## *Individual Contributions*

Miklos Haraszti, *Foreword: Hate Speech and the Coming Death of the International Standard Before it was Born (Complaints of a Watchdog)*;
Adam Liptak, *Foreword: Hate Speech and Common Sense*;
Peter Molnar & Robert Post, *Interview with Robert Post*;
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Frederick Schauer, *Social Epistemology, Holocaust Denial, and the Post-Millian Calculus*;
Julie Suk, *Denying Experience: Holocaust Denial and the Free Speech Theory of the State*;
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Peter Molnar, *"Hate Speech" and Imminent Danger of Violence*; *Katharine Gelber, Reconceptualizing Counter-Speech in Hate Speech Policy (With a Focus on Australia)*;
Arthur Jacobson & Bernhard Schlink, *Hate Speech and Self-Restraint*;
Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*;
Andrei Richter, *One Step Beyond Hate Speech: Post-Soviet Regulation of "Extremist" and "Terrorist" Speech in the Media*;
Alon Harel, *Hate Speech and Comprehensive Forms of Life*;
Jeremy Waldron, *Hate Speech and Political Legitimacy*;
Ronald Dworkin, *Reply to Jeremy Waldron*;
Stephen Holmes, *Waldron, Machiavelli, And Hate Speech*;
Yared Legesse Mengistu, *Shielding Marginalized Groups from Verbal Assaults without Abusing Hate Speech Laws*;
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Toby Mendel, *Does International Law Provide for Consistent Rules on Hate Speech?*;
Irwin Cotler, *State-Sanctioned Incitement to Genocide: The Responsibility to Prevent*;
Tarlach McGonagle, *A Survey and Critical Analysis of Council of Europe Strategies for Countering "Hate Speech"*;
Eduardo Bertoni & Julio Rivera, Jr., *The American Convention on Human Rights: Regulation of Hate Speech and Similar Expression*;
Monroe Price, *Orbiting Hate: Satellite Transponders and Free Expression.*

*Aryeh Neier*
*President Emeritus of the Open Society Foundations and Distinguished Visiting Professor at the Paris School of International Affairs of Sciences Po*
*Email: aryeh.neier@opensocietyfoundations.org*
*doi:10.1093/icon/mou053*

Andrea Bianchi & Anne Peters.
*Transparency in International Law*.
Cambridge University Press, 2013. Pp. xx + 620. £90. ISBN: 9781107021389.

## 1. The twilight of transparency

At first glance, the title of the book is an oxymoron, or, as jurists like to say, a *contradictio in adiecto*. International law, as a normative framework of inter-state relations which in times of peace are maintained by means of diplomacy, seems to be the classical field of secrecy, the very opposite of transparency. How, then, can we conceive of transparency as a mode of inter-state relations without depriving states of their single most important property—their secrets as the pledge of their security as sovereign powers? Note that a state's spying on another country is not a wrongful act under international law; it is supposed to be an indispensable instrument of protecting state security. Even among friendly allies, as we have learned

in recent months, unilateral or mutual spying appears to be the normal state of affairs; obviously both democratic and authoritarian states alike seem to believe that even in the relations between friendly states Lenin's principle still applies: trust is good, control is better.

But this may now well be the code of a gradually vanishing world. The importance of state boundaries, the exclusivity of closed state territories, and the sovereign rule over them, has considerably subsided in the last three decades as the upshot of the process of globalization, which means: an unprecedented intensity of interdependence, mutuality, and mutual vulnerability of states. The porosity of state boundaries has softened the distinction between internal and external affairs of states, largely done away with the supremacy of the executive branch in the handling of foreign affairs, and led to a stronger involvement of parliaments and the public at large in the debates around global affairs. Moreover, the gradual vanishing of the container-type of state has opened the path for citizens to engage in manifold cross-border activities and to create a distinct sphere of transnationality largely beyond state control. Finally, states are no longer the exclusive actors in the international sphere; international organizations, non-governmental organizations (NGOs), and even individuals shape the global discourse about fair distribution of the benefits and burdens of the emerging global society. This is a rough list of profound changes in the international sphere, which raises the question of whether and how they have been reflected in the field of international law.

One test case is this collection of essays about transparency in different fields of international law. It is an exceptional book in several respects. What immediately catches the beholder's eye is its cover image: which is, of course, what it's supposed to do in the first place. It shows an ornate, golden Venetian eye-mask decorated with red feathers, covering a female face made of cracked porcelain, its lips painted bright red. But rather than reveal the eyes of the wearer—which are a kind of bridge between the real and the fantasized person—the image shows only two gaping holes which stand out starkly against the red feathers in the background and the redness of the closed lips. What does this image tell the beholder? In the psychology of colors, red is often associated, besides other meanings, with visibility, a close relative of transparency. Black, in contrast, is the color of the night and epitomizes darkness and secrecy. Empty eye sockets symbolize the absence of the capacity of the person to see the world and to understand it by way of sight. So we may read the word TRANSPARENCY written in white capital letters on the cover of the book not only as an antithesis of the dark eye sockets, but above all as a challenge to the inability to view and recognize the world as it is organized through international law. This would be an unequivocal message—but perhaps the message is more ambiguous than this interpretation suggests. Perhaps it calls for removing the mask from the person whom it conceals—but what if, as a more obvious interpretation of the cover image, it is not the mask, but the person behind the mask who is unable to view the world? Does the capitalized word TRANSPARENCY on the book cover allude to the futility of the efforts to discover elements of transparency in international law because humans are blind anyway; or does it rather express the hope that the power of the combination of red and white is going to keep in check the black of the eyes of the mask? In sum, the book cover is mysterious, both for its use of the image of a Venetian eye-mask and because it combines it with the concept of transparency. Isn't it paradoxical that a hefty book on transparency tries to lure potential readers through a mystery?

Actually, it is not all that paradoxical, no more than it is paradoxical that people believe in God, His omnipotence, His omniscience, and His omnipresence, because (or: although?) He remains invisible, mysterious, incalculable, and unpredictable. Just as much as the Catholic church lures the believers, the disbelievers, and the skeptics into the twilight of their cathedrals with the promise of revelation—the religious version of enlightenment—the publisher of this book lures the beholder into

the book with the promise of enlightenment about transparency—everything you always wanted to know about transparency (but were afraid to ask).

## 2. The dark side of transparency?

Here we encounter another distinctive feature of the book: the very first chapter, written by the co-editor Andrea Bianchi, serves the curious reader a considerable dose of skepticism as to the odds of transparency in international law, and cautions him or her against erroneous expectations. The title of the chapter, "On Power and Illusion: The Concept of Transparency in International Law," implies that it would be difficult to find anybody who would say something negative about transparency in public; this is obviously a rhetorical figure which announces that the reader of this text in fact has found an exemplar of this extremely rare species. "No one would ever dare to contest something that is universally perceived as a positive value" (at 2).

Strictly speaking, Bianchi does not really dare to criticize transparency, either. But he does exhibit a certain measure of bravery which leads him to put some unsettling truths on the table: for instance, the truth that the publication of information is not synonymous with transparency, because "data does not speak for itself and needs to be evaluated in context" (at 14), which, of course, triggers strongly contested interpretations in the political area. Bianchi's article stands as a warning against what he calls the "dark side of transparency" (at 10 and 13). This dark side includes, *inter alia*, "the high level of manipulability of information, the risk of an information overload or of . . . disinformation campaign[s]" (at 10), or the fact that "at times you might need illegality to achieve transparency" (at 13).

In fact, illegal acquisition of information as a means of generating transparency is the reverse side of the power of those who "create and shape knowledge at all possible levels" and who control the various discourses in which knowledge plays a pivotal role (at 18). Obviously, the struggle for transparency is a struggle for power, and hence it is exposed to the logic of power which includes—as an indispensable element of maneuver and deceit—secrecy. Bianchi notes, "[w]hat secrecy does overtly, transparency may do surreptitiously," and hints to the practices of Wikileaks (at 19). And he adds a further warning, namely a warning against falling prey to the illusion-proneness of transparency: while we believe that transparency is like "a clean window that you can look through" (at 9), we should be well aware of the possibility that "[w]hat we see through the window of transparency . . . becomes what we are trained/forced/persuaded to believe, or to make out of what we see" (at 17). Ultimately, the clear window may turn out to be a mirror "in which our visions materialize and our desires come true, a visual illusion the power of which we may find hard to resist" (at 19).

To be sure, Bianchi does not reject the concept of transparency—that would be a strange stance as a co-editor of a book whose cover does not even have an explicit question mark after its title: "Transparency in International Law[?]." Rather, he clears up the ambiguities, and, indeed, the mysteries, of transparency which epitomizes "our perennial quest for truth, the quest for the Holy Grail of good governance and democratic rule, legitimacy and accountability, justice and fairness to all" (at 19). However, he has serious doubts whether the principle of transparency has entered international law proper: at best, and with some difficulty, it could be characterized as a "principle" under article 38(1)(c) of the Statute of the International Court of Justice (at 5). In Bianchi's view, the principle of transparency operates as a permanent connector between international law proper and the changing societal realities, a kind of interstitial norm functioning in the "interstices of primary rules in order to ensure that the legal system conforms with the contemporary ethos" (at 7).

While Bianchi admits that transparency obligations can become part of international treaties, he strictly denies their character as norms of customary international law. "[N]o one has (so far) had the temerity to characterize transparency as a rule of customary international law," he contends (at 5). Well, I guess he would not regard his co-editor Anne Peters as "no one,"

so I think that he has simply overlooked that in fact she *had* the temerity to make that claim—although, admittedly, hesitantly and cautiously.

## 3. The optimistic view of transparency in international law

Anne Peters is the author of the final chapter—by far the most comprehensive and almost book-length text of more than seventy pages, with the optimistic title "Towards Transparency as a Global Norm" (at 534 *et seq.*). In a way, the more skeptical, at times bleak opening chapter by Andrea Bianchi and the more confident, yet realistic, concluding chapter by Anne Peters, which frame the eighteen remaining sections of the book, represent a spirited and far from uncontroversial dialog between the two editors. This is the third singularity of this book that I want to highlight. Rarely do editors of a book present their different views (or should I say: intellectual temperaments?) with respect to their subject in such a subtle, and at the same time candid, manner as Andrea Bianchi and Anne Peters do in this book.

To come back to the question of whether transparency obligations can be regarded as customary international law and to Anne Peters' cautious, however unequivocally affirmative, answer. The expectation of a specific conduct of states evolves into an obligation of customary international law if this conduct has become a general practice which is supported by an *opinio iuris*. Anne Peters argues that the contributions to this book have delivered abundant evidence for the existence of an ever more expanding, i.e. general, practice of transparency. As to the question of *opinio iuris*, she applies the test of whether "a rollback is conceivable; if not, then an *opinio iuris* might be deemed to exist. According to this test, there would seem to be a relevant *opinio iuris*" (at 584). This amounts to an unequivocally affirmative answer to the question of whether transparency obligations have achieved the normative status of customary international law. However, three paragraphs later, the reader learns with some surprise that "[a]s a result, it would seem difficult to argue that transparency is a norm of hard international law—and maybe it can never become one" (at 585). This is pretty close to Bianchi's above-cited statement and a considerable attenuation of Peters' original statement. Whatever the case may be, Anne Peters is right to maintain that the "sources in terms of article 38 ICJ Statute do not tell us much about the state of international law and its power to influence the behavior of internationally relevant actors" (at 586).

Indeed, her account of the role of transparency in the international sphere attests to its relevance in the shaping of the global order, irrespective of its legal status. Drawing together the findings of the chapters in the different fields of public international law—ranging from environmental law, economic law, health law, human rights law, humanitarian law, peace and security law to international law-making, adjudication, and governance—Peters connects them with the broader debate about transparency in the context of globalization, including the "constitutional" issues of legitimacy, accountability, and democracy.

Within this context, she argues, international transparency is a necessity, a badly needed response to the tendency towards an increasing lack of transparency induced by globalization: the transfer of state functions and powers to international institutions; increasing spillover effects of states' actions upon extraterritorial persons to whom states owe no obligations; and the general tendency towards polycentric transborder forms of governance which more and more frequently escape the control of single states. The appropriate response is what Anne Peters calls "compensatory transparency" (at 540 *et seq.*). First, in order to maintain at least the current level of transparency, states' domestic obligations should be extended to new beneficiaries, namely to those who are affected by state policies, including foreign states, international organizations, and natural or legal persons residing outside the state's territory. Second, in view of outsourcing or transferring, respectively, the functions and powers of states to private entities and international organizations, these international agents should

become subject to transparency obligations, as well (at 540 *et seq.*). In a globalized world, information and transparency have become global values and objectives which embody a global public good as conceptualized by the UN Development program (at 542–543).

To condense Peters' argument almost inadmissibly, this means that both the categories of obligors and obligees of transparency obligations have to be adjusted to the globalized world in which states no longer monopolize the international sphere. As regards the obligors, not only are states and the aforementioned private entities entrusted with public functions increasingly subject to criticism for their non-transparent conduct and their internal structures, and exposed to the expectation of transparency (at 549 *et seq.*), but so are private business enterprises and NGOs—considered "traditionally the 'good guys' in global governance" (at 551). The obligees, the traditional beneficiaries of transparency, include states, by way of international treaties, especially in the fields of arms control and environmental protection. Societal actors and, ultimately, a nascent global civil society would be the appropriate beneficiary of international transparency obligations (at 553).

Of course, Anne Peters is aware of the difficulties of transferring domestic transparency obligations into the international sphere, such as the absence of enforceability, the lack of democratic procedures or of separation of powers, and the dominance of executive prerogative in foreign affairs with strong traditions of secrecy (at 543 *et seq.*). While she admits that "structural and substantive differences between domestic and international law prevent a transfer of the concept of transparency as it stands from the national to the international level," she contends that "not all specific features of international law strictly rule out its application" (at 547). In fact, transparency-based compliance mechanisms, such as naming and shaming by international organizations in the fields of environmental protection or human rights promotion, confirm her claim that "national and international transparency systems represent variations on a single governance theme" (at 547).

Arguably, the most important feature of transparency, which explains its inherently political character, is its role as a critical counterweight to power. In Anne Peters' terms, transparency is a "power shifter" (at 554). Secrets, i.e. knowledge that is monopolized by a small group of insiders, enhance the power of those insiders over those who are excluded from knowledge which is crucial for understanding, and eventually changing, their life situation. This is trivial—we all know the phrase "knowledge is power" attributed to Francis Bacon. But for Anne Peters, the power-shifting function of transparency has a much greater import. We must read her conception of transparency as an inherent element of an agenda which is somewhat hidden in this chapter but manifest in her other work, most notably in her chapter on "Dual Democracy" published in *The Constitutionalization of International Law*.[1] As the title of that book suggests, the authors, including Anne Peters, see international law on a path towards constitutionalization, that is, towards a basic institutional frame for the ordering of the actions and interactions of the plurality of states and diverse non-state actors that have emerged in the process of globalization.

Consequently, Anne Peters uses the terms "transparency" and "publicity" interchangeably, although she is aware of their slightly different meanings: the former is the mere accessibility of information, the latter the actual access to that information (at 535). It is the actual access to, and use of, information that opens a space of communication, critique, reflection, plurality of ideas and opinion, in short: a public sphere. And this, the public sphere, is an inherent element of a constitutionalized polity.

Within this "constitutionalist" framework, transparency is an indispensable element of global governance which Anne Peters elaborates in the concluding chapter of the book.

[1] Jan Klabbers, Anne Peters, & Geir Ulfstein, The Constitutionalization of International Law 263 *et seq.* (2011).

Thus, the power-shifting role of transparency is connected with a complex of problems of global governance, particularly with international democracy and the concomitant issues of legitimacy and accountability (at 556 *et seq.*). As mentioned, Peters is mindful of the structural differences between the domestic and the international "constitutional" conditions and hence very tentative with postulating transparency quasi-ubiquitously in the field of international law and politics. What she claims, however, is that transparency is not only a procedural instrument for the achievement of substantive goals—such as information, power, or welfare—but that it has an intrinsic value in itself for any democratic polity including structures of global governance (at 538 *et seq.*). However, the empirical study by Cosette Creamer and Beth Simmons about the effect of domestic transparency institutions on the quality of human rights protection yields the somewhat disappointing outcome of only "extremely weak correlations between transparency and rights improvements" (263).

## 4. Boundaries of transparency

This result does not undercut the arguments for international transparency, but it warns against too high expectations of immediate positive effects. Thus, the chapter by Antonios Tzanakopoulos on "Transparency in the Security Council" pours some cold water on the belief in the power-shifting function of transparency (at 367 *et seq.*). While it is plausible to assume that transparency enables processes to hold those wielding power accountable, the other side of the coin is the experience that the more powerful an institution, the less it is inclined to expose its actions and decisions to public scrutiny (at 381–382, with respect to the Security Council). Given the aforementioned uncertain correlation between the extension of transparency and human rights improvements, one may ask what conditions must be attained in a struggle for shifting power relations in order to use the demand for transparency as a promising political strategy?

Regardless of this partly empirical question, both editors are skeptical about viewing transparency as a general principle of international law under article 38 of the Statute of the International Court of Justice (at 5–6 and 584–585). Rather, they regard it as a normative principle which operates as a "permanent connector . . . between the law and the changing societal realities" (at 7 and 586). Further, Anne Peters rebuts the oft-heard derogative statement that transparency is merely an inferior proxy for substantive issues, contending that "transparency is indeed a substitute, but a necessary one because it replaces, in a global and pluralistic political space, the unattainable certitude and conviction about the 'right' international law and policy through a procedural device allowing everyone to form their own opinion on matters of global governance" (570).

An examination of the boundaries of transparency cannot be absent from this comprehensive account of the complexities of transparency in the international sphere. Besides drawbacks such as information overflow and disinformation, a particularly thorny problem is finding a proper balance between the need for secrecy and confidentiality, on the one hand, and the requirement of transparency within the framework of a constitutionalizing global order, on the other. While diplomacy, the core of peaceful international relations, is generally regarded as essentially confidential and opaque, even here new trends of international law-making have brought "deliberative exceptions" into being (at 574–575). The Rome conference on the ICC or the Cancun Conference on the United Nations Framework Convention on Climate Change (UNFCCC) are prominent examples. Still, Anne Peters does not ignore negative effects of transparency and presents a nuanced and empirically underpinned balance of harmful as well as beneficial effects of transparency in international relations (at 574 *et seq.*).

It is worth mentioning that transparency in international law is not merely a desideratum. This volume provides evidence of already existing considerable levels of transparency in some fields of international law. There is

one branch of government for which transparency is essential, namely the judiciary. We cannot recognize as a court or tribunal an authoritative body that does not at least give reasons for its decisions accessible to the public. As we learn from the impressive survey by Thore Neumann and Bruno Simma of eight international courts—including, *inter alia*, the International Criminal Tribunal (ICT), the World Trade Organization (WTO) Dispute Settlement System, the Court of Justice of the European Union (CJEU), and the Inter-American Court of Human Rights—international courts do not only operate on the basis of "a considerable acquis of hard-law obligations which can be found in the statutes and rules of international courts and tribunals," but more and more regard "individuals in general (and not merely State representatives)" as the proper beneficiaries of their transparency norms and practices (at 471 and 476).

It is plausible to assume that the relatively high degree of transparency in the sphere of international adjudication is due to the density of legal rules which guide the courts' operation. A comparable phenomenon could be effective in some international organizations as well. In his chapter on "Transparency in International Financial Institutions," Luis Miguel Hinojosa Martínez, while criticizing their shortcomings and "the lack of attention to basic transparency concerns" (at 79), acknowledges that, today at least, "the IMF and the World Bank are more transparent than most international organizations." He attributes this finding to their high degree of institutionalization: "[A] higher degree of institutionalization calls for a more coherent and open transparency policy, as more structured institutions have at their disposal the appropriate resources and are more easily subject to pressure by civil society" (at 109). In a very similar manner, Panagiotis Delimatsis, writing about "Institutional Transparency in the WTO," argues that ". . . [the] WTO is one of the most highly legalized international institutions. Legalization means . . . to develop relatively more precise rules and obligations, and consequently, more transparency as to what needs to be adhered to" (at 135).

A propos the connection of law and transparency, Anne Peters ventures an interesting idea, suggesting a paradigm shift towards what she calls a "publification" of international law, that is, "international law's shift from a 'private' to a 'public' character" (at 600). Referring to the unclear status of international law with respect to private and public law, she submits the criterion for its qualification as inherently public. It is the socio-moral character of law as an institution that binds all members of the polity through the invocation of public reason and public discourse as the basis of its binding character. On her understanding, inspired by concepts of deliberative democracy, law in the sphere of a nascent global society adopts public law principles and turns into "law which constrains political authority, which seeks to reconcile global political authority with individual autonomy, which is in the public interest ('for' the public), and which is made under the scrutiny of the public ('through' the public) even if not fully made 'by' a global public" (at 604). In other words, the publicness of international law is epitomized in its constitutional character.

Transparency "as a culture, condition, scheme or structure in which relevant information . . . is available" (at 535) does not amount to anything more than the accessibility to information and knowledge. Donaldson and Kingsbury rightly state that "[t]he impact of transparency measures depends on the existence of intermediaries (NGOs, academics, corporations, news media and other interested parties) willing and able to make use of the information provided" (at 524). Peters calls them "transparency power brokers" who "verify, certify, audit and distribute information" (at 551). Despite this important insight, the book lacks an elaborate study of the internal structures of those intermediaries, notably of the electronic mass media. Are they merely the mouthpiece of the information owners, or do they act as converters of opaque complexity into the language of ordinary citizens?

Of course, no unequivocal and universally valid answer to that question is possible, just as little as to the many issues which the authors of that volume rich in substance raise

in their respective chapters. For instance, how much transparency can the International Committee of the Red Cross (ICRC) sustain in its humanitarian work, how much secrecy is indispensable (Ratner, at 308 *et seq.*)? As Ratner states, "perhaps the better question is . . . how much secrecy the ICRC needs for itself?" (at 319). Or, to give a further example, Orna Ben-Naftali and Roy Peled deal with a similarly vexing issue which opens the door to manifold dilemmas, namely "How Much Secrecy Does Warfare Need?" (at 321 *et seq.*). The volume is full of these kinds of questions, and awakens the reader's curiosity, and leaves him or her at once enlightened and captivated by new questions and puzzles. Could one express higher praise for an academic book?

## Individual Contributions

Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*;
Jutta Brunnee & Ellen Hey, *Transparency and International Environmental Institutions*;
Jonas Ebbesson, *Global or European Only? International Law on Transparency in Environmental Matters for Members of the Public*;
Luis Miguel Hinojosa Martinez, *Transparency in International Financial Institutions*;
Panagiotis Delimatsis, *Institutional Transparency in the WTO*;
Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad and the Murky*;
Carlo Garbarino & Sebastiano Garufi, *Transparency and Exchange of Information in International Taxation*;
Thomas Cottier & Michelangelo Temmerman, *Transparency and Intellectual Property Protection in International Law*;
Jonathan Klaaren, *The Human Right to Information and Transparency*;
Cosette Creamer & Beth A. Simmons, *Transparency at Home: How Well do Governments Share Human Rights Information with Citizens?*;
Emily A. Bruemmer & Allyn L. Taylor, *Institutional Transparency in Global Health Law-making: The World Health Organization and the Implementation of the International Health Regulations*;
Steven R. Ratner, *Behind the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross*;
Orna Ben-Naftali & Roy Peled, *How Much Secrecy Does Warfare Need?*;
Antonios Tzanakopoulos, *Transparency in the Security Council*;
Mirko Sossai, *Transparency as a Cornerstone of Disarmament and Non-proliferation Regimes*;
Alan Boyle & Kasey McCall-Smith, *Transparency in International Law-making*;
Thore Neumann & Bruno Simma, *Transparency in International Adjudication*;
Larry Cata Backer, *Transparency and Business in International Law: Governance Between Norm and Technique*;
Megan Donaldson & Benedict Kingsbury, *Power and the Public: The Nature and Effects of Formal Transparency Policies in Global Governance Institutions*;
Anne Peters, *Towards Transparency as a Global Norm*.

*Ulrich K. Preuß*
*Professor Emeritus of Free University Berlin and of Hertie School of Governance*
*Email: preuss@hertie-school.org*

*doi:10.1093/icon/mou057*

David Schneiderman. *Resisting Economic Globalization. Critical Theory and International Investment Law*. Palgrave Macmillan, 2013. 199 pages. $95.00. ISBN: 9781137004055.

Since Martti Koskeniemmi's description of international investment law as an "exotic field" in the 2006 ILC Fragmentation Report,[1]

[1] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission UN Doc. A/CN.4/L.682 (Apr. 13, 2006) as corrected UN Doc. A/CN.4/L.682/Coor.1 (Aug. 11, 2006) (finalized by Martti Koskenniemi).