A New Global Constitutional Order?

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Accompanying the rise of new transnational legal rules and institutions intended to promote global economic integration are questions about the linkages between transnational legality and constitutional law. In what ways does transnational economic law mimic features of national constitutional law? Does transnational law complement in some ways or supersede in other ways what we typically describe as constitutional law? To these questions we can now add the following: are transnational rules and institutions a proper subject of study for comparative constitutionalists? This chapter makes a case for the incorporation of forms of transnational legality into comparative constitutional studies. Taking as its focus the regime of international investment law, I argue that an appreciation of the constitutional functions of transnational legality deepen understandings of how constitutional law develops within, across, and beyond national systems of law. More specifically, elements of transnational legality can help to explain the phenomenon of convergence and divergence in constitutional law. This expansion of the comparativist’s toolkit of resources, though challenging conventional understandings of constitutional law as grounded exclusively in states, better captures current developments.

Comparative constitutionalists traditionally have been preoccupied with the identification of difference and similarity between families of national constitutional systems (see e.g. Finer 1979). Today, the dominant trend among comparative constitutionalists is to seek out not just differences and similarities but convergence. With a focus on judicial branches operating within national constitutional systems, proportionality review typically is singled out as evidence of an emerging world-wide consensus in constitutional matters (Beatty 2004; Kumm 2009). For those states not participating in this global convergence on standards of review – the United States usually is singled out for this exceptionalism though this is not an entirely accurate representation (Gardbaum 2008) – they simply will have missed out on the manna of the post-war rights model (Weinrib 2002). That this convergence has occurred at the very same time as global economic integration has proceeded at a breathtaking pace plays little role in these analyses. Instead, there is a strange separation between global political economy and rights (Schneiderman 2003). The constitutionalization of property rights, to be sure, has been the subject of some important comparative work (Alexander 2006; Allan 2000; Van der Walt 1999) but, even here, the scholarship mostly is divorced from the simultaneous movement toward greater economic integration. Outside of work on the World Trade Organization (WTO) and the European...
Union (EU) – which invite such linkages (Fligstein & Stone Sweet 2002) – this is the case with very few exceptions.2

In the text that follows, I contrast scholarly approaches by distinguishing between ‘constitutionalism as project’ and ‘constitutionalism as critique,’3 roughly tracking the distinction between those who submerge the simultaneous spread of rights discourse and global economic relations and those who noisily take note of it. In the first, ascribing constitutional features to aspects of transnational legality is undertaken not only to uncover as yet unrecognized features of this new legal order but as part of a normative project of stabilization and legitimation (Kennedy 2009: 40). Global constitutionalism as ‘project’ has as its object the improvement of institutions for ‘global governance.’ Constitutionalism becomes a resource for entrenching global best practices around limited government and market reforms (Rittich 2006). Constitutionalism as critique, by contrast, brings power and political economy back into the folds of transnational legality, reconnecting the spread of rights discourse to the end game of removing barriers to trade, persons, and capital.4 Critical constitutionalism is an approach that best captures, I argue below, recent trends driving toward global constitutional engagement, even convergence.5 Though some scholarship bridges these divides,6 it is fair to conclude that project constitutionalism is the dominant mode of inquiry today. By contrast, I advance a critical mode of inquiry by taking up the case of international investment law. I hope to show how transnational legal norms and forms associated with economic globalization should be considered part of comparative constitutional law’s frame of inquiry.

The discussion proceeds as follows. First, I turn to the problem of stretching the constitutional analogy beyond the borders of national states and, in so doing, contrast project- and critique-constitutionalist approaches. I then take up the investment rules regime in some detail as a form of transnational constitutional law, examining its dominant features and linkages to national constitutional law. Lastly, I turn to contending non-constitutional interpretations of international investment law and suggest that, whatever the explanatory power of each of the counter-claims, they are best understood as part of a larger debate about which features of the new global legal order are deserving of the moniker ‘constitutional.’7

I. Constitutionalist Projects

2 Law (2008) and Anderson (2005) may be the few exceptions to this rule.
3 For the purposes of this essay, I do not distinguish between notions of “constitutional law,” “constitutionalism,” and “constitutionalization.” For a parsing of these terms, see Peters (2009).
4 I say reconnecting because, some argue, this is a longstanding connection. Elkin, for instance, views both Aristotle and Madison as telling us that “in thinking about a political constitution we must also think about an economic constitution” (2006: 4).
5 Engagement assumes that foreign or international law should be taken into account, though not necessarily followed by national constitutional systems. According to Jackson, this is the dominant mode of by which constitutional texts direct and national high courts consider foreign sources of law. Convergence, associated with cosmopolitanism, is a far less common posture and so is less accurately descriptive of how constitutions function (Jackson 2009: 8-9). Note that Weiler and Trachtman predict the convergence of European Community law, which they liken to constitutional law, and public international law (Weiler and Trachtman 1996: 360).
6 Consider, for instance, Van Harten (2007) who generates a convincing constitutionalist critique of international investment law but then recommends judicial-like reforms, including appellate review, which, if adopted, would generate legitimacy for the system.
7 On the politics associated with calling something constitutional see Anderson (2005: 107). I discuss this further in Part IV, below.
In the face of emergent transnational legal orders whose implications are only beginning to be understood, it comes as little surprise that analysts will look to tools readily at hand (Tushnet 1999: 1286) and assimilate these orders under the rubric of constitutionalism. In the many domains in which transnational law dominates, constitutional ideas have migrated (Choudhry 2006) in order to make sense of what is partially coming into view. John Jackson, for instance, describes the Uruguay-round World Trade Organization (WTO) system as a constitution for international trade relations (1997: 339). By this, he means to describe both the structure of rules that constitute the international trading system and the constraints they impose on governments. Jackson is not naïve about the linkages between national constitutional systems and the emergent trade constitution: both inform each other, he observes (1997: 340). McGinnis and Movsevian (2000) push the analogy even further, arguing the WTO institutionalizes Madisonian checking functions so as to deter factionalism in the international economic system by establishing a ‘world trade constitution.’ Petersmann (2000) goes so far as to promote a fully constitutionalized trade and human rights system at the global level through the WTO. These descriptive and normative accounts of the WTO have been subject to critiques by Cass who finds that the WTO falls well short of the typical markers of a “fully constitutionalized entity” (2005: 19; Walker 2001: 50; Walker 2002: 355) while Howse and Nicolaidis (2001) claim that conceiving of the WTO as constitutionalized is a counterproductive response to the WTO’s legitimacy crisis (also Dunoff 2006). Rather than raising WTO dispute settlement to a ‘higher law’ that is above the fray what is needed is more politics, not less (Howse and Nicolaidis 2001: 229).

Moving beyond the multilateral trading system, theorists have been inspired by the Kant’s sketch of a ‘perpetual peace’ based on a federation of republican states (1795). Habermas (2006) suggests that a global constitutional law can be managed not by a new global state but, following Kant, by intermediary federated institutions such as those of a reformed United Nations. Koskeniemi (2007) looks to constitutionalism in international law as a way of endowing human suffering with normative meaning through the constitutional norms of equality, autonomy and human dignity, while Kumm (2009) discerns a new cosmopolitan law, drawing on the European Court of Human Rights experience, premised on a framework of proportionality and subsidiarity. National constitutional law is legitimate for Kumm only to the extent that it is conceived as part of a new cosmopolitan paradigm.

How well do these constitutionalist accounts translate to newly operative global legal regimes (Walker 2003)? The answer turns, in part, on whether one conceives of constitutionalism as thin or thick. In its thin conception, constitutionalism refers to laws that establish and regulate groups and associations (Raz 1998: 153). Teubner, drawing on Luhmann’s systems theory (2004), describes the turn to global constitutionalism as reflecting a “multiplicity of civil constitutions” emerging outside of states initiated by various actors operating in autonomous global sectors — whether they be transnational corporations, federated trade unions or human rights networks (Teubner 2004: 8). These turn out to be specialized centers of law production that are “independent global villages” or sub-constitutions of a world society (Teubner 2004: 14). Teubner’s account turns out to be a legal pluralist one (Berman 2007), resembling early twentieth-century British political pluralist formulations (Hirst 1989). Thinner versions, it would appear to be the case, translate relatively well to the global level. Thicker versions refer to constitutional features such as the separation of powers, fundamental rights or judicial supremacy (Raz 1998: 153)

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and seemingly appear more difficult to translate. Walker (2002), for instance, wishes to distinguish between societal constitutionalism or legal pluralism per se (resembling the thin version) and constitutional pluralism (akin to the thicker one). In the European context, this means moving beyond the inter-state paradigm of constitutional monism in the direction of a heterarchical pluralism in which the European order “makes its own independent constitutional claims . . . [which] exist alongside the continuing claims of states” (Walker 2002: 337). Stone-Sweet similarly observes that certain treaty regimes, like the European one, are constitutional as they are “built on a normative foundation that is very similar to higher-law constitutions” and so are overlaid onto existing national constitutional spaces (Stone Sweet 2009a; Stone Sweet 1994).

A number of objections immediately arise. At base, these regimes appear to lack the basic element of a liberal constitutional order: a constituent authority or demos. A common rejoinder is to say that, at least in the EU case, this is an example of a quasi-constitutional legal order that is only beginning to work out fully its idea of constitutionalism (Weiler 1999: 8). Alternatively, one might say that these are instances (in the long history of the subject) of constitutionalism without a demos (Newton 2006: 330). Others object on the basis that it is inappropriate or simply beyond credulity to stretch constitutionalism beyond the state (Walker 2008: 520-22). One might reply by saying that, at a functional level, transnational legal regimes exhibit constitution-like features and employ techniques and discourses familiar to national constitutional law (Dunoff and Trachtman 2009: 9). To this end, constitutionalism is “a prism through which one can observe a landscape” and isolate certain of its features (Weiler and Trachtman 1996-97: 359). At a normative level, if one understands constitutionalism as an open-ended project under construction rather than a fully realized accomplishment – as an “ethical discourse under a constant process of re-imagining and reconstruction” (Walker 2009) – then postnational constitutionalism becomes not only a possibility but, for some, an imperative. Here arises one common animating concern among much meta-level constitutional theorizing. Almost all of these accounts have the object of positively identifying nascent or extant transnational constitutionalism for the purpose of pursuing ‘constitutionalism as a project’ (Kennedy 2009: 40). By way of contrast, I turn next to a mode of constitutional analysis that has as its object not legitimation but critique. It is this critical edge that helps to make this mode of transnational analysis advantageous to comparative constitutionalists.

II. Constitutional Critiques

I have in mind a critical discourse that brings power, history, and political economy back into view. It is an approach that best captures the rise of a “new constitutionalism” – a term coined by Stephen Gill (2003) to describe the world-wide political project to shrink political authority over markets and to replicate mythical paths to development of wealthy, capital-exporting states. If constitutional design concerns itself, in part, with the proper relationship between politics and markets – about regulating the amount of politics to let into markets – then the model of development associated with the ‘Washington consensus’ has been preoccupied with placing constitution-like limits on exercises of political power (Rittich 2006: 221; Dezalay and Garth 2002: c. 10). New constitutionalist proposals, writes Gill, are “intended to ‘lock in’ commitments to liberal forms of development, frameworks of accumulation and of dispossession so that global governance is premised on the primacy of the world market” (Gill 2008: 254; 2003: 132). There are a number of features that this work shares with other critical approaches to globalization (Mittelman 2004): it is reflexive about the interests served by the rules and institutions of globalization (Bourdieu 2000: 70); it is
attentive to the historical and national contexts out of which emerge these rules and institutions (Santos 2002: 179); it does not presume to defend the vested interests of powerful economic actors and resists being preoccupied exclusively with “northern theory” (Connell 2006); and, methodologically, insists upon interdisciplinarity as the most appropriate means of understanding the phenomenon associated with globalization (Rosamund 2006). The literature collectively aims to locate openings whereby law, politics, and economy can be reconnected, whether inside or outside of the national state.

A few scholars have taken up the new constitutionalist research agenda, principally examining developments internal to national constitutional systems. Hirschl, for instance, describes the advent of judicial review under new constitutions in Canada, Israel, New Zealand, and South Africa as generated principally by self-interested elites seeking to insulate their hegemonic rule from democratic impulse (2004: 99). Kelsey takes up the case of the Supreme Court of the Philippines which approved ascension to the WTO by effectively reading out of the Philippines constitution its strong economic nationalist discourse (1999: 515). Teivainen explores new constitutionalist mechanisms deployed by Peruvian President Fujimori in the 1990s to freeze and then de-regulate regulate market mechanisms (2002: 164).9

Gill described a new constitutionalism operating at both local and global scales (1995: 81-86), and so had in mind not only macro-institutional reform within national states but disparate international legal formations that promote privatization and free trade, such as the International Monetary Fund (IMF) and the WTO, or regional arrangements such as the EU and the North American Free Trade Agreement (NAFTA). I have attended to the transnational dimension of the new constitutionalism by focussing on the legal regime to promote and protect foreign investment (Schneiderman 2008).10 A regime made up of some 2,700 bilateral investment treaties (BITs), together with a small number of regional trade and investment treaties (UNCTAD 2009a: 32), it exhibits, at a functional level, constitution-like features and, at a normative level, is intended to spread ‘market-friendly human rights’ world wide for investors and citizens alike (Baxi 2006). I have described the regime’s ensemble of rules and institutions as a form of precommitment strategy (Elster 1984) that binds future generations to certain forms and substantive norms by which politics is practised. Like constitutions, they are difficult to amend, include binding enforcement mechanisms, and oftentimes draw on the language and experience of national constitution systems (Schneiderman 2008: 4). These limits on state action are enforceable not only by states party to these agreements but by foreign investors themselves – the great innovation of this form of transnational legality (Lauterpacht 1997).

Investment treaties guarantee a variety of substantive rights to investors that are analogous to those found in national constitutional systems, among them non-discrimination rights (or national treatment) and prohibitions against takings (nationalization and expropriation or equivalent measures) (Been and Beauvais 2003). A “fair and equitable treatment” standard has been interpreted in ways analogous to a due process clause (ibid) and to clauses guaranteeing the enforceability of contracts. Each of these standards of protection has their counterpart in the national constitutional systems of capital-exporting states, principally norms associated with rights to property and to contract. The takings rule

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9 Teivainen also maintains that the new constitutionalism cannot fully account for events in Peru. Fujimori, after all, exercised presidential power in unconstitutional ways. There is also the potential for constitutionalism in its human rights guise to re-democratize politics in Peru, he maintains.

10 Wälde and Kolo describe the regime as a “proto-constitutional order of the global economy” (2001: 814).
in the Fifth and Fourteenth amendments to the U.S. constitution, for instance, is emblematic of efforts to have local law ascend to the plane of the universal (Schneiderman 2008: c. 2). It is this desire – a “Fourteenth Amendment psychology” (Wild 1939: 10) – that undoubtedly has animated both U.S. and western European attitudes toward the protection of property and contract under international law (Williams 1928: 24). Some will deny that investment rules pedigrees are traceable back to the constitutional norms of economically-powerful states (e.g. Ratner 2008). Whatever their precise origins, it turns out that investment rules, in practice, impose harsher restraints than even these national constitutional systems would permit. This helps to explain the response of the U.S. Congress to expansive interpretations of the takings rule by international investment tribunals, discussed further below. Latitudinal interpretations precipitated reform to U.S. model treaty text, as mandated by the Trade Promotion Authority Act of 2002, so that treaty practice fell back into line with domestic constitutional practice.

As mentioned, enforcement mechanisms (dispute resolution procedures) are available not only to states party to these investment treaties. Investors are entitled to seek damages for regulatory initiatives that may run afoul of these laconic entitlements. Investors need not exhaust local remedies (Lanco International 2001) nor need their connection to the home state be any more tangible than the place of incorporation (Aguas del Tunari 2004). For these and related reasons, the regime has been described as the “most effectively enforceable in the international system” (Alvarez 2009: 565). Typically, resolution of investment disputes is sought before arbitration tribunals hosted by facilities such as the International Centre for the Settlement of Investment Disputes (ICSID) located at the World Bank or the United Nations Commission on International Trade Law (UNCITRAL). Awards usually are then enforceable within the defaulting state’s national system of courts. Van Harten likens international investment arbitration to adjudication of public law matters in national high courts, entitling investors to seek review of “governmental choices regarding the regulatory relationship between individuals and the state” (2007: 10). For these reasons, this form of transnational legality has the potential of subjecting a myriad of national law-making and law-administering authority to investment law disciplines that mimic constitutional strictures.

That international investment law has attributes making it remarkably similar to national constitutional law was admitted by arbitrator Bryan Schwartz in the case of S.D. Myers (2001). Because trade and investment agreements like NAFTA, he wrote in a separate opinion, “have an enormous impact on public affairs in many countries,” Schwartz likened these agreements to “a country’s constitution” as they “restrict the ways in which governments can act and they are very hard to change.” While governments usually have the right to withdraw with notice, Schwartz admits that this “is often practically impossible to do.” “Pulling out of a trade agreement may create too much risk of reverting to trade wars, and may upset the settled expectations of many participants in the economy,” he observes. Amendment is made no easier, he writes, “just as it is usually very hard to change a provision of a domestic constitution” (S.D. Myers 2001 [separate opinion]: paras. 33-34). This is no argument, then, that transnational legal forms supersede (in a technical sense) national constitutional formations. Nor is it this to claim that it is impossible to terminate these agreements – Ecuador in 2009 terminated nine BITs that it considered oppressive and with little impact in attracting new inward investment (UNCTAD 2009b). Though reศsson can be done unilaterally, investments established under the auspices of these treaties continue to benefit from their protections, typically, for a period of ten years. The point, instead, is that they resemble national constitutional texts in important respects and, because of the resilience of constitutional discourse together with the surveillance of international actors
and financial institutions, render investment rules difficult to escape. Tully’s suggestive formulation of an ‘informal paramountcy,’ likely drawing on Canadian constitutional doctrine, captures this sort of relationship. Transnational law is paramount (or supreme) only in an informal, rather than in a formal and positivistic, way (Tully 2008: 260).

For critical constitutionalists, analogizing to constitutionalism reveals real problems with the investment rules regime and this gives rise to legitimacy problems that project constitutionalists aim to resolve. First, the regime purports to determine the appropriate balance between states and markets – a subject that remains one of the most significant aspects of statecraft and constitutional design. That this problem is resolved in ways that structurally tilt regulatory solutions to public problems away from states and in favour of markets is a contestable and often crude formulation. Rather than enabling state-market relations to be more fluid and open to change and innovation – one of the great virtues of democratic practice (Tocqueville 2000: 202) – the regime embraces a constitution-like rigidity. Second, there is virtue to endowing states with the capacity to change course – to have what Weiss calls “transformational capacity” (1998:5) – in response to changing international economic environments. This is a capacity that corresponds well to the competitive environment in which states find themselves. States should be equipped, then, to respond to the multitude of risks and challenges they currently confront (Rodrik 2007: 176). Third, diversified responses to current socio-economic challenges facilitate development strategies better suited to complement the needs of specific political communities at differing stages of development (North 2005: 164). Rather than mimic mythical paths to development promoted by wealthy states (Chang 2002; Schneiderman 2008), developing states should have the capacity – belied by any new global constitutional order – to not only change course but to experiment and innovate in unorthodox ways (Rodrik 2002:9).

III. The Investment Rules Regime

It follows from both the project- and critical-constitutionalist accounts that international investment arbitration is generating a corpus of constitutional law that should be of interest to comparative constitutionalists. Consider the Metalclad case (2001), concerning the shuttering of a hazardous waste facility site in Guadalcazar, Mexico. The site, previously closed down by the Mexican federal government for having leached waste into local water supplies, was purchased by Metalclad Corporation of Newport Beach California in 1993. As the site was being expanded and remediated, campesinos expressed opposition to its reopening by blocking access to the site while municipal authorities refused to grant necessary construction permits (it was alleged that Mexican federal authorities misled the investor into thinking such permits were unnecessary) (Schneiderman 2008: 82-86). Ultimately, the governor of the state effectively shuttered Metalclad's operations by declaring the site part of an ecological reserve for the protection of rare cactus. An international
investment tribunal concluded that there was a compensable expropriation under NAFTA and that its takings rule caught not only the outright seizure of property by the host State but also “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State” (Metalclad 2001: para. 103).13 Resembling the *per se* rule in takings doctrine under U.S. constitutional law (*Lucas* 1992),15 the ruling went significantly further than even U.S. Fifth Amendment doctrine would have allowed in the circumstances, observe Been and Beauvais (2003: 128). Indeed, it is pretty clear that the high standards implied by investment regime’s takings rule would never be tolerated within operative national constitutional systems (Dolzer 1981: 575). More startling was the tribunal’s finding that there was a denial of ‘fair and equitable treatment’ under NAFTA by reason of the “improper” denial of the permit by the municipality “for any reason other than those related to the physical construction or defects in the site” (Metalclad 2001: para. 86). The municipality, the tribunal concluded, had acted beyond its constitutional capacity in denying Metalclad its construction permit despite Mexico’s constitutional submissions to the contrary (Metalclad 2001: para. 81). Mysteriously, the tribunal preferred the investor’s interpretation that federal authority resided within the jurisdiction of the federal government and that the city had no authority to take into account environmental concerns in the issuance of municipal construction permits. What the tribunal accomplished, observe Frug and Baron, was to incorporate the functional equivalent of a rule of U.S. municipal law into international investment law (2006: 44).16 Dillon’s Rule, a late-nineteenth century canon regulating constitutional relations between state and local government and intended to preserve private property from local government action,17 “empowers the central government to determine the legitimacy of a city’s attempt to subject private actors to novel regulations of their conduct” (Frug and Barron 2006: 4343). The tribunal’s ruling in *Metalclad* mimics this antipathy to local authority in circumstances where the central government has not condoned intrusions into the private sphere. The point is not that the tribunal uncontroversially held national authority responsible under the treaty for the misconduct of sub-national authority. Rather, the

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13 Little mention was made of the troubles giving rise to the local populace’s opposition to a revived hazardous waste site and that this local opposition entirely was foreseeable.

14 An application for judicial review to the British Columbia Supreme Court resulted in the quashing of numerous elements of the tribunal’s ruling. This finding, regarding the scope of NAFTA’s takings rule, was not vacated though Justice Tysoe cautioned that the tribunal’s interpretation “is sufficiently broad . . . to include legitimate rezoning of property by a municipality or other rezoning authority” (*United Mexican States* 2001, para. 99).

15 These are categorical rules automatically requiring the provision of just compensation under the U.S Constitution, namely, the government exercise of eminent domain, permanent physical occupations, or the complete loss of economic value (Dana and Merrill 2002: 94).

16 One could also look to the nineteenth-century common law rule of *ultra vires*, which performed similar functions in limiting municipal (and even federal) power in Canadian constitutional law. See Schneiderman (1998: 520-22).

17 In his 1872 treatise, Dillon proposed that municipal authority be limited to “public” purposes, i.e. taxation and circumscribed nineteenth-century police power regulations. The performance of private purposes, such as “build[ing] markets,” was “better left to private enterprise” (see Dillon 1872: 22-23). Dillon principally feared, as he put it, “the despotism of the many” (quoted in Fine 1964: 134). Fischel describes the “original problem that Dillon wanted to address was local majoritarianism, which had opportunities to exploit immobilized wealth” (1995: 277). Frug however, interprets Dillon as forerunner to the Progressive tradition, protecting “private property not only against abuse by democracy but also against abuse by private economic power” (1999: 46).
problem is that the tribunal purported to settle a matter of constitutional interpretation over
the objections of the presumably more authoritative national government, in which case,
Mexico’s objections either were in bad faith (of which the tribunal made no finding) or
simply wrong and international investment lawyers knew better.

From another angle, one might consider the case of CMS (2005), one of a surfeit of
disputes filed against Argentina arising out of measures taken to abate the financial
downturn of 2001 (Alvarez and Khamsi 2009). Having lured investors to take over public
utilities at certain fixed rates, Argentina unilaterally modified the terms and conditions of
licenses and framework legislation in order to abate the economic crisis. As tariffs were no
longer being converted into US dollars, Michigan-based CMS filed a claim for damages
under a US-Argentina BIT. CMS insisted that the government had guaranteed a rate of
return on its investment regardless of financial hardship to the state and its citizens (CMS
2005: para. 66). The investment tribunal agreed that profits were to be guaranteed
irrespective of the financial situation on the ground, finding that the promise of conversion
to US dollars amounted to a denial of “fair and equitable treatment.” There could be little
doubt that, the tribunal unanimously wrote, “a stable legal and business environment is an
essential element of fair and equitable treatment” (CMS 2005: paras. 274, 284). The operative
legal framework, together with the operating license, was in the nature of a “guarantee” that
these undertakings would bind the state far into the future (CMS 2005: para. 161).18 The
harsh rigidity underlying these rulings matches, even exceeds, early interpretations of the
U.S. Constitution’s prohibition on states “impairing the obligation of contracts”19 (see
Dartmouth College 1819).20 It also resembles late nineteenth-century prejudice against class- or
special-interest legislation that disrupts the seeming neutrality of the status quo ante (Sunstein

Not only is a nascent constitutional order observable from outside the borders of
national states, renovation is occurring within states as well. This is not merely to take note
of the myriad ways in which international law gets incorporated into the domestic law of
national states via established constitutional mechanisms (Ginsburg 2006: 716).21 What I
have in mind are constitutional adjustments undertaken within states –via constitutional
reform or judicial interpretation – that facilitates the open-armed embrace of the
contemporary global economic order. Consider amendments taken up by Mexico in the
process leading to the accession of NAFTA in 1994. In addition to sweeping reforms made
to ordinary Mexican law, over thirty constitutional changes were mandated, principally
concerning Article 27 of the Mexican Constitution (Sandrino 1994). Considered one of the
most significant achievements of the 1910 Revolution, Article 27 provided, among other
things, for the redistribution of rural lands (ejidos) for use by indigenous campesinos. The
communal property provisions were altered to permit for more “efficient” use of the
ejidos, including individual property holding, relaxing limits on individual acres held, and enabling
commercial or industrial joint ventures with third parties (Vargas 1994: 21). It is no
coincidence that the Zapatista National Liberation Army (EZLN) launched its rebellion in

18 It mattered little that the CMS claim was based on a license or contract as a subsequent tribunal ruled against
Argentina for similar reasons in circumstances where the investor relied only on the legal framework in
operation at the time of the investment (LG&E 2006: para. 125).
20 It certainly does not mirror the more relaxed constitutional standard as it developed through the nineteenth
and then into the twentieth centuries (see Tribe 1988: 618).
21 In the United States, for instance, Article VI renders self-executing treaties the “supreme law of the land”
which then can be superseded by ordinary legislative enactment.
Chiapas province on New Year’s Day 1994, the same day NAFTA entered into force. The EZLN demanded that Article 27 amendments be repealed and that the “right to land . . . once again be part of our constitution” (Vargas 1994: 75). It is noteworthy that the other NAFTA partners (the United States and Canada) did not have to undertake sweeping constitutional reform (Alvarez 1996: 305). This is because aspects of transnational legality are experienced unevenly and depend on the state’s place within the hierarchy of the global power order. This is suggested by the Philippines Supreme Court ruling in Tanada (1994).

Despite explicitly nationalist commitments in the Philippines constitution, the Supreme Court read the constitution in ways that ensured that there would be no discrepancy between the text and ascension by the Philippines to the World Trade Organization (Kelsey 1999: 515). Otherwise, wrote Justice Panganiban for the Court, there would be “isolation, stagnation, if not economic self-destruction” (Tanada 1994: 26).

This unevenness in legal experiences is explained, argues Santos, by the fact that globalization is not the product of interstate bargaining and negotiation between equal bargaining partners but of inter-state competition in which certain local phenomenon achieve supremacy and thereby become successfully globalized (“globalized localism”). Local conditions correspondingly are restructured in light of these transnational hegemonic practices (“localized globalism”) (Santos 2002: 179). To claim otherwise is to promote a false universality, recalling Bourdieu’s notion that we be attentive to the repressed economic and social conditions that channel access to the universal (Bourdieu 2000: 65). A handful of scholars have been attentive to this phenomenon. Dezalay and Garth (1996), in an important book inspired by Bourdieu’s work, describe a transnational struggle over commercial arbitration practice, centreed in the international arbitration centres of Paris and Geneva, and driven principally by global law firms. It is a struggle between a flexible, case-by-case determination in accordance with the traditional law merchant (lex mercatoria) and a rigid, more predictable, rule-bound approach favoured by Anglo-American trade lawyers. The U.S. rule-of-law side, Dezalay and Garth report, is winning (1996, c. 4).

Nevertheless, international lawyers continue to describe investment rules as “non-national” law that is “neutral as to nationality and legal tradition” (Carbonneau 2002: 803, 805). Ratner, for instance, addressing the fragmented legal production of international law concerning regulatory takings, identifies a consensus among scholars and decision makers over the following proposition: that “decision makers should not mechanically transcribe national notions of noncompensable takings law to the international arena . . . [as such] reliance is inappropriate as a means of creating rules of international law generally” (2008: 483). Yet, municipal practice has long been an important source for the development of international law (Lauterpacht 1929: 85; Wild 1939: 10). Moreover, warn project constitutionalists Weiler and Trachtman, “it is irresponsible and defeatist to think that no cross-fertilization among legal systems is possible” (1996-97: 355). Consider 2002 debates concerning trade promotion authority being granted to then President G.W. Bush to negotiate a hemispheric free trade agreement together with a number of bilateral trade and investment treaties. In the course of these debates, Congressional leaders made clear that it was the American standard for the protection of private property, as found in the Fifth and Fourteenth Amendments to the U.S. Constitution, which was being promoted globally. Senator Gramm traced the origins of investment protections agreements, taking note of the 45 bilateral investment treaties which the U.S. had then signed to date. These protections, the Senator noted, “were modeled on familiar concepts of American law, [and they] became the standard for protection of private property and investment around the world” (S4595). In the resulting Trade Promotion Authority Act of 2002, foreign investors “are not [to be]
accorded greater substantive rights with respect to investment protections than US investors in the US and [that] investors rights [be] comparable to those that would be available under US legal principles and practice” (s. 2102[b][3]). To this end, the 2004 U.S. model treaty identifies criteria to aid in determining whether an “indirect” taking has occurred – loosely mirroring factors identified by the leading U.S. Supreme Court case on regulatory takings in *Penn Central* (1977). Taking note of these Congressional developments, Poirier admits that investment protection going forward “will be American indeed” (2003: 898). Ratner, nonetheless, denies that there is any national competition in the struggle over defining international law in the area of regulatory takings and, if there are similarities, it is mere coincidence. He acknowledges in a footnote that it is “worth noting the significant similarity” between the three factors making up the customary international law of regulatory takings (around which there is a Rawlsian “overlapping consensus”) and those adopted by the U.S. Supreme Court in *Penn Central* (1977). He draws no further implications from this otherwise noteworthy observation (2008: 483).

What, then, are the advantages of ‘constitutionalism as critique’ over ‘constitutionalism as project’ for comparative constitutionalists? In contrast to the project approach, which is primarily about building consensus and legitimacy around particular global legal projects, a critical approach homes in on the sources of global constitutionalism and the resulting unevenness of its operation at meta-levels and internally at national levels. It highlights both constitutional difference and similarity and reveals the circuits by which constitutional experiences flow transnationally. The critical approach also is reflexive and so calls upon those involved in scholarly production to reflect on their relationship to particular constitutional traditions – they are called upon to beware, in Frankenberg’s words, of the “hegemonic self” (Frankenberg 1997: 263; Frankenberg 1985: 443). Though the two approaches overlap considerably in the scholarly literature, they provide a heuristic for understanding the merits of critique and, moreover, the political stakes in preferring one approach over the other.

**IV. Alternative Readings**

Some scholars take issue with a constitutationalist interpretation of the investment rules regime either as project or as critique. Rather than emphasizing its constitution-like features, these scholars have proposed that the investment rules regime is better conceptualized as related to other sub-fields within the law. Having already anticipated some of these objections, I turn briefly to a discussion of each. In the first reading, the regime of rules for the protection of foreign investment are better understood as advancing a private law model of commercial arbitration. This is a model intended to resolve disputes rather limited in scope, *in camera* and *ad hoc*, with little or no national judicial oversight. This is an understanding of the investment law dispute resolution process as serving “exclusively commercial objectives” (Carbonneau 2002: 775). A constitutional model, by contrast, covers a wider range of actionable conduct, draws on precedent and constitutional practice, together with oversight by a permanent judicial body with the requisite independence. This kind of oversight, Alvarez notes, requires a

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22 In August 2009, the U.S. State Department’s Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty issued a divided report but rallied around the idea that the model U.S. investment treaty should mirror property protections in the U.S. Constitution. They disagreed, however, on the precise parameters of the U.S. takings clause (2009: para. 18).

23 The following two paragraphs draw on Schneiderman (2006).
meaningful, long-term political commitment involving substantial resources and extensive efforts to provide transparency that […] is not now apparent” in this field (2003: 412). For reasons already mentioned, this is not a very convincing objection. Investment law disputes typically concern matters that are “deeply political” (Stone Sweet 2009b: 2), namely, the permissible scope of government regulation concerning a wide array of policy subjects (Van Harten 2007). Government action is tested against vague and abstract standards, often drawn from national constitutional discourse, interpreted and enforced by tribunals exercising skills likened to judicial decision making (Lalonde quoted in Melnitzer 2004: 21; Petersmann 2009: 527). Even if some claims arise out of contractual disputes, they do not all do so and this will often make little difference in the result (see discussion of CMS and LG&E in Part III, above). The private law objection, it safely can be said, elides the overarching public law features of international investment law.

A second reading of the investment rules regime considers international law as a better place to locate international investment law. In its first iteration, a number of the rules associated with international investment law amount to the codification of customary international law (Wälde and Kolo 2001: 846; Fachiri 1925: 169). The argument presupposes a pre-existing international consensus, developed over the last one hundred years or so, which provides the legal scaffolding for the modern investment treaty regime. In a second iteration, if not previously a customary rule of international law, the specific content of, for instance, the takings rule (including a prohibition on regulatory takings) unmistakably has risen to the level of customary law by virtue of the 2,500 bilateral investment treaties signed over the past two decades (Hindelang 2004). Either iteration is difficult to reconcile with the claim that investment treaty proliferation is explained by states seeking an advantage in the competition for scarce foreign investment (Guzman 1998: 686; Stopford and Strange 1991: 120) and with qualified publicists who prescribe great caution when identifying new customary international law emerging out of treaty practice (Shaw 2003: 92) and the . Yet others take issue with the conclusion that customary international law reveals a consensus concerning many issues raised by investment rules (Guzman 1998), including those concerning regulatory takings (Dolzer 1986; Dolzer 2002). This gives rise to a third iteration, that of looking to “general principles of law recognized by civilized nations” as providing a safer harbour for investment rules.24 The intention behind “general principles” is to inform the development of international law with doctrine developed out of local “jurisprudence, in particular of private law, in so far as they are applicable to relations of States” (Oppenheim 1955: 29; Lauterpacht 1929). This approach bears a relationship to an earlier ‘minimum standard treatment’ demanded by the rules of civilized justice. According to one of its early proponents, the minimum standard “was compounded of general principles recognized by the domestic law of practically every civilized country” rather than a reflection of “the crudest municipal practice” (presumably of the uncivilized) (Borchard 1939: 61). The minimum standard is “nothing more nor less,” writes another, “than the ideas which are conceived to be essential to a continuation of the existing social and economic order of European capitalistic civilization” (Dunn 1929: 175; cf. Williams 1928: 18). The notion of minimum standard, underscoring the transference of local law to the international plane, perhaps better captures the process that international lawyers aim to describe. Capital-exporting states, after all, long have attempted to claim as international law idealized versions of their own domestic legal arrangements (Lipson 1985: 20). Dolzer recommends, to this end, that arbitrators survey “typical liberal” constitutions (the U.S., U.K., French, and

24 A source of law according to the Statute of the International Court of Justice, Article 38 (1)(c).
German national legal systems) in order to fill out the meaning of an international takings rule. Such an exercise will reveal “identical positions” in regard to permissible state restrictions on the use of private property. Among the problems generated by this exercise in transnational justice is that it conveniently reflects the position of only capital-exporting states. By declining to consider alternative constitutional arrangements for the protection of property (Schneiderman 2008. c. 2), Dolzer outlines a constitutional order that perpetuates unequal access to the norm-generating mechanisms of transnational legality (Sornarajah 1997).

A third reading looks to the “embryonic” field of global administrative law as a preferred home for international investment law. Associated with the objective of promoting substantive and procedural norms worldwide, global administrative law aims to lay down standards regarding “transparency, participation, reasoned decision, and legality … by providing effective review of … rules and decisions” (Kingsbury, Krisch and Stewart 2005: 17). Leading authors in the field warn that direct analogies between national and transnational administrative law “must be viewed with great caution” though it is likely that this emergent field will “fulfill functions at least somewhat comparable to those administrative law fulfills domestically” (Kingsbury, Krisch and Stewart 2005: 28). Building on this scholarly architecture, Van Harten and Laughlin describe investment treaty arbitration as perhaps the “only case of global administrative law in the world today” (2006: 149). Performing functions similar to domestic administrative law, international investment law concerns the review of government action in the exercise of public authority. Arbitrators typically “rule on the legality of state conduct, evaluate the fairness of government decision-making, determine the appropriate scope and content of property rights and allocate risks and costs between business and society.” This, they write, “is the stuff of administrative law” (2006: 147) – one might add, as Van Harten does subsequently, that this is also the stuff of constitutional law (2008: 71). In the most comprehensive treatment of the subject to date, Kingsbury and Schell (2009) aim to inject elements of good governance, represented by principles associated with global administrative law, into international investment law. Given the far-reaching implications for public administration arising from investment treaty arbitration, bringing the system into line with the theory and practice of global administrative law, they surmise, is a means of bringing legitimacy and credibility to the investment law enterprise (2009: 4, 50, 52). They prescribe, to this end, the “rapid adoption” of proportionality review – as occurring within national constitutional systems and in the European Court of Human Rights – as a “coherent, practical means of responding to these basic legitimacy questions” (2009: 40; also Stone Sweet 2009b; Wälde and Kolo 2001).²⁵ They recommend, more precisely, that the elements making up the standard of “fair and equitable treatment” be made more robust by undertaking “a comparative analysis of the major legal systems, and of major approaches in international law and institutions, in order to grasp common features those legal systems establish for the exercise of public power” (2009: 19). Their prescription appears little different from the law-of-civilized-nations approach to the development of international law, mentioned above. It is noteworthy that in their earlier programmatic statement, Kingsbury, Krisch and Stewart warn that global administrative law might “privilege and reinforce the dominance of Northern and Western concepts of sound law and governance” (2005: 27). We should be attentive to the recommendation that strategies be developed to resist this condemnable result.

⁵ The instances of proportionality review in investment arbitration are, to date, feeble and episodic. See Schneiderman (2010).
One might conclude that any distinction between approaches rooted in administrative law on the one hand and in constitutional law on the other merely is one of degree. Overlapping considerably in both common law and civilian jurisdictions, “disentangling” the two, Krisch acknowledges, is often practically difficult to do (2009: 15). Yet another approach is to split the difference – to admit that there are both administrative and constitutional elements present in the investment rules regime and other realms of transnational legality (Burke-White and von Staden 2009: 9). Whatever the case, we might agree with Anderson (2005) that debates over how best to characterize forms of transnational legality ultimately are political ones. How we describe aspects of our legal world not only sharpens the prescriptive choices available but also determines the preferred next steps (Anderson 2005: 106). It follows that the successful embrace of any analogous sub-field of law will help shape the future direction of transnational legality’s domains. In the realm of investment rules, for instance, an administrative law analogy could have the effect of curbing the substantive reach of investment rules by focussing on process concerns (though this is by no means certain) (Krisch 2009); constitutionalism as project would seek the further convergence of investment rules with constitutional norms; while constitutionalism as critique would beat a retreat from constitutional standards to less rigid models of policy-making accountability (Rose-Ackerman 2005: 5). One can expect these sorts of questions, however, to be resolved not within the legal sub-field making a claim to ownership but by the circuits of power relations (both state and non-state) operating within and across national borders.

V. Conclusion

This chapter makes a case for the significance of transnational legality for comparative constitutionalists. It has been contended that particular national legal experiences inform the domains of transnational law and help to determine its content. One can go so far as to say that what often is labelled as ‘transnational,’ ‘universal,’ or ‘global’ is the outcome of national legal systems vying for legal supremacy. We should comprehend legal developments in transnational domains, then, as having a direct relationship to national constitutional experiences and producing what is, in effect, a new constitutional law. Furthermore, legal developments at this meta-level likely will have transformative impacts within national constitutional systems. In which case, comparative constitutionalists also should be on the lookout for reforms precipitated by transnational legal exigencies.

By undertaking a detailed examination of the investment rules regime, I have sought to exemplify the ways in which elements of constitutional law play a determinative role within the transnational legal regime but also influence national constitutional developments elsewhere. The investment rules regime is experiencing a legitimacy crisis, in part, because of this interface with national constitutional law. There are those – ‘project’ constitutionalists – who wish to shore up legitimacy concerns by linking the regime more expressly to the strong discourse of constitutional law. ‘Critique’ constitutionalists, by contrast, aim to destabilize the regime by emphasizing these particularistic constitutional analogues. It might be thought that a way of defusing the crisis somewhat can be found by having project constitutionalists link arms with those promoting alternative readings of the investment rules regime that better capture its non-constitutional features. This only would temporarily delay rather than forestall, constitutional critics warn, the inevitable repoliticization of these transnational legal domains.
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