

Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy

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Abstract: This article argues that the fields of international law and organization are experiencing a legitimacy crisis relating to fundamental reconfigurations of global power and authority. Traditional Westphalian-inspired assumptions about power and authority are incapable of providing contemporary understanding, producing a growing disjunction between the theory and the practice of the global system. The actors, structures, and processes identified and theorized as determinative by the dominant approaches to the study of international law and organization have ceased to be of singular importance. Westphalian-inspired notions of state-centricity, positivist international law, and ‘public’ definitions of authority are incapable of capturing the significance of non-state actors, informal normative structures, and private, economic power in the global political economy.

Introduction

This article posits that the fields of international law and organization are experiencing a legitimacy crisis relating to fundamental reconfigurations of global power and authority. It argues that traditional Westphalian-inspired assumptions about power and authority are incapable of providing contemporary understanding and identifies a growing disjunction between the theory and the practice of the Westphalian system. This disjunction suggests that these fields are experiencing a crisis in that they are incapable of theorizing contemporary developments that do not fit within the Westphalian paradigm of authority and rule. Indeed, a critical analysis of the Westphalian model of rule illustrates that it has never adequately captured international practice. However, the article argues that the lack of fit or asymmetry between theory and practice is becoming more acute, portending a crisis of legitimacy. The actors, structures, and processes identified and theorized as determinative by the dominant approaches to the study of international law and organization have ceased to be of singular importance. Westphalian-inspired notions of state-centricity, positivist international law, and ‘public’ definitions of authority are incapable of capturing the significance of non-state actors, like transnational corporations and individuals, informal normative structures, and private, economic power in the global political economy. Moreover, liberal mythology makes the content of the private sphere disappear by defining it out of existence as a political domain. In so doing, liberalism effectively insulates private activity from social and political controls. As a result, as part of the private sphere, neither transnational corporations nor individuals are regarded as authoritative legally or politically. Both are ‘invisible’ as agents of political and legal change. This produces some rather bizarre and alarming results. The legal ‘invisibility’ of corporations enhances their

significance, facilitating forces of globalization, privatization, and deregulation, which are expanding corporate influence in the world.¹ Simultaneously, the legal ‘invisibility’ of individuals seriously inhibits individual challenges to the expansion of corporate power and constrains efforts to hold corporations accountable.²

The article will first consider the inability of Westphalian assumptions of power and authority to capture the activities of corporations as ‘subjects’ of the law. It will then examine notions of public and private authority in the context of the legal personality of transnational corporations. The article will conclude with a discussion of the conditions of political legitimacy and evaluate the existence of, or prospects for, a severe legitimacy crisis of theoretical, empirical, and normative proportions.

The problem of the ‘subject’

While much divides theorists of domestic and international politics, many are united in the treatment of their subject-matter as a constitutional order.³ As theorists of international society have shown, the domain of international relations is characterized by principles and rules that provide a normative framework for action.⁴ This framework is in turn traced in origin to the Peace of Westphalia which brought an end to the Thirty Years’ War and is generally regarded as providing the constitutional foundations for the emerging state system. Indeed, it is almost an article of faith amongst international lawyers that the origins of their discipline can be traced to the Peace of Westphalia as a founding, original moment.⁵ David Kennedy comments on this story of origins:

¹ For a collection of papers that explores the dimensions of private, corporate power and authority in the global political economy, see A. Claire Cutler, Virginia Haufler, and Tony Porter (eds.), *Private Authority and International Affairs* (New York: SUNY Press, 1999).

² While more will be said later on the international legal status of the individual, a full analysis is beyond the scope of this article and must await another time. However, for good statements of the problem of the individual under international law, see Rosalyn Higgins, ‘Conceptual Thinking about the Individual under International Law’, in Richard Falk, Friedrich Kratochwil, and Saul Mendolovitz (eds.), *International Law: A Contemporary Perspective* (Boulder, CO: Westview Press, 1985) and M. W. Janis, ‘Individuals as Subjects of International Law’, *Cornell International Law Journal*, 17 (1984), pp. 61–78.

³ For limitations to the use of the domestic analogy, see Hidemi Suganami, *The Domestic Analogy and World Order Proposals* (Cambridge: Cambridge University Press, 1989).

⁴ For the view that international society is a constitutional order characterized by norms and rules, see A. Claire Cutler, ‘The “Grotian” Tradition in International Relations’, *Review of International Studies*, 17 (1991), pp. 41–65 and the references cited therein relating to the English school and the works of Martin Wight, Hedley Bull, and Sir Hirsch Lauterpacht. And see Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989) and Kratochwil, ‘Politics, Norms and Peaceful Change’, *Review of International Studies*, (1998), pp. 193–218. In the United States this view has been associated with the study of international regimes as constituted orders. See for example, Robert Keohane, *After Hegemony: Cooperation and Discord in the World Economy* (Princeton, NJ: Princeton University Press, 1984) and *International Institutions and State Power* (Boulder, CO: Westview Press, 1989); and Oran Young, ‘International Regimes: Toward a New Theory of Institutions’, *World Politics*, 39 (1986), pp. 104–22.

⁵ For a classic statement of this position see Leo Gross, ‘The Peace of Westphalia, 1648–1948’, *American Journal of International Law*, 42 (1948), pp. 20–41. For more contemporary texts that date the history of modern international law to the Peace of Westphalia see Richard Falk, ‘The Interplay of Westphalia and Charter Conceptions of International Legal Order’, in Falk, Kratochwil, and Mendolovitz (eds.), *International Law*, and Peter Malanczuk (ed.), *Akehurst’s Modern Introduction to International Law*, 7th revised edn. (London: Routledge, 1997).

International legal scholars are particularly insistent that their discipline began in 1648 with the Treaty of Westphalia closing the Thirty Years' War. The originality of 1648 is important to the discipline, for it situates public international law as a rational philosophy, handmaiden of statehood, the cultural heir to religious principle. As part of the effort to sustain this image, public international law historians have consistently treated earlier work as immature and incomplete—significant only as a precursor for what followed. Before 1648 were facts, politics, religion, in some tellings a 'chaotic void' slowly filled by sovereign states. Thereafter, after the establishment of peace, after the 'rise of states,' after the collapse of 'religious universalism', after the chaos of war, came law—as philosophy, as idea, as word.⁶

As Kennedy notes, law came as philosophy into a void. There it established state sovereignty as the fundamental ordering principle of the states system, placing the state at the centre as the unambiguous locus of authority.⁷ As a story of origins, it marks the birth of modern international law, anticipating the move from natural to positive law conceptions more in keeping with notions of sovereign consent.⁸ The entire edifice of modern international law thus came to be crafted on the foundation of positive acts of sovereign consent, evidenced explicitly in treaty law and implicitly in customary international law. Treaty and customary law came to be regarded as the primary sources of law, while states became its 'subjects'. The doctrine of international legal personality determines what entities are regarded as 'possessing rights and duties enforceable at law'.⁹ Citing Sir Hirsch Lauterpacht, Shaw observes that 'the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law'.¹⁰ Indeed, for most of the history of modern international law, states have been regarded as the sole legitimate subjects. While there has been a slow recognition of the legal personality of other corporate bodies, like international organizations, the general orientation of the law has been state-centred. However, there are problems with this story of origins. To begin, historically, other non-state entities like the Holy See, chartered companies, and belligerents have been treated as having some legal capacities.¹¹ As Stephen Krasner notes, Westphalia did not provide an unambiguous determination of the state as the sole or exclusive locus of authority.

The view that the Westphalian system implies that sovereignty has a taken-for-granted quality is wrong. The actual content of sovereignty, the scope of authority that states can exercise, has always been contested. The basic organizing principle of sovereignty—exclusive control

⁶ 'A New Stream of International Law Scholarship', *Wisconsin International Law Journal*, 7 (1988), p. 14.

⁷ See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977).

⁸ Kennedy, 'A New Stream', p. 22 notes that '[T]he traditional intellectual story of international law's evolution from 1648 to 1918 is familiar. Begun as a series of disassociated doctrines about navigation, war and relations with aboriginals within a "natural law" philosophy, international law slowly matured as a comprehensive doctrinal fabric rendered coherent by a set of "general principles" and authoritative by its "positivist" link to sovereign consent. The shift from fragmentation to coherence is accompanied, then, by a shift from "natural law" to a combination of "principles" and "positivism"'.⁹

⁹ M. N. Shaw, *International Law*, 3rd edn. (Cambridge: Cambridge University Press, 1994), p. 135.

¹⁰ Shaw, *International Law*, p. 137 cites a 1975 volume of Lauterpacht's *International Law: Collected Papers*, vol II, p. 489.

¹¹ Shaw, *International Law*, p. 137.

over territory—has been persistently challenged by the creation of new institutional forms that better meet specific material needs.¹²

But the problem goes still deeper than ambiguity over the exclusivity of state claims to authority and relates to the status of the state as the ‘subject’ of law and politics. This is referred to as the ‘problem of the subject’ and runs something as follows.¹³ The problem of the subject involves the tendency to ‘avoid confronting the question of who or what thinks or produces law’.¹⁴ Schlag notes that it can be stated in different ways: ‘Just who or what is it that thinks about or produces law?’ or ‘What must be true or potentially true about the character of the agents that construct the law, in order for the law to be a legitimate or a viable enterprise?’ or ‘What conception of subject-object relations is implicit in the rhetorical and social forces that are constructing us?’¹⁵ In international law, the problem of the subject appears in the designation of states as ‘subjects’ of the law while individuals and corporations are regarded as ‘objects’ of the law. While more will be said of this in the next section, as ‘objects’, whatever rights or duties individuals and corporations have are derivative of, and enforceable only by, states who, as ‘subjects’, conferred these rights and duties upon them. Conceptualizing the state as the subject thus performs a valuable function. Schlag notes that the subject is a ‘conciierge’ and as ‘the keeper of artifacts is a kind of bailee’ whose role it is to conserve and avoid change.¹⁶ But the subject is more than conservative of the existing order, for the concierge also functions as a gatekeeper. In international law, the state functions to keep out anti-statist tendencies and personalities. This is achieved through a process of differentiating between subject and object, associating the former with states and the latter with individuals and corporations and then objectifying this condition by allowing the subject to drop out of sight. This enables the law to stand alone as the embodiment of sovereign will, authority, and legitimacy. Under positive international law the law became the embodiment of the sovereign will; it was abstracted, objectified and related to the state as thought relates to action or as legal theory relates to state practice. Most importantly, the state was both reified as a ‘subject’ and deified through objectification of the law.¹⁷ As Kennedy notes, ‘[I]ronically, at the very moment of religion’s disappearance, international law appears as a universalist ideology of its own—temporally freed from its origins and context’.¹⁸ Moreover, law, like

¹² ‘Westphalia and All That’, in Judith Goldstein and Robert O. Keohane (eds.), *Ideas and Foreign Policy* (Cornell University Press, 1993), p. 235.

¹³ Pierre Schlag, ‘The Problem of the Subject’, *Texas Law Review*, 69 (1991), p. 1627, formulates the problem of the subject in the context of the objectification and sublimation of the subject as a formalistic move to give law the appearance of neutrality and objectivity, and hence to render law stable and legitimate.

¹⁴ Schlag, ‘The Problem of the Subject’, p. 1640, notes that ‘[T]he sublimation of the subject into the order of the object and the resulting fetishism is a move that is replayed endlessly in American legal thought. This self-effacement of the subject to the order of the object is precisely what enables legal thinkers to keep believing in their objectified thought structures as off the shelf, stand-alone, self-sufficient, self-sustaining systems, completely independent of the activity of the subjects. This sublimation of the subject is precisely the kind of process targeted by the reification critique of liberal legal thought offered by cls [critical legal studies].’

¹⁵ Schlag, ‘The Problem of the Subject’, p. 1629, note 6.

¹⁶ Schlag, ‘The Problem of the Subject’, p. 1726.

¹⁷ Kennedy, ‘A New Stream’, p. 25 observes that ‘[D]octrinally, the development of a territorial jurisdiction, so crucial to the image of a disembodied state, was first and foremost a religious notion—replacing and instantiating a disembodied deity as state.’

¹⁸ *Ibid.*, p. 22.

religion before, came to operate as a ‘mechanism of exclusion’, excluding and suppressing ‘actual social difference’.¹⁹ As Kennedy observes ‘... we would find in the origins of international law not a moment of tolerant generality, of liberality, but a well articulated practice of social intolerance. For it was the law of peoples which worked to exclude the Jew, the homosexual, the heretic, and perhaps most crucially, worked to suppress the exuberance of spiritual fervour, displacing it with bureaucracy. The suppression of witchcraft, sorcery, but also of ecstatic millenarianism, and their replacement by the logic of state orthodoxy, was a collaborative practice of religious inter-sovereign action’.²⁰ The subjective identity of business corporations, which are regarded as analogous to individuals, was suppressed along with that of individuals and excluded as part of the reification and deification of the state. Moreover, the law came to operate in a dialectical fashion with the state. The law both constituted the state as ‘subject’ and mirrored the state through laws governing sources and personality. But, the law also stood outside the state and, through the process of objectification described above, policed and measured state action. Kennedy describes this as a dialectical or double movement:

The move is paradoxical. We need to read it very slowly. On the one hand, international law is a matter of ideas, born in the move from state to law, instantiating law to facilitate the state. On the other, maturity is achieved at each stage through a double reversal of this order—first by a movement from thought to action, and second, exactly at the moment of law’s movement from principle toward practice, law is set up *against* the state, separated from the sovereign it facilitates and mirrors.²¹

The implications of treating corporations, like individuals, as objects and not as subjects are deeply troubling empirically and normatively. When one reviews the activities of business corporations it becomes clear that while they may be objects at law (*de jure*), they are, in fact, operating as subjects (*de facto*). Indeed, the problem of the subject is becoming increasingly more acute in the context of contemporary developments that are reconfiguring state–society relations, in some cases causing a contraction of state authority and an expansion of private, corporate authority in the world. Susan Strange has posed the problem of the subject in the context of ‘Who or what is responsible for change?’ and ‘Who, or what, exercises authority—the power to alter outcomes and redefine options for others—in the world economy or world society?’²² She calls it Pinocchio’s problem, for, like Pinocchio upon his transformation from a puppet into a boy with no strings to guide him, it involves making choices over ‘allegiance, loyalty, and identity’ in ‘a world of multiple, diffused authority’. The problem of the subject is a problem of the growing disjunction between law and politics or between theory and practice. However, this disjunction is obscured by state-centric definitions of law and politics and public notions of authority that render private authority invisible, matters to which we will now turn.

¹⁹ *Ibid.*, p. 25.

²⁰ *Ibid.*, p. 25.

²¹ *Ibid.*, p. 23.

²² *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996), p. 184.

Public and private authority: states, markets, corporations and legal personality

The distinction between public and private authority is central to legal and political theory, both domestically and internationally.²³ The association of authority with the state, government, and the ‘public’ sphere and its consequent disassociation with the ‘private’ sphere of individuals and their market activities is essential to liberal political and legal analyses. As Michael Walzer notes, these associations are fundamental to the ‘liberal art of separation’, where ‘political community is separated from the sphere of economic competition and free enterprise’.²⁴ Indeed, these associations derive from the prior more fundamental distinction between politics and economics.²⁵ They developed as powerful associations over the course of the emergence of the European state system and modern capitalism. They formed the foundation for the Westphalian order and continue to inform contemporary liberal political and legal discourse. First, the state was identified as the locus of political and legal authority, although as we noted above this association was not uncontested. Later, the nineteenth-century identification of the self-regulating market as a defining institution of the private sphere provided a crucial element for dominant notions of political authority. It perfected the association of ‘political’ and legal authority with the public sphere of governments and the association of ‘apolitical’ economic relations with the private sphere of individuals and markets.²⁶ Henceforth, governments came to be the legitimate wielders of ‘public’ and political activity, whilst markets were the legitimate arbiters of private and economic activity.

The authority of the market in ordering private relations was grounded in legal theory and liberal political economy, which provided the rationale for the private and ‘nonauthoritative’ regulation of individual and corporate activities. Morton Horowitz notes that ‘[j]ust as nineteenth-century political economy elevated markets to the status of the paramount institution for distributing rewards on a supposedly neutral and apolitical basis, so too private law came to be understood as a neutral system for facilitating voluntary market transactions and vindicating injuries to private rights’.²⁷ Liberalism facilitated these developments by providing private ordering as a *grund norm* or a founding myth for this constitutional order. The private ordering of individual and corporate economic activities was posited by liberalism to provide the most natural, neutral, consensual, and efficient means for

²³ See generally, A. Claire Cutler, ‘Locating “Authority” in the Global Political Economy’, *International Studies Quarterly*, 43 (1999), pp. 59–81 and Cutler, ‘Private Authority and International Trade Relations: The Case of Maritime Transport’, in Cutler, Haufler, and Porter (eds.), *Private Authority and International Affairs*, pp. 283–329.

²⁴ ‘Liberalism and the Art of Separation,’ *Political Theory*, 12:3 (1984), pp. 315–30.

²⁵ See A. Claire Cutler, ‘Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations’, *Millennium: Journal of International Studies*, 24:3 (1995), pp. 377–97, and Susan Strange, ‘Political Economy and International Relations’, in Ken Booth and Steve Smith (eds.), *International Relations Theory Today* (University Park, PA: The Pennsylvania State University Press, 1995).

²⁶ For a classic account of the origin of the separation of public and private authority in terms of disembedding the self-regulating market from its social and political context, see Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Times* (Boston, MA: Beacon Press, 1944).

²⁷ ‘The History of the Public/Private Distinction’, *University of Pennsylvania Law Review*, 130 (1982), pp. 1425–6.

regulating commercial activities and for achieving justice in international economic affairs.²⁸

In international political theory, the free market continues to be regarded as an integral component of liberal theorizing. Although contemporary liberals have long recognized important imperfections in market operations, they continue to regard market activity as an integral part of international relations.²⁹ However, there is a great degree of controversy over the nature of the relationship between the market and the state; between economics and politics; between the private and public spheres. The extent to which states control markets or, conversely, are driven by them forms a central debate in international political economy today. Part of this controversy stems from the near axiomatic nature of the associations of states with political activity and of markets with economic activity and with what appear to be rather visible departures from these associations. Increasingly, states are functioning as market participants and economic actors, like transnational corporations, are influencing political outcomes.³⁰ However, another part of the controversy stems from a less visible debate between liberal and Marxist analysts over the priority to be assigned to economics or to politics. Attributing authority and, hence, political significance to economic actors sits uneasily with liberal democratic theory and with the representative foundations of this constitutional order. Indeed, international law forms the foundation for a representative order in which state authority and state consent constitute the litmus tests of law and society. The recognition of the 'political' nature of private or non-state authority threatens to undermine these constitutional foundations, while attributing political functions to economic actors and processes threatens to elide into Marxism.³¹ The 'liberal art' of separating politics and governments from economics and markets is thus a crucial element of the founding mythology.

International legal theory reproduces these liberal separations in the doctrine governing international legal personality and in the distinctions between public and private international law.³² The law governing international legal personality

²⁸ Cutler, 'Global Capitalism and Liberal Myths'.

²⁹ For the significance of the market to international political economy, see generally Robert Gilpin, *The Political Economy of International Relations* (Princeton, NJ: Princeton University Press, 1987); Susan Strange, *States and Markets* (London: Pinter, 1988); Herman M. Schwartz, *States Versus Markets: History, Geography, and the Development of the International Political Economy* (New York: St. Martin's Press, 1994); Stephen Gill and David Law, *The Global Political Economy: Perspectives, Problems and Policies* (Baltimore, MD: The Johns Hopkins University Press, 1988).

³⁰ Susan Strange was probably one of the strongest proponents of this view. See *States and Markets, The Retreat of the State*, and 'Political Economy and International Relations', and with John Stopford, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge: Cambridge University Press, 1991).

³¹ See Ellen Meiksins Wood, 'The Separation of the Economic and Political in Capitalism', *New Left Review*, 127 (1981), pp. 66–95 reproduced in her *Democracy Against Capitalism: Renewing Historical Materialism* (Cambridge: Cambridge University Press, 1995) for discussion of the distinction between economics and politics. And see A. Claire Cutler, 'Historical Materialism, Globalization, and Law: Competing Conceptions of Property', forthcoming in Mark Rupert and Hazel Smith (eds.), *The Point is to Change the World: Socialism through Globalization?* (Routledge, forthcoming) for the view that Marxist analysis reproduces the liberal distinction between economics and politics and thus also neglects the authority of private relations.

³² For the liberal foundations of international law, see M. W. Janis, 'Jeremy Bentham and the Fashioning of 'International Law'', *American Journal of International Law*, 78 (1984), pp. 405–18, and for a critical analysis of the distinction between public and private international law, see A. Claire Cutler, 'Artifice, Ideology, and Paradox: The Public/Private Distinction in International Law', *Review of International Political Economy*, 4 (1997), pp. 261–85.

identifies the proper 'subjects' of the law. It determines who possesses 'rights and duties enforceable at law. ... Legal personality is crucial. Without it institutions and groups cannot operate for they need to maintain and enforce claims.'³³ In identifying the state as the proper subject of the law, the doctrine formed the foundation for establishing the dominant authority structure as that of the territorial state and the state system and eliminated any potentially rival claims to identity and authority coming from individuals or from corporate entities. As Mark Janis notes, '[n]ineteenth century positivists promoted the notion that the individual was not a proper subject of international law ... public international law went to matters affecting states, while private international law concerned matters between individuals'.³⁴

The identification of states as the proper 'subjects' of international law is generally associated with legal positivism, which attributes the binding force of international law to states and state consent. Legal positivism developed as a reaction to natural law theories,³⁵ whose assumption of a universal transcendent moral order was increasingly difficult to reconcile with the growing power of states.³⁶ Legal positivists, historically, provided the equivalent of the statist political theories advanced by Jean Bodin and Thomas Hobbes.³⁷ Today, the modern doctrine of international legal personality continues to run parallel to territorial/statist conceptions of international relations. Only states are recognized as full members of the United Nations and the degree of legal personality possessed by international organizations is determined by and derived from their member states.³⁸ Only states may bring contentious proceedings before the International Court of Justice.³⁹ Only states are entitled to claim the right of territorial integrity, a basic right recognized in the *Charter of the United Nations*. The *Vienna Convention on the Law of Treaties* explicitly limits the application of the Convention to treaties between states, although increasingly non-state entities are entering into treaties.⁴⁰ Only states may acquire territory, appoint ambassadors, or declare war.⁴¹

Importantly, as mentioned earlier, the international legal status of transnational corporations, probably the most visible private global actors today, is analogous with that of the individual. They are 'objects' and not 'subjects' of the law. As Rosalyn Higgins notes, leading legal positivists regard individuals as 'objects' of international law.⁴² According to this view, '[u]nder a legal system there exist only objects and subjects. In international law "subjects" is the term used to describe

³³ Shaw, *International Law*, p. 135. An international person is defined as 'capable of possessing international rights and duties ... and [having the] capacity to maintain its rights by bringing international claims' by the International Court of Justice in the *Reparations* case (Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, 1949 *International Court of Justice Reports*), p. 178.

³⁴ 'Individuals as Subjects under International Law', p. 62.

³⁵ See Robert J. Beck, Anthony C. Arend and Robert D. Vander Lugt (eds.), *International Rules: Approaches from International Law and International Relations* (Oxford: Oxford University Press, 1996), chs. 2 and 3 for good reviews of natural and positive law theories of international law, respectively.

³⁶ See Cutler, 'The "Grotian Tradition" in International Relations'.

³⁷ Shaw, *International Law*, p. 25.

³⁸ *Reparations* case, p. 180.

³⁹ Article 34 (1), *Statute of the International Court of Justice*.

⁴⁰ See the discussion of bilateral investment treaties accompanying note 62.

⁴¹ Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 100.

⁴² 'Conceptual Thinking About the Individual in International Law'.

those elements bearing, without the need for municipal intervention, rights and responsibilities. Under the existing rules of international law there is no evidence that individuals are permitted to be the bearers of duties and responsibilities. They must, therefore, be *objects*: that is to say, they are like “boundaries” or “rivers” or “territory” or any of the other chapter headings found in the traditional textbooks.⁴³

As objects, individuals have no original rights or liabilities under international law.⁴⁴ The only rights or liabilities they possess are derivative of states under the principles governing nationality and state responsibility.⁴⁵ The situation is basically the same for corporations, with the narrow exception of those that are constituted by states as international ‘subjects’ by international treaties creating them.⁴⁶ Thus, as one legal theorist notes, ‘[t]he law recognizes as “international corporations” only those entities which are constructed by international law, that is by treaty. ... This format is not available to the private commercial enterprise which must content itself with stringing together corporations created by the laws of different states.’⁴⁷ For private business enterprises operating transnationally, legal personality is conferred under national and municipal laws, and corporate rights, duties, and remedies remain a function of national law. The transnational corporation thus lacks ‘concrete presence in international law ... it is an apparition ... its actuality sifted through the grid of state sovereignty into an assortment of secondary rights and contingent liabilities’.⁴⁸ Like individuals, transnational corporations are treated as

⁴³ ‘Conceptual Thinking About the Individual in International Law’, p. 478.

⁴⁴ It is important to note that while the formal legal status of the individual remains that of an ‘object,’ there are growing indications that the international legal status of the individual is undergoing a practical transformation. A number of forums now entertain the human rights claims of individuals, although legal theory and the official position of many states, including the former Soviet states, many developing states, and the United States, remain stubbornly opposed to the extension of international legal personality to individuals. The most notable instances of this accretion of legal personality occur in the contexts of the European Commission on Human Rights; the European Court of Justice; the Optional Protocol to the United Nations Covenant on Civil and Political Rights; the War Crimes Tribunals for Nuremberg, Tokyo, former Yugoslavia, and Rwanda; the United Nations Commission on Human Rights. The United Nations Trusteeship Council and the yet to be established International Tribunal for the Law of the Sea entertain individual claims in areas outside the human rights context. See generally the references cited above in note 2 and Donna E. Arzt and Igor I. Lukashuk, ‘Participants in International Legal Relations,’ in *International Law: Classic and Contemporary Readings*, edited by Charlotte Ku and Paul F. Diehl (Boulder, CO: Westview Press, 1998), pp. 155–76. This trend does not appear to be occurring in areas involving individual claims of economic loss from wrongful or negligent international activities. While the Iran-US Claims Tribunal, which was set up to hear claims flowing from the Gulf War, is open to individual claims, it has largely ignored the claims of individuals as Arzt and Lukashuk note at p. 168.

⁴⁵ Typically, individuals seeking to make a claim under international law must work through the state of which they are a national. However, there is no obligation on states to represent their nationals diplomatically or in international judicial proceedings. Such representation is purely discretionary and may be withheld. See William R. Slomanson, *Fundamental Perspectives on International Law*, 2nd edn. (Minneapolis/Saint Paul, MI: West Publishing Company, 1995), ch. 4.

⁴⁶ Examples of corporate enterprises exhibiting various elements of international legal personality include Eurofima, Intelsat, Eurochemic, the Mont Blanc Tunnel Company, and the Mozelle Canal Company.

⁴⁷ Detlev F. Vagts, ‘The Multinational Enterprise: A New Challenge for Transnational Law’, *Harvard Law Review*, 83 (1970), p. 740.

⁴⁸ Fleur Johns, ‘The Invisibility of the Transnational Corporation: An Analysis of International Law and Theory’, *Melbourne University Law Review*, 19 (1994), p. 893.

nationals of the state in which they are incorporated.⁴⁹ And as in the case of individuals, the state is under no obligation to pursue a corporation's claims diplomatically or under international law. Indeed, states may be reluctant to do so in cases where the nationality of the corporation is ambiguous and difficult to determine.⁵⁰ More importantly, however, the lack of legal personality renders corporations unaccountable under international law. Once again their responsibility, like their identity, is filtered through the lens of state authority. According to the doctrine of state responsibility, states are responsible for acts or omissions that breach international law and cause injury to another state.⁵¹ However, the injuries must be caused by a state, its officials or others whose behaviour is imputable or attributable to the state.⁵² The actions of private corporate entities will thus not engage state responsibility and injured parties are left to their remedies under local law.⁵³ The ability to hold a corporation responsible for wrongful or negligent conduct will thus turn on the provisions of national law. Unfortunately, establishing corporate responsibility is particularly difficult when domestic legal doctrines, like shareholder limited liability and entity theory, shield parent corporations from domestic liability for the actions of their foreign subsidiaries.⁵⁴ This implies significantly compromised state control over corporations and their affiliates. As one legal analyst observes:

TNCs benefit from their international nonstatus. Nonstatus immunizes them from direct accountability to international legal norms and permits them to use sympathetic national governments to parry outside efforts to mold their behavior. TNCs also enjoy some immunity from third world derision at the UN General Assembly and other multinational forums

⁴⁹ The traditional Anglo-American approach to determining the nationality of a corporation is the place of incorporation (domicile) and for unincorporated businesses, the state in which the governing body meets or is located. In contrast, European states tend to use the state where the corporation's home office is located or where its principal business is carried on. See Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, 7th edn. (Boston, MA: Allyn and Bacon, 1996). See too Ian Brownlie, *Principles of Public International Law*, 4th edn. (Oxford: Clarendon Press, 1990), pp. 421–4.

⁵⁰ In the famous legal case *Barcelona Traction, Light, and Power Co., 1970 International Court of Justice Reports (Second Phase)*, 3 (1970), the company Barcelona traction was incorporated and held its registered office in Canada although 88 per cent of its shareholders were nationals of Belgium, and some lived in Canada and the US. Barcelona Traction operated a power company in Spain which was declared bankrupt by Spanish courts, who ordered its assets seized. Belgium, Canada, and the US tried to assist Barcelona Traction resist the seizure because they felt the Spanish authorities were acting prematurely and improperly in instituting the bankruptcy proceedings. Canada was unwilling to pursue the claims of the shareholders living in Canada, and Belgium pursued the claim against Spain in the International Court of Justice (ICJ). However, the ICJ disallowed Belgium's claim, finding that the proper country to initiate the claim was Canada. Given that Canada was unwilling to proceed with the claim, the shareholders were left with no remedies under international law.

⁵¹ State responsibility comes in a number of forms including injuries to a state or aliens (foreign citizens) and ranging from human rights violations to injury to property interests. See Shaw, *International Law*, ch. 13.

⁵² Shaw, *International Law*, p. 488.

⁵³ That is unless the state fails to provide local remedies to redress the wrong. Von Glahn, *Law Among Nations*, p. 201.

⁵⁴ See Philip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York and Oxford: Oxford University Press, 1993) for the doctrine of limited liability and entity theory. See Notes, 'Liability of Parent Corporations for Hazardous Waste Cleanup and Damages', *Harvard Law Review*, 99 (1986), p. 991 for the view that 'limited liability encourages corporations to place high-risk activities in the hands of poorly capitalized subsidiary corporations. The incentive for corporations to use subsidiaries as a shield against liability is particularly great in the hazardous waste disposal field because the costs of waste disposal activities may be readily shifted onto involuntary creditors'.

because national governments are willing to insulate them from these and other international pressures. Broad international legal personality would destroy these defences.⁵⁵

Understandably, transnational corporations are not lobbying for the recognition of general international legal personality.⁵⁶ Rather, they are content to arrange more specific recognition of legal personality for limited purposes so as to enable them to pursue their legal claims more directly without exposing them to more general international legal responsibility. This is precisely what they are doing in efforts ranging from their increased participation in international negotiations to the enhanced recognition of their right to make a legal claim directly against another corporation or a state in international tribunals under international law without the representation of a state.

Concerning international negotiations, the general rule is that only states are the formal participants in international negotiations. However, there has been considerable expansion of corporate representation.⁵⁷ In the International Labour Organization, representatives of business and labour participate and vote independently of government representatives.⁵⁸ In the United Nations system in general, transnational corporations, like individuals, are most often limited to observer and/or consultative status.⁵⁹ However, their participation in international organizations and negotiations has increased dramatically and their influence on the outcomes of negotiations can be substantial.⁶⁰

In terms of direct access for corporations to forums for dispute settlement, there has been a notable expansion of corporate powers. Corporations have legal standing in the European Economic Community and the European Coal and Steel Community.⁶¹ The International Bank for Reconstruction and Development (World Bank) has created an international tribunal, the International Center for the Settlement of Investment Disputes (ICSID), that hears investment disputes between states and foreign corporations. Indeed, there has been a proliferation of bilateral investment treaties that provide access to ICSID for dispute settlement and expand corporate rights by prescribing standards of treatment of corporations, protecting them from expropriation without compensation, and granting corporations the right to take legal actions against states.⁶² Corporations and individuals have legal

⁵⁵ See Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law', *Duke Law Journal* (1983), p. 767.

⁵⁶ Charney, 'Transnational Corporations', p. 766 notes that in international negotiations, 'TNCs have not overtly sought broad international legal personality' and were unenthusiastic about developing mechanisms for international incorporation.

⁵⁷ Charney, 'Transnational Corporations'.

⁵⁸ *Ibid.*, p. 750–1.

⁵⁹ *Ibid.*, p. 751, n. 4 notes that in the United Nations Commission on International Trade and Development (UNCTAD) business interests could only participate through representations to the Secretariat and to national delegations. In comparison, the Organization for Economic Cooperation and Development (OECD) enters into formal consultation with business and labour groups. He also notes that there were extensive consultations with business during the Tokyo Round GATT negotiations.

⁶⁰ See Charney, 'Transnational Corporations', pp. 754–5.

⁶¹ Arzt and Lukashuk, 'Participants in International Legal Relations', p. 167.

⁶² A bilateral investment treaty is 'a legally binding international agreement between two states, whereby each state promises, on a reciprocal basis, to observe the standards of treatment laid down in the treaty in its dealings within investors from other contracting states'. Muchlinski, *Multinational Enterprises and the Law*, p. 617. They are designed to protect the investor and when used in combination with an agreement to submit disputes to ICSID accord corporations much scope in enforcing their rights against host states.

standing in the Iran–United States Claims Tribunal, set up to settle disputes arising from the Gulf War.⁶³ The Hague Permanent Court of Arbitration has amended its rules to attract more business by offering to hear claims of non-state parties.⁶⁴ The Canada–United States Free Trade Agreement (FTA) provides for binding dispute settlement for corporations.⁶⁵ The North America Free Trade Agreement (NAFTA) provides similar access for private parties.⁶⁶ It is noteworthy that access for private parties is also provided for under the failed OECD initiative to create a Multilateral Investment Agreement (MAI).⁶⁷ Finally, the widespread preference for private arbitration over adjudication in national courts is revolutionizing the dispute settlement world by removing private international commercial relations from the purview of states and their public policy concerns. This is effecting a major expansion of corporate authority and autonomy.⁶⁸ The provision of direct access for corporations to dispute settlement panels and the expansion of private dispute settlement constitute significant accretions of international legal personality and corporate authority.

This review illustrates that transnational corporations are increasingly functioning as participants in the direct creation, application, and enforcement of international law. Moreover, governments are participating in the expansion of corporate rights and powers. Changes in national business culture and ideology consistent with the removal of barriers to corporate activity are enhancing corporate authority. As Jan Scholte notes: ‘states have played an indispensable enabling role in the globalization of capital ... governments have facilitated global firms’ operations and profits with suitably constructed property guarantees, currency regulations, tax regimes, labour laws and police protection’.⁶⁹ Corporations are gaining rights through novel uses of domestic human rights documents.⁷⁰ The resulting expansion of corporate rights under domestic constitutional laws is generally consistent with a notable decline in the corporate control function of states. As states adopt more permissive rule structures facilitating the expansion of corporate investment and financial activities, they have moved away from the ‘corporate control’ model that characterized previous approaches to regulating TNCs.⁷¹

International legal theory appears to be slow to react to the expansion of corporate personality which is contributing to a reconfiguration of state-society

⁶³ Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 101.

⁶⁴ *Ibid.*, p. 294.

⁶⁵ J. -G. Castel, ‘The Settlement of Disputes under the 1988 Canada–United States Free Trade Agreement’, *American Journal of International Law* 83 (1989), pp. 118–28; Lorraine Eden, ‘The Emerging North American Investment Regime’, *Transnational Corporations* 5:3 (December 1996), pp. 61–98; Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 101.

⁶⁶ See Eden, ‘The emerging North American investment regime’.

⁶⁷ Frans Engering, ‘The Multilateral Investment Agreement’, *Transnational Corporations* (December 1996), pp. 156–7.

⁶⁸ See Cutler, ‘Global Capitalism and Liberal Myths’, and Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago and London: University of Chicago Press, 1996).

⁶⁹ ‘Global Capitalism and the State’, *International Affairs* 73:3 (1997), pp. 442–3.

⁷⁰ Carl J. Mayer, ‘Personalizing the Impersonal: Corporations and the Bill of Rights’, *The Hastings Law Journal*, 41 (March 1990), pp. 577–667 and Chris Tollefson, ‘Corporate Constitutional Rights and the Supreme Court of Canada’, *Queen's Law Journal*, 19 (1993), pp. 309–49.

⁷¹ Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford and Cambridge: Blackwell, 1995), pp. 9–11.

relations.⁷² Noting that the concept of corporate legal personality may be 'ripe for a revival' and in need of analytical and sociological re-examination in the 'global context', one legal analyst notes scant development in the past forty years.⁷³ Indeed, when considered in light of the 'global context', such analysis becomes even more urgent. Stephen Gill analyses similar developments in the context of 'disciplinary neoliberalism' and a 'new constitutionalism' that 'confers privileged rights of citizenship and representation on corporate capital, whilst constraining the democratization process that has involved struggles for representation for hundreds of years'.⁷⁴ This development is affecting a shift in authority structures, recasting state and corporate authority and control. In some cases the political authority of states is being challenged and modified in a manner that enhances corporate power. This is evident in the broadly permissive nature of the principles that are being articulated as the *grund norms* for commercial law and in the unprecedented expansion of private international commercial arbitration.⁷⁵ In other cases, national courts are participating in the insulation of nationally-based corporations from liability. For example, the working relationship between national courts and corporations that do business or have subsidiaries abroad is evident in their efforts to limit the rights of foreign litigants, seeking to take advantage of liberal American products liability laws, to litigate in the United States.⁷⁶ The implications for holding corporations liable for environmental disasters, personal injuries from defective goods and a host of other wrongful or negligent actions are deeply problematic in this general climate.

The development of novel corporate arrangements render transnational corporations more difficult to locate nationally. This further compounds the problem of corporate accountability. As Susan Strange observes, the proliferation of inter-firm relationships, like 'partnerships, production-sharing arrangements, collaborative research and networking ... have begun to blur the identity and indirectly undermine the authority of the state' making the attribution of corporate nationality and responsibility very difficult.⁷⁷ She notes that when 'partners in the network operate and are registered in several countries, it is impossible even to guess the

⁷² In contrast, students of international political economy seem to be more aware of the growing practical significance of TNCs. For Lorraine Eden, 'Bringing the Firm Back In: Multinationals in International Political Economy', in Lorraine Eden and Evan H. Potter (eds.), *Multinationals in the Global Political Economy* (New York: St. Martin's Press, 1994), p. 26, the crucial issue in the global political economy today 'is the tension between states and multinationals, not states and markets'. Susan Strange too notes the increasing 'political' significance of firms as changes in the global political economy enhance the significance of markets. See also Strange, *The Retreat of the State*, p. 4. However, there is still a dominant tendency to regard corporate power as ultimately linked to and conditioned by state power. See Stephen Krasner, 'Power Politics, Institutions, and Transnational Relations', in *Bringing Transnationals Back In: Non-State Actors, Domestic Structures and International Institutions*, Thomas Risse-Kappen (ed.) (Cambridge: Cambridge University Press, 1995), p. 279.

⁷³ William Twining, 'Globalization and Legal Theory: Some Local Implications', *Current Legal Problems*, 49 (1996), p. 6.

⁷⁴ 'Globalisation, market civilization, and disciplinary neoliberalism', *Millennium: Journal of International Studies*, 24 (1995), p. 413.

⁷⁵ See UNIDROIT'S *Principles of International Commercial Contracts* (Rome: UNIDROIT, 1994) and Cutler, 'Global Capitalism and Liberal Myths'.

⁷⁶ See Hilmy Ismail, 'Forum Non Conveniens: United States Multinational Corporations', and 'Personal Injuries in the Third World: Your Place or Mine?', *Boston College Third World Law Journal*, 11 (1991), pp. 249–76.

⁷⁷ Strange, 'Global Government and Global Opposition', in *Politics in an Interdependent World: Essays Presented to Ghita Ionescu*, Cheltenham, UK and Brookefield, VT: Edward Elgar, 1994), p. 26.

“nationality” of the whole network. Yet much media comment and much academic analysis still assume that each transnational corporation has a national identity and that governments can identify and then support their own national champion.⁷⁸

While there appears to be a great deal of recognition of the enhanced power of transnational corporations, it is unaccompanied by effective efforts to regulate them. In many matters, international law is silent. There is no binding and general international commercial code governing the practices of transnational corporations. Most matters are dealt with under national systems of corporate and private international law principles, which even corporate lawyers agree are inadequate.⁷⁹ The efforts of international and regional organizations and private business and industry associations have produced a number of instruments that attempt to regulate corporate behaviour, but they tend to be of a predominantly ‘soft law’ nature.⁸⁰ The Draft Code of Conduct produced by the Commission on Transnational Corporations⁸¹ was hoped to make a major contribution to the development of an international regulatory framework, but the efforts failed to produce a consensus. Other failed efforts ‘affirm rather than challenge the assumption that it is a state’s prerogative to deal with TNCs [transnational corporations] through its national legal systems’.⁸² This creates a problem of ensuring corporate accountability. As noted above, there is no guarantee that a state will assume responsibility for the actions of corporations holding its nationality. Often the place of nationality is only remotely connected to corporate operations. As the United Nations Centre on Transnational Corporations observes: ‘[a] number of factors ... conspire to make purely national control systems variously evadable, inefficient, incomplete, unenforceable, exploitable, or negotiable ... with respect to transnational corporations’.⁸³ One solution is the recognition of the transnational corporation as a legal subject, bearing rights and responsibilities directly under international law. However, this faces major problems in states’ unwillingness to ‘relinquish their traditionally dominant position in international law, or to acknowledge the effectiveness of law in the absence of a sovereign’.⁸⁴ Moreover, the emphasis on the legal aspects of corporate personality risks a formalism that mistakes the *legal form* for the *actual conduct* and practices of corporations and of states. It is here that we return to the ‘problem of the subject.’ The ‘problem of the subject’ must be framed today in the context of broader and deeper forces operating in the global political economy. The contemporary ‘subject’ is being reconfigured and reconstituted through a globalizing corporate ideology and business culture. A global mercatocracy unites local and global political economies through the law merchant, *lex mercatoria*, a body of commercial law and practice that has regulated merchant activities for over a

⁷⁸ Strange, ‘Global Government and Global Opposition’, p. 26.

⁷⁹ Notes of Cases, ‘The Multinational and the Antiquities of Company Law’, *The Modern Law Review*, 47 (1984), pp. 87–92.

⁸⁰ Johns, ‘The Invisibility of the Transnational Corporation’, 897, notes 21 and 22.

⁸¹ The Commission was created in 1974 by ECOSOC and given the mandate to prepare a code of conduct for governments and TNCs. Drafts were produced in 1978, 1983, 1988, and 1990. Consensus over the draft was never achieved and in 1992 the United Nations Centre on Transnational Corporations, Secretariat to the Commission, was dismantled and its functions were transferred to a new Transnational Corporations Management Division within ECOSOC.

⁸² Johns, ‘The Invisibility of the Transnational Corporation’, p. 899.

⁸³ Quoted in Johns, ‘The Invisibility of the Transnational Corporation’, p. 896.

⁸⁴ *Ibid.*, p. 900.

millennium.⁸⁵ The modern law merchant is a central mechanism for the globalization of disciplinary neoliberal norms. These norms, in turn, constitutionalize private ordering as the dominant regulatory ethos, thus conferring legitimate authority on private business enterprises. Paradoxically, while corporations are central players in this restructuring process, linking global and local political economies, they remain invisible as 'subjects'. The *de jure* insignificance of corporations in the face of their *de facto* significance reflects a disjunction between theory and practice. In the context of the problem of the 'subject,' it marks a disjunction between law and state, for the law has ceased to constitute, mirror and, in some cases, to discipline its 'subject,' the state and state practice. The 'subject' has in fact, been reconfigured in the legally 'invisible' form of the transnational corporation. This portends a legitimacy crisis for both law and state.

The disjunction between theory and practice: a crisis of legitimacy

All constitutional orders require some degree of fit between their principles and practices. Whether one focuses upon the symmetry between law and practice through 'rules of recognition'⁸⁶ or the 'convergent expectations' of the participants,⁸⁷ the legitimacy of a constitutional order is associated with some measure of conformance of the actual practices of participants with its founding legal/constitutional theory and principles. A disjunction between constitutional theory and the practices of participants, more often than not, portends a crisis of legitimacy.⁸⁸ When the participants fail to recognize the legitimacy of law through their practices, the law's claim to authority is challenged and potentially undermined. In international law, state practice is regarded as one of the main sources of law, another source being international treaties.⁸⁹ Traditionally, state practice constituted the state as the 'subject' of the constitutional order. However, we have argued that increasingly state practice is reconstituting the *de facto* 'subject' in the form of the transnational corporation. However, legal theory has not kept in step with this changing practice. The resulting disjunction between legal theory and state practice is part of a larger disjunction associated with globalization more generally. As Philip Cerny observes:

... globalization leads to a growing disjunction between the democratic, constitutional, and social aspirations of people—which continue to be shaped by and understood through the framework of the territorial state—and increasingly problematic potential for collective action through state political processes. Certain possibilities for collective action through multilateral regimes may increase, but these operate at least one remove from democratic accountability. Indeed, the study of international regimes is expanding beyond intergovernmental institutions or public entities *per se* toward 'private regimes' as critical

⁸⁵ See Cutler, 'Global Capitalism and Liberal Myths'.

⁸⁶ H. L. A. Hart, *The Concept of Law*, 2nd edn. (Oxford: Oxford University Press, 1994).

⁸⁷ Stephen Krasner (ed.), *International Regimes* (Ithaca, NY and London: Cornell University Press, 1983).

⁸⁸ A good example of a legitimacy crisis could be found in the former Soviet Union in the context of constitutionally protected human rights that were in practice quite meaningless.

⁸⁹ Art. 38 of the *Statute of the International Court of Justice*.

regulatory mechanisms. New nodes of private quasi-public economic power are crystallizing that, in their own partial domains, are in effect more sovereign than the state.⁹⁰

The disjunction between law and practice is not lost on corporate actors. Indeed, a transnational corporate elite is pushing hard for the establishment of a global business regulatory order.⁹¹ But it is an order of a particular sort—one consistent with a renewed emphasis on neoliberal values concerning the superiority of the private ordering of global corporate relations.⁹² Global corporate actors are not trying to discipline corporate activities. They resist developing methods for the international incorporation of companies, and the ancillary reporting requirements.⁹³ The MAI was not intended as a mechanism for enhancing corporate responsibility, but as a means for limiting the restrictions that national governments could place on foreign corporations.⁹⁴ Indeed, together corporations and states are reworking the nature of the relationship between states and business enterprises as part of the reconfiguration of the ‘welfare state’ as the ‘competition state’.⁹⁵ This reconfiguration is in part a response to intensified global competition brought about by forces of economic globalization and competitive deregulation and liberalization. Increasingly states are functioning as market participants, blurring the separation between private and public authority and agency. In corporate law, this trend is evident in the competitive deregulation of corporate activities. Robert Cox argues that ‘[n]eoliberalism is transforming states from being buffers between external economic forces and the domestic economy into agencies for adapting domestic economies to the exigencies of the global economy’.⁹⁶ The enhanced authority of transnational corporations is a significant element of this transformation, for they mediate between local and global political economies, facilitating the mobility and accumulation of capital. In so doing, they function as crucial bearers of neoliberal discipline, enhancing the power of private capital.

However, the enhanced power of private capital is rendered ‘invisible’ by liberal theories of international law and organization. This portends a legitimacy crisis that is empirical, theoretical, and normative. From an empirical point of view, the law governing international legal personality tells us very little about the nature of the corporate world, the authority wielded by corporations, or their complex relationships with states, both national and foreign. Theoretically, international law is unable

⁹⁰ ‘Globalization and the Changing Logic of Collective Action’, *International Organization*, 49:4 (Autumn 1995), p. 618.

⁹¹ See Johns, ‘The Invisibility of Transnational Corporations’, p. 896; Detlev Vagts, ‘The Multinational Enterprise’, p. 764.

⁹² This is evident in the terms of the MAI, which restrict the regulatory ambit of states over foreign investment activities and in the shift in corporate legal preferences for ‘soft law’ agreements over ‘hard law’ ones. See A. Claire Cutler, ‘Public Meets Private: The International Unification and Harmonization of Private International Trade Law’, *Global Society: Journal of Interdisciplinary International Relations*, 13:1 (January 1999), pp. 25–48 on the appeal of soft law norms governing international commercial contracting.

⁹³ See above, note 56.

⁹⁴ For a review of the provisions of the MAI, see Frans Engering, ‘The Multilateral Investment Agreement’, *Transnational Corporations*, 5:3 (December 1996), pp. 147–61.

⁹⁵ Philip Cerny, *The Changing Architecture of Politics: Structure, Agency and the Future of the State* (London: Sage Publications, 1990), p. 230 and ‘Paradoxes of the Competition State: The Dynamics of Political Globalization’, *Government and Opposition*, 32:2 (Spring 1997), p. 273.

⁹⁶ ‘Critical Political Economy’, in *International Political Economy: Understanding Global Disorder*, edited by Björn Hettne (Halifax, Nova Scotia: Fernwood Publishing, and London and New Jersey: Zed Books, 1995), p. 39.

to theorize about its 'subject' in any but the most formalistic and artificial ways. The corporation is under-theorized, while the state is over-theorized. Finally, and probably most importantly, the normative implications of the problem of the 'subject' are obscured by the same moves suppressing the corporate subject. The problem of corporate accountability is concealed by avoiding the questions of 'who or what produces law?', 'what are the political conditions for legitimate agency in the creation and enforcement of law?', and 'who legitimately determines outcomes in the global political economy?' The very same doctrine that constructs the transnational corporation as an 'invisible subject' blocks the abilities of individual citizens to challenge corporate behaviour because such challenge must run through the agency of the state. In 'guaranteeing the economic *res public* for capitalism', states are causing shifts in power relations within and between states.⁹⁷ Robert Cox refers to a 'decomposition of civil society,' in terms of 'a fragmentation of social forces and a growing gap between the base of society and political leadership'.⁹⁸ He identifies the alienation of people from their political institutions and a loss of confidence in the abilities of politicians to deal with contemporary problems as contradictions generated by globalization. To Cox, 'globalization has undermined the authority of conventional political structures and accentuated the fragmentation of societies'.⁹⁹ Stephen Gill reminds us that 'the question of globalization raises the issue of globalization for whom and for what purposes'.¹⁰⁰ Echoing Cox's view that theory always serves some purpose, Gill notes increasing social polarization, 'a sense of political indifference, government incompetence, and a decay of public and private responsibility and accountability', as aspects of the contemporary crisis.¹⁰¹ The basic contradiction between globalization and democratization portend a legitimacy crisis wherein 'the ruling class has lost its consensus, i.e. is no longer "leading" but only "dominant" ... The crisis consists precisely in the fact that the old is dying and the new cannot be born.'¹⁰² The 'problem of the subject' is so deeply embedded in international thought that it creates a blind spot of changes in practices resulting from changing material conditions. Moreover, neoliberal ideology compounds the problem by reasserting the values of enhanced private authority and the continuing significance of the distinction between the public and private spheres. Liberal thinking works against recognizing the authority of private corporations. The liberal faith in free economic markets and in representative democracy presents barriers to conceiving private relations or entities as politically authoritative or representative. Recognition of the transnational corporation as 'subject' is thus 'inconsistent with the liberal belief that the processes of democratically-elected government ought to be the only legitimate means of curtailing individual liberty'.¹⁰³ Liberalism and public notions of authority thus preclude the recognition of corporate legal personality. They are incapable of conceptualizing *de facto* corporate authority and

⁹⁷ Leo Panitch, 'Rethinking the Role of the State', in James A. Mittelman (ed.), *Globalization: Critical Reflections* (Boulder, CO: Rienner, 1996), p. 86.

⁹⁸ 'A Perspective on Globalization', in Mittelman (ed.), *Globalization*, p. 27.

⁹⁹ *Ibid.*, p. 27.

¹⁰⁰ 'Globalization, Democratization, and the Politics of Indifference', in Mittelman (ed.), *Globalization*, p. 205.

¹⁰¹ *Ibid.*, p. 206.

¹⁰² Antonio Gramsci, *Selections from the Prison Notebooks*, edited by Q. Hoare and G. Smith (New York: International Publishers, 1971), pp. 275–6.

¹⁰³ Johns, 'The Invisibility of Transnational Corporations', p. 913.

control, for this would upset the logic of the liberal representative state and consent-based notions of international law. Moreover, such recognition would threaten the state as the 'subject' of international law and, hence, challenge law's claims to objectivity, neutrality and legitimacy. In a word, the recognition of corporate personality comes up against the problem of the 'subject'. Moreover, disciplinary neoliberalism reinscribes the problem of the subject as a seemingly objective and, ultimately, legitimate state of affairs that is removed from individual challenge. This suggests that for international law there is only one story and one problem. 'The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it's never been part of the story.'¹⁰⁴

¹⁰⁴ Schlag, 'The Problem of the Subject', p. 1628.