders of transnational legality (Roberts, 2010) – they are its 'primary enablers' (Yackee 2012, p. 419). I share with other theorists an appreciation that the current scene is heavily managed by states and their transnational delegates (Panitch, 1996; Hirst and Thompson, 1999; Sassen, 2006). The state retains its place, then, as a key nodal point in the continued maintenance of the regime. In which case, there is presumably much that can be achieved via states to undo these constraints (Amoore et al., 2000, p. 22). If the state does not have a rigorous homogeneity (too often presupposed) (i.e. Schmitt, 1999), but is understood as having a relation to the changing balance of forces within society – as being 'strategically selective' (Jessop, 2002, p. 40) and shot through with contradictions (Poulantzas, 1978, p. 132) – then one can envisage opportunities when a change of direction in state policy is possible, if not likely. Such a turning point might be at hand in some places.

This emphasis on state agency can also be understood as a move away from a cartographic preoccupation with levels or scales in favour of a concern for 'jurisdiction'. It is jurisdiction, Valverde observes, that predetermines how legal knowledge operates at different scales (2009). This helps us to appreciate that the state is implicated, at various levels, in the production of transnational legality via the machinery of jurisdiction (Valverde, 2009, p. 143). A focus on jurisdiction, then, isolates an agential authority with the power to undo some of its binding constraints. From yet another angle, we could say that states, although 'losing power', have not lost their 'influence' (Castells, 1997, pp. 305, 243). Castells describes, for instance, the European project of integration as aggregating 'state power at a higher level', leaving states with some authority to direct the future of multilateral and global regulatory regimes (Castells, 1997, p. 267). Nation states and their elites, after all, 'are too jealous of their privileges to surrender sovereignty except under the promise of tangible returns' (Castells, 1997, p. 268) and so would be expected to have reserved residual authority for themselves. Influence, however, is not something exercised equivalently by all states (Braithwaite and Drahos, 2000, p. 475), neither are the 'tangible returns' of the networked society evenly distributed (Harvey, 2000, p. 81). Castells claims too much, then, by generalizing from the European case. Not all states, particularly capital-importing ones, will be part of the influential network of states and regions. All should have jurisdictional capacity, however, to reoccupy the space ceded to the investment rules regime.