Chapter 10

Citizens of a New Agora: Postnational Citizenship and International Economic Institutions

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Globalization is eroding the certainties of citizenship, but not citizenship itself. Instead, new supranational regimes and institutions are increasingly populated by new forms of political subjecthood and participation, creating new possibilities for citizenship.¹ Contrary to the hopes expressed in the literature on global citizenship, however, not all of these possibilities are salutary. In particular, although much of this literature has focused on the development of human rights regimes and transnational mobilization by civil society groups, the vocabulary of citizenship is unexpectedly relevant for characterizing the growing body of trade-related rights and entitlements that businesses enjoy under international economic institutions. This chapter traces the processes by which private economic actors, in claiming their newly minted rights, participate in building institutions of economic governance. Taken together, these rights add up to a deterritorialized and functionally specific status that I propose to call market citizenship.²

Insofar as market citizenship consists of political enfranchisement for private actors in postnational economic governance, it pinpoints a different kind of fragmentation and layering of citizenship. In recent years, scholars have documented highly consequential ways in which the traditional elements of citizenship are becoming disassembled at the national level and reassembled at different tiers of political organization.³ This chapter helps map the complex landscape of multilevel citizenship by documenting the functional specialization of citizenship practice. To continue the spatial metaphor, my overall argument is that the multilevel nature of citizenship should be understood not only vertically, across sub- and supranational levels, but also in terms of a horizontal dispersal: asymmetric rights of political participation attach to individuals and legal entities by virtue of the particular activities they pursue as well as by virtue of their territorial presence or membership. Those who engage in cross-border commerce, for example, increasingly enjoy special legal protections and political enfranchisement under specialized international regimes that operate quasiautonomously from national jurisdictions. By contrast, the relinquishment of certain functionally delimited domains of policy to supranational or non-majoritarian institutions of governance can leave large constituencies of citizens with few effective channels through which to contest the policy decisions that affect them. Market citizenship is symptomatic of a world in which citizenship entitlements are not only reshuffled along a vertical axis stretching from local to regional and global levels of governance but also redistributed horizontally across different policy domains, disproportionately favoring the interests of some and excluding others. In what follows, I begin by unpacking the phrase market citizenship and outlining three distinct dimensions of market citizenship. I then critically evaluate the impact of this new form of political agency on traditional democratic institutions, emphasizing the asymmetries that they create between different forms of citizenship practice.

Preliminaries

Can specialized international regimes, particularly economic ones, engender some form of citizenship practice? In what sense can one be a citizen of the market, as opposed to a mere market actor? When speaking about the citizenship of market actors, we usually refer to their broader social obligations. Good corporate citizenship means assuming responsibility for the places and communities within which a firm operates, beyond the profits those places and communities make possible for the firm’s shareholders.⁴ Thus, businesses are called upon to maintain labor standards that correspond to the needs of employees, comply with human rights, refrain from corrupt business practices, respect local cultures and ways of life, and “give back” to the community through philanthropic projects. Moreover, as
environmental disasters such as the BP oil spill in the Gulf of Mexico in 2010 periodically remind us, we also expect corporations to offset the "negative externalities" that they cause—that is, to clean up after themselves. Somewhat like regular citizenship, then, good corporate citizenship entails certain duties that arise as a result of participating in the life of a community.

This chapter is not about corporate citizenship in that sense. Rather, I argue that the term citizenship captures the ways in which private economic actors participate in the operation of international economic institutions as political subjects in their own right. Many such bodies foster the involvement of corporations and industry groups in their political and legal development by bestowing on them rights, entitlements, and advantages that go beyond the domestic. Most important, the adjudicative mechanisms commissioned by institutions such as the European Union (EU), the World Trade Organization (WTO), and the North American Free Trade Agreement (NAFTA) open a window within public international law through which private economic actors can register their preferences and interests in the development of these institutions. For instance, rights of cross-border commerce can be invoked before the European Court of Justice (ECJ) as "fundamental freedoms" and are treated with the kind of urgency normally reserved for constitutional rights.² Firms' claims of market access can be raised before the WTO's dispute resolution panels indirectly with the aid of business-friendly government agencies responsible for foreign trade. Bilateral and multilateral investment treaties signed by states create opportunities for private investors to challenge the macroeconomic policies of states before investor-state arbitration bodies. Cumulatively, these legal channels vest supernational dispute settlement mechanisms with power over rule making, often at the expense of policy ends other than trade.³ The legal recognition that private economic actors enjoy before these bodies provides not only privileged access to economic and other forms of politically consequential decision making but also a voice in shaping the very institutions within which they transact. To put it provocatively, this may currently be the most formal and effective citizenship status that exists in the postnational realm.

In sketching the elements of market citizenship, this chapter draws primarily on three international economic institutions: the EU (and its predecessor, the European [Economic] Community); the WTO (particularly the 1947 General Agreement on Tariffs and Trade, or GATT); and the International Center for the Settlement of Investment Disputes (ICSID), which operates under the auspices of the World Bank. Although they share a primarily economic focus, each of these bodies is very different from the others in terms of its institutional framework, membership composition, and functions. Despite the inevitable awkwardness of considering them under such general terms as "institution," "regime," or "system," these cases demonstrate the construction of a new, legally protected status for businesses in the institutional architectonic of postnational governance.

Three Dimensions of Market Citizenship

Over the past two decades, scholars have latched onto citizenship theory as a particularly suitable analytical perspective for making sense of the shifting parameters of political organization. Much of the work in this area is enriched by a perspective that treats citizenship as a "bundle" of distinct elements that can be studied individually, such as formal membership, rights and duties, cultural identity, allegiance and belonging, and political engagement.⁴ Each of these traditional features of citizenship faces a particular series of challenges, many of which can be traced to the sovereign state's diminished ability to serve as the exclusive locus of political power. The methodology of disaggregation responds to the diversity of contemporary citizenship practices, as well as the uneven evolution of citizenship's many elements. Perhaps most important, it highlights the reemergence of traditional features of citizenship at nontraditional levels of governance, including cities, regions, states, stateless nations, and the odd supranational polity.

Following this tack, I account for market citizenship first as a status; second, as a substantive bundle of entitlements; and third, as a practice wherein actors renegotiate those entitlements within dynamic institutional contexts. First, I show that private actors have begun to enjoy different forms of legal recognition under many international economic regimes. Investment treaties, the EU, and NAFTA all grant some form of standing to private parties to bring disputes before their adjudicative mechanisms. Second, private economic actors can raise a notable array of rights claims by virtue of economic institutions. Third, and most important, corporations use these incipient forms of legal recognition to gradually widen their access to the decision-making mechanisms of these institutions. Litigation lends corporations a voice in how international bodies develop, enabling
them to “act back” on the institutions that give them the tools of political agency. Over time, the combined effect of these three elements (status, rights, and political participation) is to shape global economic governance in line with the priorities of transnational firms and commercial actors. Understood in this way, the kind of political agency that private economic actors exercise in the realm of global economic governance is strongly reminiscent of citizenship.

Market Citizenship as Legal Status

At the most rudimentary level, citizenship can be understood as membership in a self-contained political unit. Market citizenship is perhaps most weakly defined as a formal status of this sort. Clearly, no existing international regime designates corporations as its subjects or issues passports to them. Unlike states, international economic institutions are not comprehensive territorial units. Their activities are typically concentrated in one functionally specialized sphere, and the obligations they place on states are limited to their delegated scope of competence. In this respect, then, applying the idea of citizenship to trade regimes may seem counterintuitive. Nevertheless, the extension of citizenship to forms of political organization other than the territorial state begins to make sense if we consider citizenship not as a specimen frozen in the amber of the nation-state but as a concept whose meaning undergoes reflexive shifts in response to the evolution of new legal and political institutions. In developing the category of market citizenship, therefore, I also mean to highlight the gradual functional disaggregation of citizenship. Rather than being a formal member of a territorially defined and functionally comprehensive political unit (the sovereign state), market citizens are ad hoc co-constituents of specialized and only partially autonomous institutions of governance. I use the term co-constituent because I do not mean to imply that international economic regimes are republics populated exclusively by corporations or that the state is no longer the preeminent actor in the international realm. Rather, I mean to argue that these regimes have moved beyond the classical paradigm of interstate politics in the sense that they take some private actors (not solely states) as their direct addressees, and because corporations, as well as states, feed directly into the evolution of these regimes.

At present, the most consequential form of legal recognition that international economic regimes extend to private economic actors is the legal standing to activate dispute settlement proceedings, particularly by bringing claims against sovereign states. For instance, the European Union has long afforded supranational rights to cross-border traders and others falling within the (mostly economic) scope of European law. In 1963, the ECJ held that the EC Treaty, initially little more than an agreement among states, gave rise to rights that individuals could claim before the domestic courts of member states. Moreover, in the event of a conflict between an individual’s European rights and the domestic laws of a member state, the ECJ directs national courts to disregard the latter, even if the offending law is a provision of that state’s constitution. As a consequence, the European legal order has provided a supranational forum for private parties hoping to enforce European law over conflicting domestic laws that offers countless opportunities for individuals, firms, and interest groups to challenge national systems of market regulation.

In fact, the phrase “market citizenship” originates in Michelle Everson’s work describing the status of individuals under European Community law where, prior to the Maastricht Treaty of 1992, member state nationals exercised supranational rights even though they were less than full citizens of a supranational polity. Those who engaged in economic activity across borders found themselves subject to the ever-expanding functional domain of the “European economic constitution.” With the gradual expansion of the scope of EC law, particularly since the introduction of the status of Union citizenship and the modest range of civil and political rights that complements it, the status of individuals in the European Union has broadened beyond market citizenship.

In many ways, the most interesting application of this functionally specific, conditional, and postnational form of political agency lies elsewhere than the EU. Increasingly, many investment regimes also enable private economic actors to sue signatory states in order to protect the assets they have invested in their territories. There are about twenty-five hundred bilateral investment treaties (BITs) currently in effect around the world. A former deputy secretary-general of ICSID observed that the shoring up of enforcement through the institutionalization of investor-state arbitration mechanisms has greatly encouraged the conclusion of a greater number of BITs. Most often, BITs will assign particular regimes or arbitral venues to settle disputes between investors and states. ICSID is the most popular
among these institutions, followed by the International Chamber of Commerce and other private arbitral forums. Chapter 11 of the North American Free Trade Agreement similarly enables investors to sue a member state before investment tribunals if they consider it to have violated its obligations.\(^7\)

As the most diverse and comprehensive international trade body, the World Trade Organization does not allow private parties to activate its dispute settlement system. Although firms lack formal standing to enforce the law of international trade, domestic government agencies such as the U.S. International Trade Commission, the International Trade Administration of the Department of Commerce, or the Office of the U.S. Trade Representative fulfill a key role. These agencies mediate between national industry interests and international institutions such as the WTO, where only states can negotiate agreements and bring infringement proceedings. They enable businesses to bring the noncompliant policies of other states to the attention of their governments\(^8\) and act as conduits for businesses to use in challenging those policies in intergovernmental venues. For instance, the 1974 U.S. Trade Act enables private firms and trade associations to petition the Office of the U.S. Trade Representative concerning foreign trading practices that appear to violate the laws of international trade and charges the Office of the U.S. Trade Representative with “investigating and combating foreign trade barriers.”\(^9\) The market access unit of the European Commission’s Directorate-General for Trade fulfills a similar function in the EU. Moreover, the relationship does not go only one way. Governmental institutions rely on businesses and trade associations to report foreign trade barriers, provide them with information on the impact of those barriers, and help their governments prepare claims to be brought before the WTO dispute settlement mechanism.\(^10\) In sum, even in the absence of formal standing to bring disputes, private economic actors spearhead the initiation of complaints and provide the legal and technical expertise that underpins the formal positions adopted by their governments.

Market Citizenship as a Series of Subjective Rights

Most international agreements, economic ones included, set out a series of policy objectives and the correlative duties states must perform to realize those objectives. The international economic institutions considered here are designed to liberalize the circulation of goods, services, and capital across borders. This objective finds expression as, inter alia, obligations to lift quantitative restrictions and barriers to trade and investment, reduce customs duties, and minimize a host of other burdens associated with cross-border commerce.

However, if an agreement grants legal standing to private parties to initiate disputes against signatory states, this straightforward model is called into question. Most important, as a result of private rights of action, policy objectives codified in the agreement can be litigated as subjective rights that states are bound to respect. Because these objectives often have to do with facilitating the movement of factors of production across borders,\(^21\) the substantive rights and entitlements that private economic actors enjoy under these institutions cluster around market access. For the most part, market access entails two major claims, the first relating to free circulation and the second prohibiting discriminatory, unfavorable, or arbitrary treatment of foreign economic actors. Thus, if traders are granted legal standing to sue states under a particular agreement, the obligation to apply the same standards to domestic products and their imported equivalents becomes a right not to be discriminated against on the basis of nationality. Similarly, the requirement to accord “fair and equitable treatment” to foreign investors turns into an open-ended right, requiring dispute resolvers to fashion standards of fairness with which to gauge the behavior of states. Crucially, once the principles and standards enumerated in an interstate agreement are translated into state duties that corporations can claim as rights owed to them, supernatural economic governance undergoes a qualitative change: unlike the classical public international law model of cooperation among states, the economic regimes in question begin to function as platforms that protect private economic actors as subjects of international law in their own right. As I will show in the next section, combined with the private cause of action recognized by many economic regimes, even such a limited set of rights and freedoms can transform into a kind of de facto subjecthood for corporate entities in the international realm.

Market Citizenship as Political Agency:
I Sue Therefore I Am . . . a Citizen?

So far, I have pointed to the forms of recognition and the substantive rights that businesses enjoy under the auspices of international economic institutions. However, do these two elements add up to a kind of citizenship,
especially given that the corporate rights in question are negative rights that create duties of noninterference on the part of states? As John McCormick points out, in the context of the EU, citizenship, whether within or beyond the state, is "characterized by the substantive social, public, and political exercise of formal rights rather than the mere enumeration or even observance of them." Joseph Weiler’s quip that “long before women and Jews were made citizens they enjoyed direct effect” gets at the same idea: politically disenfranchised groups can nevertheless often claim civil rights, but this, alas, does not make them into citizens. On this reading, having certain rights granted to them by international bodies does not raise corporations to the status of citizens.

Recent scholarship on the cumulative impact of supranational forms of dispute settlement complicates this assessment. Although negative rights can only create passive subjects, rights adjudication coupled with important structural conditions turns out to be a surprisingly dynamic and politically consequential process. Once individuals gain legal standing to claim their rights in judicial or quasi-judicial forums, processes variously described as "legalization," "judicialization," and "constitutionalization" can be set in motion. These are fed by the increasingly common institutional choice of complementing economic regimes with binding dispute settlement mechanisms whose decisions are difficult to overturn. Most notably, the outcome of each dispute signals to states, traders, and other institutions the kinds of arguments and actions that are likely to pass muster in future disputes, leading to what Alec Stone Sweet terms "feedback effects." A significant body of scholarship documents the way in which the steady output of decisions from dispute settlement mechanisms of international economic institutions crystallizes over time into a de facto body of norms by which states and other actors are bound regardless of whether they have formally consented to them. Litigation acts as a catalyst for further norm-production that not only sets parameters for the behavior of actors going forward but also further develops and entrenches the regime in question.

For decades, the prime example of judicialized postnational governance has been the European Union (and its predecessor, the EC). In adopting the doctrine of direct effect, the European Court of Justice enlisted the "vigilance of individuals concerned to protect their [Community] rights," in order to create a "decentralized enforcement mechanism for EC law." Once granted directly enforceable rights under supranational law, individuals with a positive stake in the abolition of national barriers to trade were quick to bring enforcement actions against member states in their domestic courts. Over time, the ECJ found that more and more pieces of EC law gave rise to private causes of action and instructed national courts to invalidate national legislation found to infringe on those rights. National courts, in turn, took up this invitation with unanticipated zeal. Particularly useful to traders was the ECJ’s doctrine that products legally produced and marketed in one member state could be sold in all other member states barring narrowly construed, overriding public policy justifications. The doctrine of "mutual recognition," as this principle is known, has served as the battering ram used by cross-border traders to tear down trade-restrictive national regulatory frameworks.

This logic can take hold in the context of other international economic regimes even if they are not as robustly institutionalized as the EU. Within the realm of bilateral and multilateral investment treaties, businesses that resort to arbitration against states have been likened to "private attorneys general" of international trade law. Through litigation, loosely formulated treaty terms such as "investments," "indirect expropriation," "fair and equitable treatment," and "state of necessity" can be gradually expanded in favor of the interests of private economic actors. Moreover, although investment tribunals are constituted to resolve a single dispute, they often interpret rules and terms in a way that spells out, builds on, and expands their meaning. These meanings, in turn, get picked up by the litigating parties and adjudicators in future disputes. Although investment tribunals lack formal rules of precedent, they often appropriate the analytical strategies and substantive interpretations of their predecessors and peers. Most important, future decision making by governmental institutions and businesses is conducted in the ever-growing "shadow" of the body of rules and standards to which adjudicators hold states.

This process is more formalized at the World Trade Organization, where the reports of ad hoc panels are subject to appellate review by a permanent Appellate Body (AB), an institutional innovation introduced by the 1996 Uruguay Round. The AB has been praised for lending stability and uniformity to the interpretation of the GATT. Its authority is enhanced by two considerations. First, the AB’s decisions are binding on parties unless unanimously rejected by the WTO’s membership, which is highly improbable given that it would require the winning party to renounce the decision in its favor. Second, it is exceedingly difficult to amend the GATT to correct the AB’s growing jurisprudence. Institutional mechanisms such as appellate
review help to consolidate trade law over time and make it more effective, particularly in comparison to other, less well entrenched international regimes, many of which happen to pursue goals other than trade.

It is in light of these processes of norm making and polity building through litigation that the concept of market citizenship begins to make sense. What makes businesses market citizens, as opposed to mere market actors, is that the rights they derive from international economic institutions are not politically inert. Because most legal orders that attribute independent legal status to firms are works in progress, participating in adjudicative rule making doubles as institution building for the future. Through litigation, private economic actors can engage in a kind of "constitutive citizenship activity" that lets them register their preferences and interests in the development of international institutions. In sum, if citizenship entails exercising authorship of the laws by which one is governed, then this is precisely what supernatural economic litigation has shown to be possible, even if this kind of political participation occurs via the judicial route rather than through traditional representative channels. Corporations thus have access to important legal avenues within international commercial institutions that enable them to exercise forms of political agency with consequences beyond their own incidental interests.

Market Citizens versus Old-Fashioned Citizens

Democratic legitimacy is perhaps the trickiest issue raised by the emergence of postnational institutions. Establishing even a minimal degree of citizen control over political processes beyond the state is beset by problems of diversity, scale, and attenuation: institutions such as the WTO, International Monetary Fund (IMF), or even the EU are simply too far removed from effective oversight by democratic publics. Modern institutions of representative democracy have been imagined in the state context and assume the congruence of a variety of conditions, including territorial contiguity, concentrated political authority, and some measure of cultural commonality among the governed. As a result, political scientists have sought to reimagine institutional mechanisms that would bring democratic criteria to bear on governance beyond the state, most notably by making international institutions more accessible and responsive to those whom they govern.

Given the gravity of this challenge, we may be tempted to chalk up any successful mechanism by which private stakeholders can participate in supernatural governance as a gain in democratic legitimacy. Seen this way, processes that enable private parties to raise claims concerning the practices of states seem to democratize global economic institutions by making them more accessible to nonstate actors. The adjudicative mechanisms of these institutions provide a rare opportunity for nonstate entities to participate in the evolution of international institutions that are otherwise tightly controlled by states. Furthermore, if the judicialization thesis is even partially correct, and litigation by private parties really does help create an enforceable body of norms that bind states, the practices described here present a strikingly effective mode of postnational political agency by nonstate actors. Does market citizenship amount to a democratization of global governance?

The key to addressing this question lies in investigating how functionally specialized and deterrioralized practices of market citizenship affect domestic practices of citizenship within democratically constituted political communities. The asymmetric political enfranchisement that market citizenship entails should be viewed against the broader forms of disenfranchisement to which it gives rise. To be sure, this claim calls for detailed empirical research to study the effects of international economic rule making on specific domestic policy choices. The examples below are meant simply to illustrate (rather than conclusively demonstrate) a series of trade-offs that favor the rights of market actors over the prerogatives of democratically constituted public institutions at the domestic level.

Starting in 2002, ICSID began to hear a number of arbitral disputes filed against Argentina by U.S. firms on the U.S.-Argentina bilateral investment treaty. In one of these cases, CMS, a gas distribution firm that had invested in Argentina's newly privatized gas transportation sector, alleged that the emergency economic management measures taken by Argentina during its economic crisis of 1999–2002—including devaluing its currency and subsidizing consumer gas prices—amounted to a breach of CMS's rights as an investor. The ICSID panel commissioned to resolve the dispute sided with the firm. It found that Argentina had breached the fair and equitable treatment standard by failing to assure the "stability and predictability of the business environment" in which CMS operated. Unimpressed by the respondent's pleas concerning the gravity of this crisis (and the general climate of turmoil it created not just for foreign investors but for all
Argentineans), the panel held Argentina responsible for CMS’s financial losses. It also rejected Argentina’s argument that its acts were justified under the “state of necessity” exception set out in the U.S.-Argentina BIT concluding that Argentina was responsible for the crisis without the slightest hint of humility about its own competence to second-guess immensely complex questions of macroeconomic policy and domestic public order. The panel ordered Argentina to pay $133 million to compensate the firm for its losses, a significant amount given that this was only one out of scores of such claims brought against Argentina (many of them successful) for its actions during the same period. Even more important are the long-term effects of the panel’s reasoning: if future investment arbitration panels follow its logic, the interpretation of the “state of necessity” exception advanced by the CMS decision would dramatically curtail the policy options available to states in responding to economic and social crises, opening up virtually any emergency measure to challenge by a potentially unlimited pool of international investors.

Taken as a whole, this decision neatly illustrates the “shadow” effect mentioned earlier. Even though the CMS arbitral panel’s decision is technically only binding on the parties in that dispute and does not constitute formal precedent for ICSID or other arbitral bodies, it nevertheless signals a winning legal strategy to investors operating in similarly volatile political or economic environments and a warning to policy makers contemplating their options in situations of crisis. In this case, it implies that states bound by agreements must first consider the interests of foreign investment firms when responding to public emergencies.

From a democratic perspective, what is particularly problematic about dispute settlement at the level of international economic institutions is that the national measures challenged by business and industry groups through adjudication often involve public policy objectives other than market liberalization. Over the past two decades, the adjudicative mechanisms of international economic regimes have entered into public concerns as diverse as consumer protection, public health, environment, domestic security, and human rights, appraising the policies of signatory states from the point of view of their conduciveness to the interests of investors, traders, and other market actors. Thus, WTO panels and the Appellate Body have been asked to adjudicate disputes in which the rights of exporting countries were pitted against other member states’ rights to adopt marine stewardship policies, regulate the sale of cigarettes, and ban the importation of toxic products.

and cattle reared on artificial growth hormones. Because different policy domains are often closely entwined, dispute resolvers stake out the contours of trade law, where the outer reaches of market freedoms intersect with questions of broader societal needs and recourses. The teleological nature of the treaties that “specialized judicial bodies” are called on to interpret can result in “a biased approach to questions of clashes between different values and issue areas.” The problem of overreach and colonization through “linkages” is compounded because trade regimes tend to be more deeply institutionalized than looser areas of international cooperation. As a result, economic liberalization, as one substantive policy in the full universe of public policy objectives, threatens to colonize the rest.

In evaluating domestic measures in the light of market liberalization norms or the rights of cross-border economic actors, the adjudicative organs of international economic institutions undertake functions that resemble judicial review. As with domestic processes of constitutional entrenchment, the consolidation of market norms through binding dispute settlement in the international realm can be said to place “economic liberties and rules allowing for free movement of transnational capital beyond the reach of majoritarian control.” Although the translation of states’ obligations into subjective rights protects private economic actors who benefit from the global deregulation of commerce, this happens at the cost of reducing the ability of domestic institutions to safeguard a broader spectrum of interests. In democratic systems, this curtails the authority that citizens at other levels (regional, domestic, or subnational) may exercise over the laws that govern them. When the rights of cross-border economic actors are backed up by the prospect of litigation, compensatory penalties, retaliatory measures, and capital flight, it is as if market citizens exercise a veto over lawmaking carried out in the name of all other citizens.

In contrast, citizens and civil society groups that represent interests other than market advantage lack access to transnational mechanisms of adjudication. They cannot use international economic regimes to challenge the policies pursued by states either domestically or through international agreements, much less to hold accountable other private parties such as foreign investors. This is a critical asymmetry whose significance bears emphasis. To be sure, “citizen pilgrims” can pursue policies that tend to counterbalance economic liberalization such as labor rights, social and economic rights, transnational distributive justice, environmental protection, public health, and gender equality. Global civil society actors have
had a significant impact in the realm of international institutions, not least by using the UN and other forums to raise awareness of their causes, by spearheading the development of new treaties, by monitoring states’ compliance with their international obligations, and by providing resources with which to foster the participation of citizens and developing nations in international affairs. In addition, consumer, labor, and environmental rights groups have made much headway in terms of propagating minimum standards of corporate conduct, even if there exists no central enforcement body to secure compliance with these standards. In all these ways, transnational advocacy networks can temper the hegemony of market forces by promoting “globalization from below.”

In fact, since the 1990s, transnational activism by NGOs within the global economic system has garnered extensive academic attention, to the point that transnational activists are often seen as the closest thing to a new class of global citizens. Focusing on the rights of firms rather than conventional transnational citizens’ movements does not deny the consequential role of NGOs in global governance but underlines the fact that within the realm of global economic institutions, another type of actor, the profit-seeking enterprise, enjoys a more formalized degree of subjecthood. Regrettably, the legal recognition accorded to noncommercial activists within formal mechanisms of global economic governance falls far short of the three criteria central to the practice of market citizenship. First, although some transnational institutions have limited participatory opportunities for NGOs and citizens’ groups, these actors rarely enjoy comparable access to dispute settlement mechanisms that drive norm production over time. For instance, although nongovernmental organizations have been allowed to submit amicus briefs in WTO dispute settlement proceedings on a case-by-case basis, no economic regime gives NGOs standing to initiate binding dispute resolution processes against sovereign states. Second, the lack of legal standing and recognition keeps global civil society groups from claiming or acquiring legal rights or entitlements similar to those enjoyed by corporations. Third, the fact that global economic institutions tend to be more deeply institutionalized than noneconomic regimes places the claims of civil society groups on a defensive footing: for instance, whereas exporters can dismantle barriers to trade by pushing their countries of origin to bring disputes against their trading partners before the WTO, competing public policy concerns can be raised only as exceptions or derogations that have to be justified against the liberalizing presumption. As a result, NGOs’ status, rights, and opportunities for participation in global economic governance are not formalized to the same extent as those of corporations as producers and investors. Again, if the judicialization thesis is correct and important political consequences do flow from the apparent technicality of firms having legal standing to initiate disputes before international economic institutions, private economic actors claiming rights under functionally specialized regimes can shape postnational institutions of governance in line with their interests. To the extent that international economic regimes tend to be the most deeply entrenched institutions in the complex landscape of global legal governance, this means that private economic actors have a significant advantage over civil society institutions representing noncommercial interests.

This stark asymmetry of access to dispute resolution is often justified by market liberals on the grounds that corporations are directly and individually affected by the failure of states to adhere to the laws of international commerce. Thus, in explaining the disproportionate influence private businesses wield over domestic policy thanks to arbitral remedies, advocates often invoke the principle of affected interest: foreign investors and traders constitute a vulnerable group whose interests may not be adequately protected by domestic systems of justice. Most such defenses neglect the point that the affected-interest argument cuts both ways: investors may have few recourses against host states, but the communities in which they do business have few means of holding them accountable. As U.S. diplomat George W. Ball, otherwise as ardent a defender of market liberalization as any, asked: “Where does one find a legitimate base for the decisions of a corporate management that can profoundly affect the economic life of a nation to whose government it has only limited responsibility?”

Moreover, although it is generally assumed that governments who negotiate international treaties and respond to legal complaints can effectively represent the full universe of countervailing societal concerns, in practice, they are often reluctant to curb the privileges of corporations for fear of repelling investors. In more egregious cases, states and corporations are jointly complicit in violations of labor, environmental, and human rights standards. Widely publicized examples include Unocal’s knowing use of slave labor in its Burmese operations, Shell’s complicity in the
imprisonment and execution of opposition activists in Nigeria, as well as countless sweatshops that manufacture goods for high street labels in countries whose governments keep wages at a minimum so as to attract capital. The tendency is reinforced by bilateral investment treaties that tend to reflect asymmetrical economic relationships among industrialized and developing countries eager to gain a greater share of foreign direct investment. This can often give wealthy countries an upper hand at the expense of developing countries.

This highlights a somber and less frequently noted implication of the legal transformation that cosmopolitans have hailed as the post–World War II rights revolution, namely the emerging status of individuals as subjects of international law in their own right. To be sure, we should welcome the political salience of human rights regimes such as the European Convention on Human Rights and the EU Charter of Fundamental Rights, as well as the growing willingness of domestic courts to take account of certain fundamental rights as peremptory law of customary international norms and assert universal jurisdiction against severe violations of them. Borrowing a concept used by Miguel Maduro in the EU context, we might call this the gradual “subjectivation” of international law. However, market citizenship as developed here throws into sharp relief a different kind of subjectivation, in which legal persons rather than natural ones populate supranational institutions, position themselves as their true subjects, and use their newly minted rights to dismantle the autonomy of traditional democratic publics. When citizenship becomes dispersed among multiple “nested and overlapping” orders, there is no guarantee that its benefits and burdens will be distributed equally among different levels of governance.

This taps into the deep irony of market citizenship: private rights of action and treaty-based market freedoms may have enhanced the possibility for private parties to voice their preferences in building the new institutions of global economic governance, but the rights claims raised by market citizens are by no means universally inclusive. In Saskia Sassen’s words, “a privatizing of capacities for making norms . . . brings with it strengthened possibilities of norm-making in the interests of the few rather than the majority,” attended by “the sharper restricting of who might benefit.” Most important, vast segments of the world population who may be adversely affected by market integration measures have little access to the privileged portals of political contestation offered by the dispute settlement mechanisms of international economic institutions. As Anne-Marie Slaughter and Walter Mattli put it in the context of the European Community, “the [European Court of Justice] was careful to create a one-way ratchet by permitting individual participation in the system only in a way that would advance Community goals,” most notably those of market integration. The “one-way ratchet” metaphor is equally appropriate for other economic regimes. The result is a unidirectional citizenship practice that creates new “outsiders” of those who draw limited benefits and have limited opportunities for participation in shaping the new market order. This is not necessarily to impugn programs of economic liberalization; it is rather to observe that the participatory avenues opened up by supranational economic regimes are restricted in scope and betray the egalitarian and inclusive thrust of rights associated with citizenship. The irony of market citizenship, therefore, is that although it furnishes a rare example of private parties participating successfully in global governance, its effect is to favor already privileged actors through the systemic exclusion of wider constituencies of citizens.

Finally: The Changing Nature of Citizenship

We have indeed come a long way from classical understandings of citizenship. Linda Bosniak rightly warns us against overextending citizenship into a conceptual vessel that captures much and signifies little. With this concern in mind, my use of market citizenship as a characterization of the developing status of private economic actors in global governance remains, to some extent, metaphorical rather than literal. Pace the U.S. Supreme Court’s reasoning in the controversial Citizens United decision, corporations are not people, and the term citizenship should ultimately be reserved for real individuals whose needs and aspirations should be the primary concern of public institutions. Nonetheless, I hope to have developed the term market citizenship in a way that captures the problematic arrogation (not to say hijacking) of legal concern at the global level in favor of profit-seeking enterprises and often at the expense of real human beings. This, along with the fact that corporations espouse derivative and contingent interests rather than long-term loyalties and principled commitments brings out the critical agenda behind my deliberately unsettling use of the term citizenship in this chapter. What should concern normative scholars
of citizenship (not to mention citizens themselves) is not the ways in which the market citizenship of corporations falls short of a bona fide conception of citizenship but just how closely it mimics the essential institutional features that make citizenship so indispensable to the moral dignity of individuals.

In turn, this new form of political agency and its fictitious subjects indicate that greater changes are afoot. Recall that within the traditional vocabulary of democracy, agora refers to a public forum where citizens assemble to partake of the bustling political life of a community of their peers. Over time, the word agora has shifted away from its original meaning as the center of civic life in classical Athens to connote a marketplace. The account I have given in this chapter suggests a similar shift in priorities at the global level: market citizenship is symptomatic of a creeping takeover of the possibilities for democratic politics by market logic. For this reason, the adaptation of the familiar practices of democratic citizenship to the realm of economic institutions is fascinating and disquieting in equal measure.

Chapter 11

Sites of Citizenship, Politics of Scales

Catherine Neveu

There is in the literature on citizenship a frequent tendency to focus on nation-state citizenship, obscuring other sites, spaces, and levels where citizenship manufacturing processes also take place. But even when citizenship analysis does include other sites, spaces, and levels, such diversity is too often analyzed through the lens of nation-state citizenship, which is thus maintained as the implicit norm. As a contribution to the debates on the notion of multilevel citizenship, I argue that they might be more fruitful if connected to an in-depth analysis of their “politics of scale” as a way in which to grasp how, in processes that are built on circulation and exchange, the role of some levels or scales become forgotten and denied and that of others (especially the central or nation-state one) is underlined, made central, and reified.

It is indeed not just the sheer plurality of levels and spaces that matters when considering how to grasp and understand such politics of scale but the ways in which each is generally connected to specific competences, attitudes, or audiences. That is, for some analysts, there are different ways to be a citizen (or even an impossibility in becoming one), depending on the level or space where one acts; thus, configurations connecting competences, audiences, and levels depend not on these levels as such but on the political projects at play and their politics of scale. It is such sets of (dis)connections with which I would like to critically engage, both by replacing them within a more general discussion about the “topographic imaginations of politics” underlying them and by relying on empirical research, the aim being to highlight the extent to which maintaining “scalar thought” today constitutes a major obstacle to the analysis of a growing number of processes.


33. The exclusion of various minorities throughout Bosnia and Herzegovina has been confirmed by many empirical research studies conducted in the country over the past ten years. Among recent ones, the UNDP’s National Human Development Report on Social Inclusion recorded that more than 50 percent of the population in the country faces exclusion on various grounds, from ethnicity to gender identity to age to disability. See more in Maida Feticagić, Boris Hrabac, Fahruddin Memić, Ranka Ninković, Adila Pašalić-Kreso, Leja Somun-Krupalić, and Miodrag Živanović, “Social Inclusion in Bosnia and Herzegovina,” National Human Development Report (Sarajevo: United Nations Development Programme, 2007), http://www.undp.ba/upload/publications/NHDsrlpg.pdf.

34. Štiks, Igor, “Nationality and Citizenship in the Former Yugoslavia: From Disintegration to European Integration,” South East European and Black Sea Studies 6, no. 4: 483–500.


Chapter 10

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1. I use the term supranational to refer to institutions, norms, and processes that exist outside the domestic context of the nation-state. Supranational is meant as a blanket term and should not be confused with supranational, which implies that the entity in question exists in a superordinate hierarchical relationship vis-à-vis states. Genuinely supranational institutions are few and far between, an advanced example being certain institutional mechanisms of the EU. Supranational is also more general than transnational, which is most frequently used with regard to nongovernmental processes operating through and across nation-state borders. Third, it is distinct from international, which is most apposite in the context of interactions between sovereign states and classic public law structures authorized by them. Last, I reserve the term postnational to denote the limited range of processes or forms of political ordering that have truly transcended or superseded the nation-state in some important respect.

2. This term was developed in the context of the European Union by Michelle Everson, “The Legacy of the Market Citizen,” in New Legal Dynamics of European Union, ed. Jo Shaw and Gillian More (Oxford: Clarendon Press, 1995). Everson attributes it to German jurist H. P. Ipsen, Europäisches Gemeinschaftsrecht (Tübingen: Mohr, 1972). For a less critical formulation, see Tony Downes, “Market Citizenship: Functionalism and Fig-Leaves,” in Citizenship and Governance in the European Union, ed. Richard Bellamy and Alex Warleigh (London: Continuum, 2001). Saskia Sassen has used the term economic citizenship in a sense similar to that used in this chapter. She understands it to cover the rights and entitlements that multinational corporations


5. For a more thoroughgoing comparison of the EU's "fundamental freedoms" of cross-border trade and "fundamental rights" as they are conventionally understood, see N. Türküler Ihsedel, "Fundamental Rights in the EU after Kadi and Al Barakaat," *European Law Journal* 16, no. 5 (2010): 551–577, especially 553–556.


27. The reports of WTO panels and of the post-Uruguay WTO Appellate Body are binding on the parties unless the entire composition of the organization votes unanimously to reject them. The ECJ has been commissioned as the authoritative interpreter of European law. Investment treaties and free trade agreements, including NAFTA, often vest arbitral bodies such as ICSID with final authority over disputes between investors and states. For the dynamics of rights litigation and third party dispute resolution, see Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes,” *Indiana Journal of Global Legal Studies* 16 (2009): 621–645.


33. This logic was developed in the now-legendary *Cassis de Dijon* decision. European Court of Justice Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein [1978] ECR 649.


36. Investment treaties often define “investments” broadly to include not only tangible property but also an open-ended list of intangible property, including trademarks, patents, copyrights, contractual rights, licenses, ownership interests, and even potential investments that have not yet been made.
37. Indirect expropriation clauses require states to compensate firms for measures that have an effect tantamount to nationalization or wealth deprivation. The vagueness of the legal term enables firms to hold states responsible for a range of public policies that diminish the value of their investments and pass on the risks of doing business abroad to host states. A 2004 OECD report notes that “concepts such as indirect discrimination may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society.” See Catherine Yannaca-Small, OECD Directorate for Financial and Enterprise Affairs, Working Papers on International Investment No. 2004/4, “Indirect Expropriation and the ‘Right to Regulate’ in International Investment Law” (2004), 2, http://www.oecd.org/investment/investmpolicy/33776546.pdf. Also see Afifalo, “Constitutionalization through the Back Door.”


46. Argentina’s claim that it had been forced to take the measures in question in response to one of the biggest financial crises in modern times was supported by U.S. economists who advised the panel. CMS Gas Transmission Co. v. Argentine Republic, para. 320.

47. CMS Gas Transmission Co. v. Argentine Republic, para. 329.


50. Shaffer, “Developing Country Use.”

51. The CMS Gas Transmission Co. v. Argentine Republic decision was criticized in the international law community on these and other grounds; for instance, in Burke-White, “The Argentine Financial Crisis.” Some of the penalties levied against Argentina by ICSID panels were reexamined by ad hoc annulment committees constituted under ICSID rules. Each of these committees found fault with the application of the U.S.-Argentina BIT, although not all of them opted to annul the arbitral awards. The CMS case’s annulment committee strongly criticized the CMS panel’s application of the law but found that it had no authority to annull the panel’s decision absent a manifest misuse of its powers. The annulment committees commissioned to review the decisions of arbitration panels in the Sempra Energy and Enron disputes (in which U.S. investors had successfully sued Argentina over the same set of economic recovery measures contested in the CMS dispute) did vote to reverse the decisions of both panels in 2010, scaling back the considerably restrictive standards imposed by the three panels and restoring a greater measure of policy autonomy to states under the necessary defense. See Annulment Proceeding, CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/18, September 25, 2007, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_E&caseId=C4; Annulment Proceeding, International Center for the Settlement of Investment Disputes, Enron Creditors Recovery Corp. Pooderossi Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/13, 29 July 2010, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1271_E&caseId=C13; Annulment Proceeding, International Center for the Settlement of Investment Disputes, Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Annulment Proceeding, 29 June 2010, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_E&caseId=C8.

63. Falk, *On Humane Governance*.

64. The terms NGO and global civil society are contentious. Strictly speaking, firms, too, are nongovernmental organizations and, as such, a part of civil society. Here, I take pains to distinguish between, on the one hand, private economic actors (firms, industry groups, and business associations, even where the latter are not for profit) and on the other, civil society groups that pursue ends other than the strictly commercial. For a treatment of these and other distinctions bedeviling these terms, see Charnovitz, “Two Centuries of Participation,” especially pp. 185–188. For a conceptual account, see John Keane, *Global Civil Society* (New York: Cambridge University Press, 2003), especially chapter 1.

65. The decision to accept or reject amicus briefs is at the discretion of the individual panels and the Appellate Body. For a legal history of this development, see Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (New York: Cambridge University Press, 2005), 196–202.

66. Although human rights regimes such as the European Convention on Human Rights constitute an obvious exception, my point is limited to the lack of legal status for nonmarket private actors within international economic regimes.

67. The ICSID tribunal in the Tecmed dispute articulated this argument clearly as a claim from affected interests: “the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled [sic] to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors.” Moreover, the tribunal cited case law from the European Court of Human Rights to the same effect: the ECtHR had held that “non-nationals are more vulnerable to domestic legislation,” both because they are not politically enfranchised and because covert protectionist motives may be operating against them that would disadvantage them vis-à-vis nationals. *Tecnicas Medioambientales Tecnimed, S.A. v. Mexico*, ICSID Case No. ARB (AF)00/2, May 29, 2001, para. 122, http://icsid.worldbank.org/ICSIID/ICSIDFrontServlet?requestType=Cases&RHactionVal=showDoc&docId=DC602_En&csciId=C186.


75. Maduro, We the Court 9.


77. Sassen, Territory, Authority, and Rights, 247.

78. Burley and Mattli, Europe Before the Court,” 60.

79. In his classic essay, T. H. Marshall emphasized a peculiar dynamism inherent to citizenship rights. According to his historical and sociological account, rights are characterized by a dual tendency toward inclusion and expansion: not only do they come to include ever-greater groups of hitherto disenfranchised or excluded people, they also protect an ever-growing range of interests. T. H. Marshall and Tom Bottomore, Citizenship and Social Class (London: Pluto Press, 1992), 18.


Chapter 11

This chapter’s arguments largely flow from an ongoing collective discussion involving John Clarke (Open University, UK), Kathleen Coll (Stanford University), and Evelina Dagnino (University of Campinas, Brazil).


7. Catherine Neveu, Anthropologie de la citoyenneté, document de synthèse (Habilitation à Diriger des Recherche [HDR], Université de Provence, 2005).


12. As Ferguson rightfully emphasizes, such uses and success tend to replace the previous enthusiasm of anthropologists for “the local.” Categories may change, but not the topography of politics underlying them, even if the values they are associated with can be reversed.