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978-0-521-87147-1 - Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise

David Schneiderman

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CONSTITUTIONALIZING ECONOMIC GLOBALIZATION

Are foreign investors the privileged citizens of a new constitutional order that guarantees rates of return on investment interests? David Schneiderman explores the linkages between a new investment rules regime and state constitutions – between a constitution-like regime for the protection of foreign investment and the constitutional projects of national states. The investment rules regime, as in classical accounts of constitutionalism, considers democratically authorized state action as inherently suspect. Despite the myriad purposes served by constitutionalism, the investment rules regime aims solely to enforce limits, both inside and outside of national constitutional systems, beyond which citizen-driven politics will be disabled. Drawing on contemporary and historical case studies, the author argues that any transnational regime should encourage innovation, experimentation, and the capacity to imagine alternative futures for managing the relationship between politics and markets. These objectives have been best accomplished via democratic institutions operating at national, sub-national, and local levels.

DAVID SCHNEIDERMAN is professor of law and political science at the University of Toronto.

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CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521871471

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First published 2008

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication Data

Schneiderman, David, 1958–

Constitutionalizing economic globalization: investment rules and democracys promise / David Schneiderman.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-87147-1 (hardback: alk. paper) – ISBN 978-0-521-69203-8 (pbk.: alk. paper)

1. Investments, Foreign–Law and legislation. 2. Constitutional law. 3. Globalization.

4. Democracy. I. Title.

K3830.S36 2008

346'.092–dc22

2007038850

ISBN 978-0-521-87147-1 hardback

ISBN 978-0-521-69203-8 paperback

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*To my mother, Rose Schneiderman, and to the memory of my father, Joshua
Schneiderman, who experienced both the peril and promise of constitutional
democracy*

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ACKNOWLEDGMENTS

In the course of toiling over this book over a number of years, I have accumulated many debts. My initial interest in the intersection between constitutionalism, markets, and economic globalization was prompted in the early 1990s while undertaking graduate work at Queen's University under the supervision of John Whyte. Returning to my post as executive director of the Centre for Constitutional Studies at the University of Alberta provided me with the institutional space to pursue further my interest in the topic. I am grateful to my colleagues at the centre, particularly Bruce Elman (now dean of law at the University of Windsor), for supporting me in these endeavors. A large measure of thanks is owed to Ron Daniels, who welcomed me into the community of scholars that is the Faculty of Law at the University of Toronto. Though he has since left the deanship, Ron built at the law school an intellectual hothouse of teaching and research. It is a delight and a privilege to be a part of this community of higher learning. I was able to make great strides in my research and writing during two terms of teaching relief that the Faculty of Law provided to me. A Canada–U.S. Fulbright Visiting Scholar Award assisted greatly during one of those terms, in the spring of 2001, enabling me to bring previously written parts of the book together as well as to wholly revise and write new chapters. The Fulbright Award also facilitated my association with two venerable New York institutions: The New School for Social Research and Columbia University. I am grateful to Sondra Farganis at the New School and to Michael Dorf at Columbia Law School for providing the institutional support which allowed me to substantially complete the book. In the book's later stages, I was fortunate to be Visiting Sabbatical Scholar and then Visiting Professor at Georgetown University Law Center. I am grateful to Dean Alex Aleinikoff and his colleagues for the congenial environment within which I was able to put the finishing touches to the book. Funding for the project also was provided by the Social Sciences and Humanities Research Council of

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Canada under an MCRI grant to the Globalism Project. I am indebted to SSHRC for funding this and other of my research endeavors.

Working on globalization and investment rules from a critical angle within the legal academy is often a lonely enterprise. I am grateful, therefore, for having had the opportunity to present some of this work early on to different audiences, including associates in the Globalism Project and to researchers involved in the Consortium on Globalization, Law and Society (CONGLAS). Some of the work was also presented at seminars and conferences at Brock University, Carleton University, Georgetown University Law Center, Harvard University, New York University, Strathclyde University, the University of British Columbia, University of Toronto, and a joint Duke University-University of Geneva-University of Alberta conference on privatization.

This is a book which ranges over different disciplines and constitutional systems. I make no apologies for the fact that, methodologically, the book is eclectic in its sources and style, ranging from political theory and history to social theory and international political economy. This eclecticism is largely driven by the book's subject matter. Mapping linkages between economic globalization and constitutionalism demands a measure of interdisciplinarity that exceeds, admittedly, the bounds of any one person's expertise. The book's comparative dimension adds further layers of complexity. In my view, too much current work on economic globalization draws conclusions from impressionistic accounts of the world situation. By contrast, I endeavor here to move beyond conventional understandings and to locate how economic globalization is being made through constitution-like rules over time and in very specific locales. This requires that various constitutional systems get taken up for discussion. To the extent that this comparative endeavour is successful, it is because I have benefited from the advice of some local informants, such as Heinz Klug, Diego López-Medina, and Luz Nagle, though none should be held responsible for what appears in print. I am also pleased to acknowledge the able students who assisted with the translation of texts or otherwise with various dimensions of this research project: Rodrigo Garcia Golindo, Kyle Gooch, Moira Gracey, Mark Grzeskowiak, Ian Richler, and Mauricio Salcedo. Deborah Bays of Georgetown University Law Center provided superb secretarial assistance in the final stages.

As this is no defense of the current legal order of economic globalization, the book likely will attract the ire of economic globalization's defenders. This is because work in this area is inevitably assimilated

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into the political contest which currently is being played out on a global scale. It is fair to say that the investment rules regime has proved to be a flash point for some of the debate around economic globalization. As I have developed and presented the arguments in the book, I have heard supporters of the regime argue that it is continually improving and that, usually, its most recent iteration solves many of the problems critics have noted. It is true that there are continual developments in this area, such as new treaty language and recent arbitral jurisprudence. I have tried to attend to these developments in the course of my argument, though I make no claim of having reviewed all of the issues and cases that arise within the field. Readers seeking out more definitive statements of the law are advised to seek out publications by the United Nations Commission on Trade and Development as well as recent volumes on the topic (too often, regrettably, in a format which speaks only to specialists) (Bishop *et al.* 2005; Rubins and Kinsella 2005; Weiler 2004; 2005).

It remains to thank those who have read all or parts of the book. They include Richard Bauman, Stephen Clarkson, Kevin Davis, Andrew Green, Donna Greschner, Robert Howse, Heinz Klug, Patrick Macklem, Luke Eric Peterson, Pratima Rao, William Scheuerman, Vicki Jackson, and Bruce Ziff in addition to anonymous reviewers who provided their insights and made a number of helpful suggestions. A special note of thanks is due to colleagues who are working on somewhat similar terrain and from whom I have learned a great deal: Harry Arthurs, Stephen Clarkson, Stephen Gill, and M. Sornarajah.

Though the chapters have been substantially revised, earlier versions of some of the chapters appeared in the journals *Law and Social Inquiry*, *Constellations*, *Law and Contemporary Problems*, *Citizenship Studies*, and the *University of Toronto Law Journal*, and in the books *Governance on the Edge: Semi-Peripheral States and the Challenge of Globalization* edited by Marjorie Cohen and Stephen Clarkson and *The Migration of Constitutional Ideas* edited by Sujit Choudhry. I am very grateful to Finola O'Sullivan at Cambridge University Press and to the editors of the series for their expressions of enthusiasm and also to the able staff at Cambridge who helped to facilitate production of the book.

It would be an understatement to say that Pratima Rao has been a constant source of support and guidance, both intellectual and emotional. In addition to encouraging me to enter this field early on, she has helped me along at every step. The arrival of Joshua Kiran as I was

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ACKNOWLEDGMENTS

about to submit the final version of the book may have delayed matters a little, but Kiku has provided his share of support at home with his laughter and love.

The book is dedicated to my parents, Rose and the late Joshua Schneiderman. They experienced more than their fair share of adversity in mid-twentieth century Europe. Though this book does not bear directly on that experience, the currents of their travails run deep throughout. It is my modest hope that the book will hold out some promise today for those experiencing hardship in other parts of the world.

March 2007
Washington, DC