

Investment Rules, Irreversibility, and the Difficulties of Democratic Resistance

By David Schneiderman^{*}

States play ambivalent roles in contemporary processes associated with economic globalization. On the one hand, states actively participate in the construction of the rules and institutions intended to bind the hands of governments far into the future (Panitch 1996). In this way, states commit to not act in ways that impede market processes within and across national borders. On the other hand, states are expected to ensure that strategies of self-limitation are complemented by state supports that assist in, and even legitimate, pre-commitments of self-limitation (Schneiderman 2006). These supports may take the form of police action to suppress resistance by a mobilized populace (Hardt and Negri 2000: 38) or measures for societal self-protection (as Polanyi [1957] called them) so long as they are not beyond the hegemonic norm. As Santos and others have noted (Sassen 2006: 229), accompanying processes of de-regulation are those of re-regulation. In an age of economic globalization, state functions do not entirely recede into the background, instead, states play continuing critical roles in the structuration of economic globalization.

In Santos' *Toward a New Legal Common Sense* (2002), one of the most important and provocative social theoretical contributions to the literature on law and globalization, the state has some prominence in at least three stages of the book's argument. First, the state is critical to the story Santos tells about the rise of modernity. The liberal-capitalist-bureaucratic state is a central figure in this story until eclipsed by markets. Second, the post-westphalian system of states contributes to the unevenness with which globalization is experienced in different parts of the world. This is because particularistic national legal systems, predominantly from the north, compete for hegemony in the modern world system. This leads to Santos' insightful observation that globalization is the product of inter-state competition, in which certain local phenomenon are successfully globalized - - instances of "globalized localism" - - and in which local conditions correspondingly are restructured in light of these transnational hegemonic practices - - the phenomenon of "localized globalism" (2002: 179). This puts paid to the claims of universality paraded about by international trade

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and investment lawyers (Carbonneau 2002) - - claims defending the abstract universalism of international economic law that generally serve to justify the established order of things (Bourdieu 2000: 71). Third, though state authority is diminished in this period of transition, the task of articulation and coordination of formerly public functions, now sub-contracted to various private actors operating at various scales, remains with the state. Counter-hegemonic movements will want to democratize this “task of co-ordination,” he writes (489). As the institutional form the emergent state will take is not yet clear, Santos suggests that we keep open the channels of change and that “irreversible institutional options” be avoided (ibid.). By experimenting with differing institutional solutions, the state can be understood as the “newest social movement” (Santos 2002: 492). The focus of this paper is on Santos’ third conception of the state which suggests an emancipatory pathway out of the persistent problems generated by modernity’s fault lines.

The legal regime for the protection and promotion of foreign investment is considered tangible evidence of the spread of globalization (IMF 2007), and so serves as a useful device for testing hypotheses about the role of the state in the current era. It turns out that the investment rules regime disparages state functions beyond those considered normal and consonant with investment rules strictures. They are considered, for the most part, untrustworthy constituents of social change. This is paradoxical in so far as the regime relies on states to serve certain legitimating functions (Schneiderman 2006). Social movement actors and transnational NGOs are considered non-participants in the investment rules regime. Lastly, those most vulnerable to the machinations of foreign investment activity – the voices of the suffering (Baxi 2006: 6) – simply are excluded from the logic of the regime. They are scrubbed clean out of the picture. They truly are the subaltern – those who fall outside of “capitalism’s logic” and who have no established agency in the North’s culture of consumerism (Spivak 1993: 78). To the extent that they enter into the picture, they are portrayed as the dupes of rent-seeking and corrupt local actors. Simply put, they are paid to make an appearance. This, for instance, is how the Metlaclad Corporation of Newport Beach, California characterized protests by campesinos against Metalclad’s hazardous waste facility site in Guadalcazar in 1995 (Schneiderman 2004a). It also is how San-Francisco based Bechtel Corporation characterized the mobilization of civil society protests in Cochabamba Bolivia in 2000. Both were the subject of investment disputes before international investment tribunals. Metalclad won an award of some US \$16 million with the tribunal making little mention of the entirely foreseeable local opposition to the re-opening of a site previously closed down by the Mexican federal government for having leeched hazardous waste into the local water supply. Bechtel, suing in the name of its subsidiary, Aguas del Tunari, for the sum of US \$ 25-50 million withdrew its claim after winning an initial award on jurisdiction. I focus on the Cochabamba case in this paper as it enables us to test the extent to which investment rules “lock in” states to

predetermined policy outcomes and also the capacity of states, civil society groups, and transnational NGOs in facilitating resistance.

I begin, in the first part of the paper, by exploring the role of states in Santos' socio-legal thought and his conception of the state as the newest social movement. In the second (and longest) part, I bring in the investment rules regime and illustrate its structural tilt by highlighting the investment tribunal's decision on jurisdiction in the Aguas del Tunari case against Bolivia. In the last part, I review the factors giving rise to the withdrawal of the dispute against Bolivia, drawing on the social movement and contentious politics literature. The case study suggests that, though transnational coalitions provide vehicles for disrupting economic globalization's strictures and even may help temporarily to transform local conditions, resistance is episodic, tactics not entirely novel, and objectives located comfortably within the paradigm of modernity. All of which leaves pretty much intact the core constraints of investment rules on states.

I

In Santos's view, western modernity has been an audacious yet contradictory project. If modernity has opened up vistas of human possibility previously unforeseen, it also has required the generation of techniques of management with which to control its excesses. Modernity rests, in this way, on the contradictory pillars of emancipation and regulation. The state, in Santos' scheme, is one of the foundational principles, along with the market and community, upon which the pillar of regulation rests. The second chapter of *Toward a New Legal Common Sense* takes up this story of the rise of the liberal-capitalist-bureaucratic state, the fall of its regulatory capacity, the accompanying decline of community, and their eclipse by the market principle (2002: 9, 53). Coincidentally, the pillar of emancipation has been swallowed up by the pillar of regulation. Capitalism, in this account, has overtaken modernity.

It follows, Santos argues, that we are in the midst of a paradigmatic transition, where the routine answers associated with modernity no longer are tenable in the current environment. In the face of this "crisis," a paradigmatic reading provides an opportunity to think beyond modern capitalistic solutions toward radically new social relations "that go beyond capitalism" (2002: 173). This is in contrast to the sub-paradigmatic reading, which looks for "structural adjustment" within, "rather than beyond" (2002: 174) modernity's framework of possibilities.

In the paradigmatic transition, the state plays an increasingly diminished role. Its place as the central unit of analysis – what Beck calls "methodological nationalism" (Beck 2005) – is complemented if not overtaken by the activities of non-state actors. Private-public partnerships, privatization, and governance are some of the terms we associate with this transfer of authority, oftentimes resulting in conservative outcomes. In this age of the "postinterventionist state" (2002: 55), we are pressed to look elsewhere for the means by which communities

might be able to countervail markets and open up a range of possible societal futures (a “non-capitalist, eco-socialist future being one of them”) (2002: 63). Newer social movements and transnational NGOs provide locales out of which the solidaristic strategies of “oppositional postmodernism” may be pursued. Santos places on these movements the carriage of a “counter-hegemonic globalization,” which have the potential of generating a “transnational emancipatory sub-politics” (2001: 190).¹ Drawing on Keck and Sikkink’s criteria for determining the success of advocacy movements (1998: 25), Santos looks to social movements to counter hegemonic globalization by generating shifts in “agenda setting” and the “rhetoric of decision makers” and, more concretely, by generating “institutional changes” and having “an effective impact on concrete policies” (Santos 2001: 190). These elements were in play in Cochabamba, where privatization of municipal water supply spawned vociferous local and then transnational opposition generating changes at, arguably, all four of these levels.

In the paradigmatic transition there remain progressive, non-capitalist alternatives and some of these are noted in his discussion of the state as the “newest social movement” (Santos 2002: 489; Santos and Avritzer 2005: lxvii). If the functions formerly served by the state have been dispersed, these are “the object of permanent contention and painstaking negotiation among different social actors” which will take place “under state coordination” (2002: 489). Santos here is ambivalent about state capacity in the transition: the state is, on the one hand, an “imagined, “partial and fragmented political relation” with seemingly little left to do (ibid.). On the other hand, the state constitutes an “unregulated political battlefield” which is open to differing agents “carrying alternative conceptions of the goods to be delivered” (ibid.). Future struggles, he predicts, will be fought over the remains of the state’s monopoly over the regulatory pillar (2002: 490). Santos admits that it is difficult to predict precisely the ensuing configuration of new state forms that will emerge. There are an “unprecedented proliferation of alternatives,” Santos claims, which cannot be subsumed under the “umbrella of a single global alternative” (Santos 2006: 28). What can be predicted is that the democratic struggle will be ones over “alternative institutional designs” (2002: 492) in which preference will be given to experimental forms that guarantee the greatest level of participation for social groupings (Santos 2006: 35). In the interim, therefore, it is preferred that alternatives remain open - - that “irreversible institutional options” be rejected in favour of more fluid outcomes, ones that may result in more egalitarian distribution of global wealth. In this regard, and this is in contrast to Habermas (Schneiderman 2005), Santos looks to leading states of the South rather than the North to play a leadership role (2002:

¹ Sub-politics is Ulrich Beck’s term (1992).

493).² It is in these locales that we can expect a subaltern cosmopolitan consciousness to be articulated and non-capitalistic alternatives devised.

To what extent can the state be re-appropriated for these purposes? To be sure, there remains some room to manoeuvre to states and citizens in the development of elements of social policy. On matters such as welfare reform (Hay 2005) or industrial and technological subsidies (Weiss 2005), for instance, room remains for some policy difference despite globalization's convergence effects. There are thresholds (Coward 2005: 868), however, to what may be permissible in an age of economic globalization. The investment rules regime might institute a range of substantial limits on the capacity of publics, in both the North and the South, to experiment institutionally and to imagine alternative, democratic, and non-capitalistic solutions to problems continuing to be posed by modernity.

II

The investment rules regime looks precisely like the sort of irreversible institutional option that should be eschewed in this period of fluidity and transition. The regime has as its object to limit the imagination of alternative futures whether by state or non-state institutions. By an investment rules regime, I am referring to the world-wide web of legally-enforceable instruments that discipline state conduct so that it not unreasonably impair investment interests. States, for instance, may not take measures that discriminate on the grounds of nationality, take measures equivalent to expropriation or nationalization or measures that deny fair and equitable treatment to foreign investors. These disciplines may be subject to state and non-state enforcement, hence, the several hundred investment disputes that have been lodged in such arbitration facilities as the International Centre for the Settlement of Investment Disputes (ICSID) at the World Bank, the United Nations Commission on International Trade Law (UNCITRAL), the Court of International Arbitration of the International Chamber of Commerce in Paris, and elsewhere.

This is a regime that I have described elsewhere as constitution-like drawing on principles familiar to the national constitutional systems of the north, with judicial review-like enforcement authority, and intended to last far into the future (Schneiderman 2000; Schneiderman 2008). These are features that Gill appropriately has associated with the idea of the new constitutionalism (Gill 1995;

² This prescription of institutional experimentation resembles Unger's in so far as both reject the liberal legal model of institutional design (i.e Unger 1996). Unger, Santos argues, continues to work mostly within the modernist paradigm of state forms - - the state monopoly over legal production marginalizes existing and emergent pluralist legal forms, including subaltern ones, where hope for democratic consolidation and experimentation may lie. Unger's account, according to Santos, is thereby incompletely radicalized (2002: 13).

Gill 2003). New constitutionalist proposals, Gill writes, emphasize “market efficiency, discipline and confidence; economic policy and consistency; and limitation on democratic decision making processes.” The project “insulates key aspects of the economy from the influence of politicians or the mass of citizens by imposing, internally and externally, ‘binding constraints’ on the conduct of fiscal, monetary, and trade and investment policies” (Gill 1995, 412; Gill 2003, 132).

The regime is organized around the logic of the market. Priority is placed on the rights of investors rather than the capacity of states to take measures that are considered beyond the norm, or out of the ordinary. The investment rules regime, in this way, aims to establish thresholds of tolerable behavior promoting a culture of markets seemingly freed from the control of politics. All of this is associated with the early twentieth-century idea that there are ‘minimum standards of justice expected of all civilized nations’ and that departures from these minimum standards are to be discouraged (Schneiderman 2008). In the contemporary world, this is achieved by “locking” states in to these commitments far into the future, holding in check resistance at local levels. Many small and large acts of resistance to economic globalization effectively are rendered illegal under this new constitutional order.

Local policy initiatives are expected to conform to this culture of limited and constrained government and citizens that rebuff the regime’s precepts can anticipate punishment with an award of damages in the range of tens to hundreds of millions of dollars. This is despite the fact that the investment rules regime is critically reliant on stable national legal orders to protect fixed and immovable investment interests. National states are expected to take the difficult and contradictory path of both succumbing to economic globalization’s legal edicts while resisting demands for non-market based solutions to contemporary social problems.

The operational dampening of policy choices on affected citizens is best exemplified by case studies taken up in particular locales, be they national or sub-national. It is in these places where resistance to the hegemony of investment rules can be discerned and the capacity to turn things around best evaluated. They also provide us with evidence with which to evaluate Santos’s claim about modernity’s crisis and the opportunities for paradigmatic readings of the non-capitalist world to emerge. One such instance is the celebrated ‘water wars’ of Cochabamba, Bolivia. Forgive me if you will have heard much about this before, but my purpose is not so much to rehearse events in Cochabamba as to take up matters after the company fled Bolivia.

Under direct pressure from the World Bank, Bolivia introduced new legislation to permit the privatization of water and sanitation services by large municipalities. Public subsidies would cease. This, the Bank admitted in its Bolivia country report, “will not be easy to implement.” It was expected that privatization in three urban centres would, whoever, “liberate” \$13-15 million of public funds.

Cochabamba is Bolivia's third largest city and embraced the water privatization initiative, leasing its water concession to the Aguas del Tunari consortium, led by subsidiaries of San Francisco-based Bechtel Enterprises. It is important to emphasize that this privatization plan was enthusiastically endorsed not only by national state actors, by the state governor, and the municipal council until, that is, civil society unrest moved the Governor, mayor, and city authority to withdraw its support (Nickson and Vargas 2002: 113). The state, in this story, was an "active culprit" and no mere bystander in these events. The costs of the privatization plan were enormous. This was, in part, because of a plan to tunnel water through the Tunari mountains, a plan which the Bank, to its credit, frowned upon and which Bechtel, according to the company, reluctantly agreed to take on (Quint 2000). Nevertheless, with a guaranteed annual rate of return of 16 per cent on its investment, price hikes were inevitable if these sorts of profits were to be realized. Cost increases immediately were passed on to the citizens of Cochabamba (at an average of 35 percent) and without any appreciable improvement in services. Water rates almost doubled. In a city where the minimum wage is less than US\$100 per month, many families saw their bills rise by US\$20, almost one fifth of their monthly income. If payment was not made, services were terminated. Traditional forms of water collection were outlawed and community wells shut down.

The citizens of Cochabamba took to the streets in protest. Led by the *Coordinadora del Agua y la Vida* (Coalition in defense of water and life) - - a citizen's movement of consumers, workers, cocoa growers and others, uniting both urban and rural sectors, and led by trade union federation president Oscar Olivera - - a general strike shut down the city for four straight days in January 2000. President Banzer declared a state of emergency and dispatched military troops in April 2000. By this time, more than 175 protestors had been injured, two youths blinded, and four persons killed. After four months of protest, the government of Bolivia relented, advised Aguas del Tunari executives that their safety could not be guaranteed, and the company fled the country. The government declared its concession contract with Aguas del Tunari terminated and the municipality retook control of Cochabamba's water utility (Olivera 2005: 25-49; Shultz 2003; Finnegan 2002).

This local story of resistance against a large multinational has inspired a broad spectrum of activists and intellectuals. Gavin Anderson mentions it in the closing of his book *Constitutional Rights After Globalization* (Anderson 2005: 150) and, in both the closing parts of the film "The Corporation" (2004) and in its companion book (Bakan 2004: 164-66), Joel Bakan recounts these events so as to inspire citizens to repatriate power that has been granted to corporations. For Anderson, social movements have shown the capacity to hold corporations to account for exercises of private power. For Bakan, corporations are creatures of public law and so only have power that governments have granted to them which also can be denied to them. But corporate power has established a powerful legal

order that can impede local acts of resistance like those in Cochabamba. What usually is recited is only one side of the Cochabamba story - - that of a popular movement expelling a rapacious water company from their town.

There is another other side to the story and it is the one that interests me here. It concerns a US \$25 to \$50 million dollar claim Aguas del Tunari launched against the Government of Bolivia under a Netherlands-Bolivia bilateral investment treaty. Originally incorporated in the Cayman Islands and after the contract with Cochabamba was negotiated, Aguas del Tunari's principal shareholder, International Water, engaged in complex corporate reorganization. This resulted in the company "migrating" and re-incorporating to Luxemburg and being subsumed under the ownership structure of two different companies incorporated under the law of the Netherlands, of which Bechtel remained a principal shareholder (de Gramont 2006: 12-13). This, purportedly, was done for tax reasons but undoubtedly also to take advantage of investor rights available under the investment treaty, including rights entitling investors to sue should they be substantially deprived of their investment interest.

These proceedings were treated as confidential by the ICSID, the World Bank arbitration facility which administered the arbitration proceedings. It was in late 2005, after the arbitration tribunal established to resolve this investment dispute released its preliminary ruling on jurisdiction, did we learn conclusively that the company was arguing that there was a "taking" of its investment interest. There were other disciplines in the investment treaty available to the investor, including those prohibiting denials of "fair and equitable treatment" and "full security and protection" of its investment. That is, the company could have claimed that the Government of Bolivia did not make sufficient effort to secure and protect the viability of the consortium's investment. The state's brutal response to the Coordinadora's campaign, in other words, were not only warranted by the regime but may not have gone far enough as far as the company is concerned. So while there was much to celebrate in the streets of Cochabamba, analysts have failed to take into account the corporate response. For these reasons, I agree entirely with Shamir who writes that "any effort to explore and to theorize counter-hegemonic practices must also deal with corporate responses to such threats" (2005: 94).

Here, I review briefly the tribunal's decision on jurisdiction so as to explicate the structural tilt of the investment rules regime, one that decidedly favours investors over state and non-state actors. There are four principal lessons to be drawn from the tribunal's ruling.

1. First, local and transnational NGOs are relegated to the sidelines in this model of dispute resolution. In August 2002, one year after proceedings were initiated by Aguas del Tunari, the U.S.-based environmental NGO, Earth Justice, filed a petition on behalf of the Coordinadora, Friends of the Earth-Netherlands, Oscar Olivera and others to intervene in the arbitration (the petition, organized by the

Institute for Policy Studies, is discussed in Part III below). The petition was denied by the tribunal. Though politely acknowledging their concerns, the tribunal unanimously concluded that the NGOs' request was not within the competence of the tribunal to grant. Control over the proceedings rested with the parties, not the tribunal and, absent the consent of both sides, the tribunal could not "join a non-party to the proceedings; to provide access to hearings to non-parties and, a fortiori, to the public generally; or to make the documents of the proceedings public (2005: para. 17).

International arbitration of investment disputes are structured on the private law model of commercial arbitration. This is a model intended to resolve disputes rather limited in scope, *in camera* and in an *ad hoc* fashion, with no oversight by non-parties. This is in contrast to the ideal public law model which insists on the principles of openness, transparency, and oversight, even participation, by non-parties (Hall, Lobina, and de la Motte 2005: 296). This is somewhat ironic, given that investors insist that investment rules requires state parties to adhere to the principles of openness, transparency, and procedural fairness. They will have none of this when they seek claims for damages that would bankrupt the economies of many states in the world. Investors are not entirely having their way. Recent changes to ICSID rules permit the submission of third party briefs (ICSID 2006: Rule 37[2]) at the discretion of the tribunal, applying a multi-factor analysis, and permit the attendance of non-parties to proceedings if all parties provide their consent (ICSID 2006: Rule 32[2]).³

2. Second, it is difficult for states to avoid investment rules disciplines. Bolivia argued that the tribunal was without jurisdiction in the dispute by reason of the choice-of-forum clause in the concession contract (de Gramont 2006: 16-17). The contract granted exclusive jurisdiction to settle disputes as between Aguas del Tunari and Bolivia to Bolivian courts applying only Bolivian law (Art 41.2). This clause, however, did not preclude access to international arbitration to the concessionaires' shareholders (Art. 41.3). The tribunal would not accept that it was intended by the parties that exclusive jurisdiction be granted to Bolivian courts in the former case. Aguas del Tunari's a claim, after all, was not about an alleged breach of contract but an alleged violation of an international investment treaty (para. 114). If a waiver of ICSID jurisdiction was intended, the tribunal surmised, this would have required a specific and clear expression of the parties' intent, which was not evident in this case (para. 118).

Bolivia also claimed that it had not contemplated that the Netherlands-Bolivia BIT would govern relations between itself and Aguas del Tunari. For this reason, Bolivia effectively had not granted consent to arbitration, a fundamental prerequisite to ICSID jurisdiction. The concession was structured specifically so that it would not fall under a BIT, in other words, the contract was awarded to

³ The U.S. model treaty of 2004 also provides for greater transparency in investment dispute proceedings.

Aguas del Tunari so that no foreign investor could take advantage of commitments to investor protection beyond those available in the concession contract (para.195). Professor Rudolf Dolzer, a well-recognized authority in the area and a champion of the investment rules regime (elsewhere, Dolzer has argued that the “general principles of law recognized by civilized nations” provide a fount of legal norms with which to fill in the laconic wording of investment treaties⁴), backed up the Bolivian case with his expert evidence. Dolzer opined that the “circle of beneficiaries” was carefully described and negotiated. Each investment operates within a specific legal setting, and the Bolivians were under the impression that the specific setting would be within the framework of Bolivia’s law and regulations (para. 199).

The tribunal preferred the position taken by the investor which accepts the BIT as general written consent to authorize arbitration (Arbitrator Alberro-Semerena dissented on this point). This is how other tribunals have resolved similar claims. In cases against Argentina, for instance, ICSID panels found the consent requirement satisfied as soon as the State, via a BIT, extended a “generic invitation” to all investors from the other Contracting State (*Lanco International* 2001, para. 43) Investors are entitled to accept this offer which, when accepted, cannot be withdrawn unilaterally; nor is that consent vitiated by a clause in a concession contract entitling investors to pursue their claims in local courts (*Lanco International* 2001, para. 40).

3. Third, despite its foundation in a series of bilateral treaties, the nationality of the foreign investor is of less consequence than would appear in taking advantage of investment disciplines. Investment rules, in other words, will catch states in its web regardless of an investor’s national origins. Bolivia argued that Aguas del Tunari’s principle shareholder, International Water, could not invoke the Dutch-Bolivia BIT as the company was not “controlled” by a Dutch national. International Water merely was a corporate shell, incorporated under Dutch law but under the control of U.S.-based Bechtel Corporation. No investment treaty existed between the U.S. and Bolivia which Bechtel could invoke. Aguas del Tunari admittedly was under the control of foreigners but not those of the correct nationality. The tribunal rejected this argument too, preferring to adopt a formalistic definition of control, that is, one requiring only a “legal capacity to control” to be “ascertained with reference to the percentage of shares held” rather than an “actual day-to-day or ultimate control” (para. 264) (Arbitrator Alberro-Semerena dissented also on this point). It was sufficient that

⁴ These nations, after all, are the principal exporters of foreign capital, Dolzer asks, so why not also be the principal exporter of controlling laws in the area [2002: 77]?

International Water was incorporated in the Netherlands, though decisions actually may have been made back in Bechtel headquarters in San Francisco.⁵

Yet, the Dutch government expressed some ambivalence about whether Aguas del Tunari and International Water should be entitled to take advantage of these treaty commitments. Responding to questions put to the Government of the Netherlands in 2002, the State Secretary for Economic Affairs twice replied that it was up to the discretion of the tribunal to determine jurisdiction (paras. 253-54). On a third occasion, when five Dutch MPs put the question to the government, the Minister for Housing, Spatial Planning and Environment responded on behalf of his ministry and two others (the Minister for Development Cooperation and State Secretary for Economic Affairs) that, as noted in the previous responses, “the Government is of the view that the investment treaty is not applicable to this particular case” (para. 255). The government, in fact, had not responded in this way on the two previous occasions. This caused the tribunal to conclude that the third response was “inconsistent” with the previous two (para. 258). The tribunal took the extraordinary step in 2004 of seeking clarification from the Netherlands. This prompted a reply letter from the legal advisor to the Dutch Ministry of Foreign Affairs with little more than a recital of the Vienna Convention on the Law of Treaties (Art. 31; para. 260). According to the tribunal, the Netherlands government failed to “express with any clarity the position that the BIT does not apply in this case.” In any event, the tribunal concluded, the government was correct to say on the two prior occasions that this remained a matter for the tribunal alone to decide (para. 263). If we understand that the state has little substantive unity (Jessop 1990: 9; Santos 2006: 61) – that there are left and right hands to the state (Bourdieu 1998: 2) – this kind of fragmented response from the Dutch government might have been anticipated. Ultimately, it was the legal advisor directing the right hand of the state – the one handling the investment treaty dossier – that delivered the muted response of the Dutch government to the tribunal.

In its concluding observations, the tribunal resisted finding any bad faith on the part of the company in shifting its corporate nationality. International Water of the Cayman Islands would not have moved corporate headquarters to Luxembourg so as to be under the control of a Netherlands holding company in anticipation of an investment dispute, the tribunal generously finds, as the record shows that the “severity” of resistance was not “foreseeable” (para. 329). Yet, as the dissenting reasons show, opposition to the concession was foreseeable even on the eve of the signing of the contract. According to de Gramont (co-lead counsel for Bolivia before ICSID), “the Dutch holding companies were inserted

⁵ The tribunal relied, in a footnote, on the ruling of another tribunal in *Aucoven* which found that this “formality” of corporate control “is the fundamental building block of the global economy” (2001: 16 ICSID Rev. 468 at para. 67)

into AdT's intermediate ownership structure after the street protests and negative press reports had begun, and after public calls to cancel the Concession Agreement had been made" (de Gramont 2006: 24). The tribunal instead was satisfied that the company had changed corporate nationality for tax reasons, though "it is not uncommon in practice, and - - absent a particular limitation - - not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples [sic], of taxation or the substantive law of the jurisdiction, including the availability of a BIT" (para. 330). So there was no fraud being perpetrated on the ICSID tribunal by the claimant company. Instead, the tribunal declared that, though considered primarily as bilateral treaties, "such treaties serve in many cases more broadly as portals" (para. 332) - - entry points for footloose capital caught between the contradiction of having the ability to move capital easily across borders while relying on fixed and immobile capital investments that require security and stability. This truly is a world wide network of investment disciplines, with over 2,500 BITs in place, from which most states will find it difficult to hide.

Despite the compelling nature of the facts on the ground at Cochabamba, the logic of international investment law, and the primacy it places on the security of investment interests, led not only to the finding of jurisdiction but, as I have suggested elsewhere, may very well have resulted in a successful claim for damages (Schneiderman 2004b). Admittedly, there were many outstanding questions of fact and law yet to be settled. Additionally, Bolivia planned to file its own counter-claim against Aguas del Tunari and this may have also have precipitated a negotiated outcome. Nevertheless, exceptions to investment disciplines are read narrowly⁶ and the takings standard will more easily be satisfied in the case of a total loss of an investment. If Aguas del Tunari had succeeded in its multi-million dollar claim, small victories like the one in Cochabamba simply would not be economically sustainable. Worse yet, they would provide warrant for even more brutal responses to local resistance against economic globalization. As it turns out, the company withdrew its claim and aborted the process for the payment of a few cents by Bolivia. So although the investment rules regime signals a loss in the capacity to reorder and redistribute public functions in progressive ways, the regime has its weak links. In the next part, I examine the features of the resistance that precipitated this withdrawal. Are there lessons to be learned about the capacity of states together with social movements from the South coordinating with NGOS from the North to resist the regime's disciplinary effects?

⁶ See the case of *CMS v. Argentina* where, following the 2000 Argentine economic melt-down, the state could not rely on treaty and customary international law exceptions of state of necessity or emergency in revoking commitments to pay high-priced returns on a denationalized investment (*CMS* 2005: paras. 316-17, 355).

III

In this part, I examine strategies taken up by the coalition of local social movement actors, the Bolivian state, and NGOs operating in the global North that precipitated the withdrawal of Aguas del Tunari's investment dispute. It is true that parties occasionally settle foreign investment disputes. What was largely unprecedented was the counter-hegemonic campaign waged at multiple scales which convinced Bechtel Corporation (the controlling shareholder in the investment consortium) that it was best to withdraw the damage claim instead of pursuing it to its logical conclusion.⁷ In this way, the Bolivian state could recapture the water assets of Cochabamba (meager as they were) and pursue alternative strategies by which the state, following Santos, could experiment with more socially sustainable and progressive outcomes. Are there features of this campaign that are generalizable to other investment disputes in other locales around the world and which could re-energize state capacity in similar ways? Does this case generate resources of hope for those wishing to roll back or extinguish these constitution-like commitments to inhibited state action and guaranteed rates of return to foreign investors? In this part, I move beyond describing hegemonic constraints and take up the task of analyzing these spaces for and strategies of counter hegemony (Santos and Rodríguez Garavito 2005: 11). I do so by looking to the literature on social mobilization together with a small sample of interviews I conducted with activists and lawyers who were involved in the dispute. I conclude that movements for the advancement of transnational social justice likely are to be mired in the goals and tactics associated with modernity. Though they may generate more transformative possibilities at the level of local institutions and politics, as suggested by events in Bolivia following the Coordinadora's victory, transnational movement action is unlikely to reverse investment rules' legal constraints without concerted action by states themselves.

Undoubtedly, the current global scene provides new opportunities to engage in the politics of contention.⁸ Though contentious politics ordinarily are performed at local and national levels (Tilly and Tarrow, 2007: 22), the rules and institutions of globalization provide "political opportunity structures" to engage in new practices of transnational activism (Tarrow 2005: 8). Political opportunity structures, according to Tilly and Tarrow, can both facilitate and inhibit collective action – they are, one might say, strategically selective (Jessop 1990: 9-10). If the ICSID proceedings at the World Bank closed their doors to social movement

⁷ Vis-Dunbar and Peterson reports that the British-based Big Food Group abandoned its investment dispute against the government of Guyana under pressure from British movement activists (2006).

⁸ Contentious politics are defined as "interactions in which actors make claims bearing on someone else's interests, leading to coordinated efforts on behalf of shared interests or programs, in which governments are involved as targets, initiators of claims or third parties. Contentious politics thus brings together three familiar features of social life: contention, collective action, and politics" (Tilly and Tarrow 2007: 4).

actors deeply implicated in the dispute, such as the Coordinadora, other opportunities opened up for contentious politics (though this was not inevitable). Even if they had been welcomed to participate in the legal proceedings, this was not a locale that movement actors would have wanted to end up in, according to Jim Shultz of the Democracy Center. This was forum of Bechtel's choosing where social movements could exercise little influence or exhibit real strength. Rather than being confined to monolingual-legalistic argumentation in world bank arbitration facilities, social movements would want to raise the level of discourse from a legal to a moral one (Shultz interview 13 July 2007).

It is appropriate to begin this discussion by introducing Jim Shultz, who probably had the greatest hand in facilitating the transnational network of social activists. Shultz is executive director and founder of the Democracy Center, an organization that educates and empowers people by reporting, training, and organizing movements for human rights and social justice. Originally based in San Francisco, the Center moved its offices to Cochabamba in 1998 where Shultz has established an impressive network over the internet to publicize the Center's work (www.democracyctr.org/about/history.htm). Shultz capitalized on this network and contacts in San Francisco when the connection to San Francisco-based Bechtel Corporation was made public in the midst of the 2000 water wars. Activists in the Bay area occupied Bechtel corporate headquarters. Protestors as far away as Auckland hosed down the Bolivian embassy with high pressure water hoses from a borrowed fire truck in a protest against both the state's brutal response and Bechtel's complicity (Shultz 2003: 274). Shultz disseminated the President and CEO of Bechtel, Riley Bechtel's, e-mail address, and activists bombarded him with messages. Shultz exploited Bay-area media connections. Democracy Center reports were syndicated by the Pacific News Service and then picked up in the U.S. and Canada, generating a spiral of interest in national US media outlets like *The New Yorker* (Finnegan 2002) and PBS (Moyers 2001) (Shultz 2003: 274).

Once Aguas del Tunari was forced out, the second phase of the campaign kicked into gear that would pressure the company to withdraw its claim for US \$25 million in damages. Bechtel offices again were occupied and protestors chained together in Bechtel's lobby (Harris 2006). Municipal allies were conscripted. The San Francisco Board of Supervisors approved a resolution calling on Bechtel to withdraw its claim (Harris 2006). Shultz happened to be visiting family in the Bay area at the time and so was able to appear in person before the municipal council. Abengoa SA of Spain, a minority shareholder in International Water of the Netherlands, helped direct the legal proceedings along with Bechtel and so this prompted civil society action in Spain, resulting in hundreds of further e-mails to Riley Bechtel. King Juan Carlos and Spanish Prime Minister Zapatero called on Abengoa to drop its claim against Bolivia (Harris 2006). Dutch Parliamentarians and NGOs were conscripted (as discussed above), calling on the Government of the Netherlands to denounce corporate

jurisdictional gerrymandering which entitled International Water to sue under a Dutch-Bolivia BIT.

Oscar Olivera became an international celebrity. The Washington, DC-based Institute for Policy Studies (IPS) awarded Olivero the Letelier-Moffit award for human rights in 2000. It was on meeting Olivero that IPS began to participate in this global campaign. The IPS's global economy project, under the direction of Sarah Anderson, took a lead role in soliciting support from over 300 civil society organizations across five different continents seeking to make the ICSID proceedings public and allowing for participation by Olivera and others in the case. Anderson organized protests outside the Virginia home of Bechtel's Washington lobbyist. All of this was done, she advises, in consultation with the Coordinadora and the government of Bolivia. She admitted to me that there was a "good flow of information" between the government and IPS; meetings were held directly with the Bolivian government and its D.C. lawyers (interview 26 Oct. 2006). They were "happy to have the activists back them," she said (*ibid.*). The network of activists in Bolivia – Shultz, Olivera – and in the US – EarthJustice, IPS – together with their personal ties – Olivera's sister, Marcela, worked for Ralph Nader's Public Citizen in D.C. – helped to ensure that there were "strong bridges" of solidarity across national frontiers. There was at least one idea, she writes, "that we thought a real winner" but it was later dropped "because people in Cochabamba disagreed with that approach" (Anderson 2006).

In the social movement and contentious politics literature, this was an instance of transnational contention whereby transnational activists were linked to one another, to states, and to international fora (Tarrow 2005: 25). This transnational advocacy network (Keck and Sikkink 1998: 16), though rooted in specific national and sub-national contexts, engaged in contentious political activities that linked them with activists in other national contexts, shifting their activities from the local to the transnational, and then back again to the local (Tarrow 2005: 29). It is not that some transnational global civil society emerged out of this activity, rather, activists remain rooted largely in the local, exploiting local contacts and institutions (Tarrow 2005: 43; Johnston and Laxer 2003).

What were some of the reasons that Bechtel dropped the case, even though, after winning the decision on jurisdiction, they might also have won on the merits? Bechtel, after all, was a "tough adversary". They were unlike the Gap – they were without storefronts and not vulnerable to consumer activism. Nor was Bechtel a publicly-traded company, which would have provided outlets for contention through shareholder activism. In these ways, the company truly was a "global abstraction" (Dirlík 1994). The company could have held out. Anderson identified a number of factors that helped to contribute to this "rare" victory (Anderson 2006). They mostly appear to be associated with worries about bad publicity that would imperil company profits. For instance, Bechtel received one of the first and largest contracts for Iraq's reconstruction (worth up to US \$680 million) (CorpWatch 2003: 4). With subsequent work, Bechtel was awarded the

staggering sum of \$2.8 billion in Iraqi reconstruction contracts (Juhasz 2006: 229-30). Bechtel also secured a large contract to help rebuild New Orleans after Hurricane Katrina. The bad publicity associated with Aguas del Tunari, according to Anderson, may have jeopardized future, similarly lucrative, contracts. It was significant that San Francisco's Board of Supervisors issued a resolution calling on Bechtel to withdraw from the suit. This threatened future municipal water contracts with the city of San Francisco and elsewhere. Lastly, the protest appears to have gotten "under the skin" of President and CEO Riley Bechtel. He was flooded with e-mails and portrayed as the lord of darkness in a fight over something as necessary and basic to human existence as water. According to Bolivia's lead negotiator, Eduardo Valdivia, CEO Riley Bechtel "personally intervened" to ensure the case was settled. It was not "worth the damage to the company's reputation," he had concluded (Shultz 2007). In an interview with me, Jim Shultz emphasized the significance of social movement corporate campaigns that rely on repertoires associated with reputation. If social movements can't take the fight to the mall or to shareholder meetings, movements can always go after the CEO.⁹ Shultz likened it to throwing rocks over a brick wall – you are never sure if you are hitting someone but, given their thin skins, you are sure to find out if you do (interview 13 July 2007).

Ultimately, Shultz claims, corporations are like mathematicians – the strategy was to change their understanding of the math. It would seem that, for the most part, this transnational movement was effective to the extent that it could undermine Bechtel's potential future profits. In other words, it was the threat of economic loss, greater than the sunk costs and lost profits in Cochabamba, which precipitated the withdrawal of the company claim. This was a calculation based, perhaps, on nothing more than the bottom line of company balance sheets. What I have been describing is a strategy familiar to those who have been operating under the paradigm of modernity. The labor movement, for instance, was best able to secure collective bargaining rights, the improvement of working conditions and wages based on the threat of withdrawal of labor power. These were conflicts over "the power to inflict costs" (Biggs 2002: 589, 611) – workers, by withdrawing their labour power, and employers, by locking-out or replacing those workers. Ethical consumer activists and anti-sweatshop activists have been able to use the 'power of the purse' to sway corporate production practices somewhat (Klein 1999). Santos admits that, in this period of transition, hegemonic tools might be used to achieve non-hegemonic purposes. But to make my point more strongly, there is still much work to be done under paradigm of modernity using modernity's tools, particularly through the aegis of the state - - the most proper agent with which to unlock the ball and chain of investment disciplines.

⁹ Shultz in his book, sub-titled "a practical guide to changing the world" admonishes activists to "make it personal, names names, and bring it close to home" (Shultz 2002: 117)

What appears to be most effective, then, are strategies of economic coercion. It may be that similarly bad publicity will work against other large transnational enterprises. It may not work as well, however, against small to medium size operations - - I am thinking here of the Metalclad Corporation, Marvin Feldman, Thunderbird Gaming Corporation, and numerous other claimants who have invoked NAFTA's Chapter Eleven and for whom a large damage award based on lost profits would provide salvation to company ownership.

There is the associated problem of organizing global campaigns of this sort. The singular circumstances giving rise to the Cochabamba water wars will not be easy to replicate. The Coordinadora – a non-hierarchical umbrella organization giving voice to interests both modern and traditional (Linares 2004: 76) – linked arms with the Democracy Center, headquartered in Cochabamba, an intermediary that could share a base of information with activists in the global North in real time over the internet. Jim Shultz and the Democracy Center, in this way, acted as a “transnational hinge” for activists working across borders (Tarrow 2005: 190). In this second phase (after company executives fled the country), the campaign's sole objective was to have Bechtel (and Abengoa) withdraw their investment dispute against Bolivia. This was, in Tarrow's lexicon, a short-term “event coalition,” exhibiting an intensity of participant involvement and the potential for future collaboration, but of limited duration (Tarrow 2005: 168). It was not what Tarrow would label a long-term “campaign coalition,” which are less thrilling than short-term coalitions but “may be the wave of the transnational future,” Tarrow surmises (Tarrow 2005: 179). Significantly, the Democracy Center has no plans to initiate another campaign of this sort in the near future.¹⁰

This was a strategy that also relied on traditional legal forms. The frustrated intervention in the ICSID dispute at the World Bank and its supporting petition sought to invoke conventional principles of procedural justice. Bolivian constitutional principles were conscripted into the campaign: water is a national resource available for public use rather than for private gain, the Bolivian constitution provides. So law and legal forms played an ambiguous role in this struggle – a discourse to be embraced and resisted, underscoring the “complexities, contingencies, and ironies at stake in legal mobilization” (McCann 2006: 19). To the extent the Coordinadora and its allies were successful, water resources would revert back to the public regulator and, indirectly, to the state.

This modernist result left open the possibility of pursuing alternative, more democratic and participatory institutional designs, as Santos suggests. This, in part, is what happened with the establishment of a national Inter-Institutional Water Council (CONIAG) in 2002. The Council drew representation from

¹⁰ The episodic nature of transnational coalitions is observed by Rodríguez Garavito and Arenas in the case of the struggle of the U'wa people of Colombia (2005: 259).

government, civil society groups, and the business sector and was influential in the adoption of a 2004 law which recognized local and customary laws regarding access to water (de Vos, Boelens, and Bustamente 2006: 44). This piece of the story suggests that the political opportunity structures generated by economic globalization, in this instance repelling World Bank-induced modes of privatization, can be exploited for the purposes of generating new modes of institutional design at local levels.

There also is the no small matter of the impact of the Coordinadora's success on the local Bolivian oppositional movement, helping to mobilize support for Evo Morales' presidential bid in 2000, ultimately winning the presidency in 2005 (Linares 2006). In addition to 'nationalising' gas and oil markets in Bolivia, Morales has vowed to remove water from the table of any future international trade negotiations. Moreover, Bolivia has withdrawn its consent from the ICSID convention (though it may still be party to investment disputes under ICSID's Additional Facility Rules) (ICSID 2007; Gaillard 2007). This, of course, is part of a wider trend of resistance to neo-liberal rules and institutions in Latin America (Lomnitz 2006). In its World Investment Report of 2006, UNCTAD reports that in the year 2005, there were an unprecedented number of regulatory changes making host countries "less welcome" to foreign investment, (the highest ever recorded by UNCTAD). Two-thirds of these changes issued out of Latin American states (UNCTAD 2006: 25).¹¹

There remained a residual controversy over whether the settlement of the Aguas del Tunari claim was on terms that were beneficial to Bolivians. The state paid the sum of 2 bolivianos, (about US 30 cents) in exchange for an eighty per cent interest in the company (the remaining shareholders, all local Bolivian nationals, were not party to the settlement). Legal fees in the amount of US \$1.6 million also were paid by Bolivia (Harris 2006). Oscar Olivera, on behalf of the Coordinadora, worried that Bolivia had assumed the company's debt of some Euro \$7 million (about US \$8.2 million). Olivera, however, had seen only 18 pages of a 25 page English document (*La Razón* 06). The Bolivian Vice Minister of Public Utilities, Eduardo Rojas, denied that the state had taken up company debt of this enormity. Warranties were made, he claims, that there were no debts or liabilities exceeding US \$100. As if underscoring the non-transparent nature of the investment dispute process, he admitted that the agreement was executed in English and was not yet translated into Spanish (*La Prensa* 2006). The Bolivian-Bechtel/Abengoa settlement hung in the balance following these allegations by Olivera. The settlement documents confirm, however, that Aguas del Tunari's debt of some Euro 5 million was cancelled. Other debts, associated with Aguas del Tunari's short-lived operations in Bolivia, including social security

¹¹ There is a debate brewing amongst investment lawyers about whether Carlos Calvo is having a revival in Latin America. See, for instance, Cremades 2005.

contributions, health care contributions, and value added tax were assumed by the state as principal shareholder.

IV

Victory in social justice struggles are rare. In so far as the citizens of Cochabamba won the water wars, in both of its phases, they have generated fertile ground for oppositional politics in many places around the world. After all, as Shultz aptly put it, the “revolt over water was a revolt against everything” (Shultz 2003: 273). People in many places in the world are fed up. Polanyian measures for societal self-protection drawing on market models may no longer be sufficient (Patel and McMichael 2004). Santos’ hopeful account of the paradigmatic transition suggests there are struggles yet to be won, alternative futures to be imagined, their specificities to be worked out in a spirit of democratic contestation and pluralism. In the meanwhile, there are more mundane but no less difficult things to be achieved which require toiling in the mines of the sub-paradigm, such as removing binding legal constraints on the capacity of publics so that they may go about doing this sort of work.

BIBLIOGRAPHY

- Anderson, Gavin W. 2005. *Constitutional Rights After Globalization* (Oxford: Hart Publishing).
- Anderson, Sarah. 2006. "Communication Re: Bechtel" (26 October) on file with the author.
- Bakan, Joel. 2004. *The Corporation: The Pathological Pursuit of Power* (New York: Free Press).
- Baxi, Upendra. 2006. *The Future of Human Rights*, 2nd ed. New Delhi: Oxford University Press.
- Beck, Ulrich. 1992. *Risk Society*. Transl. Mark Ritter (London: Sage Publications).
 ---- 2005. *Power in the Global Age: A New Global Political Economy*. Transl. Kathleen Cross (London: Polity Press)
- Biggs, Michael. 2002. Strikes as Sequences of Interaction: The American Strike Wave of 1886. *Social Science History* 26: 583-617.
- Bourdieu, Pierre. 1997. *Pascalian Meditations* (Stanford: Stanford University Press).
 ---- 1998. *Acts of Resistance: Against the Tyranny of the Market*. New York: New Press.
- Carbonneau, Thomas. 2002. "The Ballad of Transborder Arbitration" *University of Miami Law Review* 56: 773-829
- CorpWatch, Global Exchange and Public Citizen. 2003. Bechtel: Profiting From Destruction – Why the Corporate Invasion of Iraq Must be Stopped (June 2003) available at <http://www.corpwatch.org/article.php?id=6975>.
- Coward, M. 2005. "The Globalisation of Enclosure: Interrogating the Geopolitics of Empire" *Third World Quarterly* 25: 855-871.
- Cremades, Bernardo M. 2005. "The Resurgence of the Calvo Doctrine in Latin America" *transnational-dispute-management.com* (November) 2(5).
- de Vos, Hugo, Rutgerd Boelens, and Rocio Bustamente. 2006. "Formal Law and Local Water Control in the Andean Region: A Fiercely Contested Field" *Water Resources Development* 22: 37-48.
- Dezalay, Yves and Bryant G. Garth. 1996. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press).
- Dirlik, Arif. 1994. "The Postcolonial Aura: Third World Criticism in an Age of Global Capitalism" *Critical Inquiry* 20: 328-56.
- Finnegan, W. 2002. "Letter from Bolivia: Leasing the Rain" *The New Yorker* (8 April) 43-53.
- Gaillard, Emmanuel. 2007. "The Denunciation of the ICSID Convention" *New York Law Journal* (June 26) 6-7
- Gill, Stephen. 1995. Globalisation, Market Civilisation, and Disciplinary Neoliberalism *Millennium: Journal of International Studies* 24: 399-423.
 ---- 2003. . *Power and Resistance in the New World Order* (Hampshire: Palgrave Macmillan)
- Harris, Paul. 2006. "Bechtel, Bolivia Resolve Dispute" *San Francisco Chronicle* (19 January) A3.
- Hardt, Michael and Antonio Negri. 2000. *Empire*. (Cambridge: Harvard University Press)
- Hay, Colin. 2005. Too important to leave to the economists? the political economy of welfare entrenchment. *Social Policy and Society* 4: 197-205

- Hirst, Paul and Grahame Thompson. 1999. *Globalization in Question: The International Economy and the Possibilities of Governance*, 2nd ed. (Cambridge: Polity Press).
- International Center for the Settlement of Investment Disputes [ICSID]. 2006. *ICSID Convention, Regulations and Rules* (Washington DC: ICSID).
- 2007. "News Release: Bolivia Submits a Notice Under Article 71 of the ICSID Convention" (16 May) available at <http://www.worldbank.org/icsid/highlights/05-16-07.htm>.
- International Monetary Fund [IMF], 2007. *World Economic Outlook: Globalization and Inequality* (Washington, DC: The Fund) online at www.imf.org/external/pubs/ft/weo/2007/02/pdf/text.pdf
- Johnston, Josée and Gordon Laxer. 2003. "Solidarity in the Age of Globalization: Lessons from the Anti-MAI and Zapatista Struggles," *Theory and Society* 32: 39-91
- Jessop, Bob. 1990. *State Theory: Putting Capitalist States in their Place* (University Park: Pennsylvania State University Press).
- Juhasz, Antonia. 2006. *The Bush Agenda: Invading the World, One Economy at a Time* (New York: HarperCollins Publishers).
- Keck, Margaret E. and Kathryn Sikkink. 1998. *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press).
- Klein, Naomi. 1999. *No Logo: Taking Aim at the Brand Bullies*. New York: Picador
- La Prensa*. 2006. "Temer heredar deudas de Aguas del Tunari" (4 January).
- La Razón*. 2006. "Coordinadora pide rechazar acuerdo con transnacionales" (10 January).
- Línera, Álvaro García. 2004. "The 'Multitude'" in Olivera with Lewis (2004). 65-86.
- 2006. "State Crisis and Popular Power" *New Left Review* 37: 73-85.
- Lomnitz, Claudio. 2006. "Latin America's Rebellion: Will the New Left Set a New Agenda?" *Boston Review* 31(5): 7-10.
- McCann, Michael. 2006. "Law and Social Movements: Contemporary Perspectives" *Annual Review of Law and Social Science* 2: 17-38.
- McGinnis, John P. and Mark L. Movseian. 2000. "The World Trade Constitution" *Harvard Law Review* 114: 511-605.
- Moyers, Bill. 2001. "NOW with Bill Moyers: Trading Democracy" transcript available at www.pbs.org/nw/printable/transcript_tdfull.html (accessed 8 August 2003).
- Nickson, Andrew and Claudia Vargas. 2002. "The Limitations of Water Regulation: The failure of the Cochabamba Concession in Bolivia" *Bulletin of Latin American Research* 21: 99-120.
- Oscar Olivera with Tom Lewis (eds.) 2005. *¡Cochabamba! Water War in Bolivia*. (Cambridge: South End Press).
- Panitch, Leo. 1996. "Rethinking the Role of the State" in James Mittelman, ed., *Globalization: Critical Reflections* (International Political Economy Yearbook, vol.9) (Boulder: Lynne Reiner Publishers).
- Patel, Rajeev and Philip McMichael. 2004. "Third Worldism and the Lineages of Global Fascism: The Regrouping of the Global South in the Neoliberal Era" *Third World Quarterly* 25: 231-54
- Polanyi, Karl. 1957. *The Great Transformation*. Boston: Beacon Press.
- Santos, Boaventura de Sousa. 2001. "Nuestra América: Reinventing a Subaltern Paradigm of

- Recognition and Redistribution” Theory, *Culture & Society* 18: 185-217
- 2002. *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, 2nd ed. (New York: Routledge).
- 2006. “Beyond Abyssal Legal Thinking: From Global Lines to Ecologies of Knowledges” (4 November draft).
- Santos, Boaventura de Sousa and Leonardo Avritzer. 2005. “Introduction: Opening Up the Canon of Democracy” in Boaventura de Sousa Santos (ed.) *Democratizing Democracy: Beyond the Liberal Democratic Canon* (London: Verso). xxxiv-lxxiv.
- Santos, Boaventura de Sousa and César A. Rodríguez Garavito. 2005. “Law, Politics and the Subaltern in Counter-Hegemonic Globalization” in Santos and Garavito, (eds.) 2005. 1-26.
- Santos, Boaventura de Sousa and César A. Rodríguez Garavito, (eds.) 2005. *Law and Globalization From Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press).
- Sassen, Saskia. 2006. *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press).
- Schneiderman, David. 2000. “Investment Rules and the New Constitutionalism: Interlinkages and Disciplinary Effects” *Law and Social Inquiry* 25: 757.
- 2004a. “Taking Investments Too Far: Expropriations in the Semi-Periphery” in M. Griffin-Cohen and S. Clarkson, eds., *Governance On the Edge: Semi-Peripheral States and the Challenge of Globalization* (London: Zed Books) 218-238.
- 2004b. “Globalisation, Governance and Investment Rules” in John N. Clarke and Geoffrey R. Edwards, eds., *Global Governance in the Twenty-First Century* (Houndsmills: Palgrave) 67-91.
- 2005. “Habermas and Global Trade Power Policy” [unpublished].
- 2006. Transnational Legality and the Immobilization of Local Agency. *Annual Review of Law and Social Science* 2: 387-408.
- 2008. *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge: Cambridge University Press)
- Shamir, Ronen. 2005. “Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony” in Santos and Rodríguez Garavito (eds.) 2005. 92-117.
- Shultz, Jim. 2002. *The Democracy Owners’ Manual: A Practical Guide to Changing the World* (New Brunswick: Rutgers University Press).
- 2003. “The Water is Ours Dammit!” in Notes from Nowhere (ed.) *We Are Everywhere: The Irresistible Rise of Global Capitalism* (London: Verso) 265-77.
- 2007. “The Cochabamba Water Revolt and its Aftermath” in Jim Shultz and Melissa Draper (eds.) *Dignity and defiance: Stories from Bolivia’s Challenge to Globalization* (University of California Press, forthcoming).
- Sornarajah, M. 2004. *The International Law on Foreign Investment*, 2nd ed. Cambridge: Cambridge University Press.
- Unger, Roberta Mangabeira. 1996. *What Should Legal Analysis Become?* London: Verso.
- United Nations Conference on Trade and Development (UNCTAD). 2004. *International Investment Agreements: Key Issues*, volume 1 (New York and Geneva: United Nations).
- 2005. *World Investment Report: Transnational Corporations and the Internationalization of R&D* (New York and Geneva: United Nations).
- Vandavelde, Keneth J. 1992. AThe BIT Program: A Fifteen-Year Appraisal@ American Society of International Law, Proceedings of the 86th Annual Meeting. (Washington: ASIL). 532-540.
- 1998. The Political Economy of a Bilateral Investment Treaty. *American Journal of International Law*. 92: 621-641.
- 2007. “Bilateral Investment Treaties – Investor-state arbitration – jurisdiction –

choice of forum clauses – corporate nationality – control of investment” *The American Journal of International Law* 101: 179-184.

Vis-Dunbar, Damon and Luke Eric Peterson. 2006. “Bolivian Water Dispute Settled, Bechtel Foregoes Compensation” *Investment Treaty News* (20 January) available at http://www.iisd.org/pdf/2006/itn_jan20_2006.pdf.

Weiss, Linda. 2005. Global governance, national strategies: how industrialized states make room to move under the WTO. *Review of International Political Economy* 12: 723-49