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## **PRIVATE LAW AND STATE-MAKING IN THE AGE OF GLOBALIZATION**

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**Private Law and State-Making in the Age of Globalization\*\***

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*Abstract* – The rise of post-national entities, such as the institutions of the European Union and of free-trade regimes, bears no obvious relation to the traditional pillars of western private law (mostly contracts, torts, and property doctrines). The claim of this article is that the global diffusion of private law discourse contributes significantly to the emergence of new centers of authority in the global arena. The article tests the impact of private law arguments in three contexts – the growing legitimacy of regional human rights adjudication, the consolidation of the institutions of the European Union, and the higher binding force of international investment treaties. Private law gains popularity in global legal discourse when its most centrifugal features are emphasized (individual autonomy, horizontal dispersion of authority, indifference to governmental institutions). Once popular, however, private law discourse also evokes centripetal arguments (aspiration to internal coherence, uniformity in adjudication) and therefore paves the way to new centers of public, vertical power. Most noticeably, private law discourse provides regional or global institutions with a patina of distributive neutrality, and therefore facilitates the endorsement of ideologically laden institutional developments.

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# PRIVATE LAW AND STATE-MAKING IN THE AGE OF GLOBALIZATION

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## INTRODUCTION

The current world order is characterized by an intricate mix of cross-border dealings between individuals and/or public entities.<sup>1</sup> The sovereign nation state, as we have come to know it for over three centuries, is not necessarily central to this picture.<sup>2</sup> Many transactions take place within loose regulatory schemes provided by international networks of public agencies,<sup>3</sup> or by horizontal clusters of transnational market actors.<sup>4</sup> In this context, private law is a central subject in globalization discourse, and contributes in many ways to the decline of the state.<sup>5</sup> Private law performs a significant state-breaking

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<sup>1</sup> PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956) still offers a most interesting description and prediction of these phenomena. See Peer Zumbansen, *Transnational Law*, in *ENCYCLOPEDIA OF COMPARATIVE LAW* (Jan Smits ed., 2006) (forthcoming, p. 4 of manuscript on file).

<sup>2</sup> The relation between the expansion of the role of private actors in public international law and the erosion of sovereignty is now the subject of intense academic debate. See e.g. Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 *B.C. INT'L & COMP. L. REV.* 235 (2002), especially at 235-236.

<sup>3</sup> See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton UP, 2004).

<sup>4</sup> Network theory postulates that private legal orders generate new regulatory dynamics in a global economy, where spontaneous law-making replaces state-based hierarchies of norms. See Gunther Teubner, *'Global Bukowina': Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE*, 3 (Gunther Teubner ed., Dartmouth 1997). Teubner's now classic work brings the independence of private transnational interactions to the level of axiom. The author identifies a number of different systems, such as the worlds of *lex sportiva* or *lex constructionis*, capable of producing real and effective norms of conduct for discrete economic or associational purposes, without the assistance of state-based law-making institutions. See *Id.* at 4 (pointing at "a new body of law that emerges from various globalization processes in multiple sectors of civil society independently of the laws of the nation-states." See also Sol Picciotto, *Introduction: Reconceptualizing Regulation in the Era of Globalization*, in *NEW DIRECTIONS IN REGULATORY THEORY* 1-11 (Sol Picciotto & David Campbell eds., Blackwell, Oxford, 2002).

<sup>5</sup> Torts, property, and contracts rules – traditional pillars of private law systems in the western world - are at the core of transnational disputes between individual litigants. Through conflicts-of-law mechanisms, states' courts must make room now more than ever for rules originating outside of their jurisdiction. For critical insights on this point see Ralf Michaels, *Globalizing Savigny? The State in Savigny's Private International Law, and the Challenge of Europeanization and Globalization*, Duke Law School Legal

function. It de-emphasizes the ‘vertical’ subordination of citizens to their sovereigns, and points at ‘horizontal’ relations between equally situated market actors.

At the opposite end of the globalization picture, one encounters a different phenomenon – one of consolidation of sovereignty around new centers of institutional power, such as the European Union (EU), regional human rights courts, or the institutions of world trade.<sup>6</sup> These post-national institutions differ profoundly from national governments and need not even be identified by geographical borders. Yet there is no doubt that such institutions constrain the political will of state sovereigns.<sup>7</sup> They are fully recognized by the international legal community and endowed with regulatory and/or

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Studies Research Paper Series, Research Paper No. 74 (2005). Secondly, the diffusion of private arbitration decreases the role of state-based institutions in matters of adjudication. See *infra* \_\_ Part II.iv. Lastly, a lot of law-making now stems from networks of economic operators acting independently of official governments. See Teubner, *Global Bukowina*, *supra* \_\_.

<sup>6</sup> The age of globalization is witnessing many instances of this phenomenon. The switch is from a stage in which the fortunes of the Dutch Guilder were only *de facto* dependent upon the stability of the German Mark, to a stage in which the European Central Bank in Frankfurt dictates the interest rates applicable in the Netherlands (and in the rest of the Euro area); from a stage in which a country spontaneously improved its internal human rights regime because, if it did not, its trade relations with neighboring states would suffer, to a stage in which individuals can actually sue that country and have it pay compensation whenever it fails to comply with a human rights charter developed by neighboring states; from a stage in which treating foreign investors fairly was merely in the economic interest of the host state, to a stage in which mistreating foreign investors actually leads to enforceable sanctions. These are all forms of regional or global integration implemented by the creation of new institutions, and by legal – as opposed to social, political and economic – tools. See Kal Raustiala, *Book Review* of ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004), 55:3 J. LEGAL ED. [page 2 of <http://ssrn.com/abstract=880798>] (2005) (noting that "The number of such institutions rose dramatically in the postwar era, and their ambit is wide.")

<sup>7</sup> See SLAUGHTER, *A NEW WORLD ORDER*, *supra* \_\_ at 144-145 (distinguishing between horizontal and vertical networks of global or regional government, and explaining that in the case of vertically integrated networks, such as the EU and the WTO, governments have chosen to delegate some functions to independent organization endowed with real sovereignty, whereby “supranational officials can harness the coercive powers of national officials.”)

adjudicatory functions once reserved solely to states.<sup>8</sup> In such cases, sovereignty sheds the appearance of horizontal dispersion. Its many pieces, disassembled by globalizing forces, coalesce around public, official, vertical power structures.<sup>9</sup>

In this part of the globalization picture, traditional private law –understood as a coherent set of rules for the adjudication of contracts, torts and property disputes – is by no means prominent. The re-definition of state sovereignty resulting from the legal growth of numerous free trade areas and regional human rights regimes is mostly studied as a subject of political theory<sup>10</sup> and constitutional or international law.<sup>11</sup>

Against the background of such common understandings, this article aims at highlighting the yet insufficiently explored connection between (old) private law and (new) post-national sovereignty. The claim is that, for better or worse, traditional private-

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<sup>8</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

<sup>9</sup>In the aftermath of World War II, two ideological strands fueled this institutional development - the economic logic of free trade, and an international convergence on the values of human dignity. Ricardo's theory of comparative advantage became the center-piece of a grand vision which associated long-lasting peace with economic interdependence between sovereign nations. The proliferation of free trade areas and other forms of regional economic integration in the past 50 years can only be explained by the popularity of that vision. For a recent analysis of this development see Ari Afilalo & Dennis Patterson, *Statecraft, Trade and the Order of States*, \_\_CHI. J. INT'L L. 2005 [Manuscript on file, p. 18]. At the same time, the horrors of the war generated a broad based consensus on the need to create supra-national control mechanisms, capable of bringing states to compliance with what was hoped were universal values of human dignity. (For the important qualification that "consensus" was formed without the direct participation of colonized world leadership see Beth Lyon, *Discourse in Development: A Post-Colonial "Agenda" for the United Nations Committee on Economic, Social and Cultural Rights*, 10 AM. U.J. GENDER SOC. POL'Y & L. 535, 538, fn 5 (2002)). Both free-trade logic and universalism in human rights provided the ideological momentum for progressive cessions of sovereignty, and at times prompted the creation of new centers of governance in post-national settings.

<sup>10</sup> For a recent and helpful review of this literature see Afilalo & Patterson, *supra* \_\_.

<sup>11</sup> See Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L.J. 1 (2000).

law discourse facilitates the emergence of new forms of institutional sovereignty in the age of globalization. The point of these pages is to illustrate how and why this is the case.

The process of reassembling vertical power within new post-national institutions is hereby termed ‘State-making’ for the purpose of evoking historical precedents.<sup>12</sup>

The rhetoric of private law was notoriously relevant to the construction of European nations in the 18<sup>th</sup> and 19<sup>th</sup> centuries. (At least according to popular iconography, the *Code civil* was an essential component of Napoleon’s state-making agenda.<sup>13</sup>) Today, private law discourse fulfills the analogous task of consolidating post-national authorities and supranational forms of government. These powerful, yet under-defined, institutions lack such traditional sources of legitimacy as representative democracy and broad-based accountability. Their authority is still fragile, improbable, and often politically contested.<sup>14</sup> In this context, private law performs badly needed justificatory functions, and bolsters the institutional strength of such entities.

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<sup>12</sup> Post-national institutions are usually not referred to as “States” because of the many differences between traditional state sovereignty and post-national governance. The traditional state, territorially confined and monopolistically endowed with all functions of government at once, bears little resemblance with the multi-level governance models embodied in such entities as the EU or regional human rights courts. See, however, VIVIEN A. SCHMIDT, *DEMOCRACY IN EUROPE: THE EU AND NATIONAL POLITICS*, Chapter 1 (OUP, forthcoming 2006, manuscript on file) (acknowledging the profound transformation of Westphalian sovereignty in the age of globalization, and yet ‘stretching’ the concept of the State to encompass post- and supra-national institutions with real coercive powers such as the EU.) Throughout the article, I shall use the word “State” with a capital S when referring to post-national institutions. A lower case initial indicates, instead, sovereign states as traditionally understood in modern international law.

<sup>13</sup> See *infra* Part I.iii.

<sup>14</sup> SLAUGHTER, *supra* \_\_ 219-221 (reviewing the charges of unaccountability moved against global government networks); ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 81 (NYUP 2004) (lamenting the loss of participatory democracy that stems from the super-power of states’ executive branches at the international level). Cf. Andrew Moravcsik, *Is There a Democratic Deficit in World Politics?* 39 *GOV’T & OPPOSITION* 336 (2004) (arguing, by contrast, that if

This happens because in global legal discourse, more often and forcefully than in domestic settings, the label of private law is still associated with the highly formalist rhetoric of classical legal thought, capable of drawing seemingly firm boundaries between public and private domains, or between multiple spheres of private power.<sup>15</sup> Authority feeds on legitimacy, and legitimacy thrives on the apparent clarity of boundaries. In the context of post-national institutions, private law seems still capable of defining the limits of authority, and therefore shelters authority from challenge. Its State-making power is today less obvious, but no less effective than it ever was.<sup>16</sup>

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properly understood, democratic deficits do not really exist in global governance.) For sector-specific analysis of democratic deficits see Stephen C. Sieberson, *The Proposed European Union Constitution. Will It Eliminate the EU's Democratic Deficit?* 10 COLUM. J. EUR. L. 173 (2004) (surveying the literature on the EU's alleged democratic deficit); Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 6 (2005) ("the WTO suffers from a lack of popular support, loyalty, and input legitimacy..."); and Teubner, *Global Bukowina*, supra \_\_ at 19 (noting, in the context of transnational arbitration, that "[L]ack of institutional autonomy makes [lex mercatoria] vulnerable to political pressures for its ... 'legitimation.'")

<sup>15</sup> See Daniela Caruso, *Private Law and Public Stakes in European Integration: The Case of Property*, 10 EUR.L.J. 751 (2004) (showing, in the context of European integration, that private/public boundaries may shift from time to time, depending on strategies and circumstances, but that the very possibility of line-drawing is unmistakably at the core of transnational private law discourse.) Private law categories have helped to consolidate public sovereignty on both sides of the Atlantic. In the US, the clear-cut partitions of private law provided the federal architecture with convenient metaphors. After the Civil War, "the use of the common law rules to provide a meaning for concepts like property, liberty, contract, and so forth, reinforced the judges' claim to a neutral, apolitical method of public law adjudication." DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* 266 (Cambridge: AFAR 1998).

<sup>16</sup> Like nationalism, private law discourse comes in two varieties – state-breaking *and* state-making. See Joseph H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 YEARBOOK EUR. L. 268 (1981) (explaining that nationalist sentiments can operate both centrifugally (when ethnic minorities rebel against incumbent powers to reclaim self-governance) and centripetally (when new nation-states are built upon a Bismarckian emphasis on common 'volkish' roots). See also Nathaniel Berman, "But the Alternative Is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106

This article offers a counterpoint to a conspicuous strand of contemporary legal discourse, intensely preoccupied with the state-breaking function of private law and obsessed with issues of spontaneity, horizontality, and dialogue in norm production.<sup>17</sup> An excessive emphasis on these traits unduly reinforces the perception of private law's autonomy from constituted powers, and downplays private law's predictable rise to systemic dimensions. The result is a chronic underestimation of the role of private law arguments in bringing to life new systems, and – for better or worse – new institutional hierarchies in a post-national landscape.

Part I recounts how classical private law features prominently in the legal history of the entire western world. Historical and structural differences notwithstanding, both common- and civil-law systems at some point generated the idea of a self-contained body of rules, meant to guarantee the smooth running of horizontal relations between equally situated subjects. This idealized system stood in contrast with other sets of rules and principles meant to regulate the exercise of discretionary authority in 'vertical' relations between states and subjects. Indifferent to power, technical, and therefore utterly non-political, this distinctively 'private' mode of legal discourse still enjoys much currency. Part I proceeds to identify two discursive strands within this form of private law discourse – one pointing at private autonomy and dispersion, the other infused with systemic traits and usually associated with centralized authority. The two strands can be conceptualized as two sides of the same coin, necessarily related and inseparable. The

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HARV. L. REV. 1792, 1803 (1993) (portraying nationalism in interwar European discourse as both an agent of devastation and a potentially stabilizing foundation of new legal systems.)

<sup>17</sup> See *infra*, Part I.iv.

analysis is meant to show how quickly the coin can be flipped, and how conveniently the state-breaking rhetoric of one side can feed into the State-making logic of the other.

Part II provides three examples of this phenomenon, arranged in ascending order of impact: (1) The private property paradigm has recently led to the enforcement of international human rights law even in areas characterized by otherwise intractable political impasses; (2) EU courts and institutions are increasingly invoking private law in order to consolidate and legitimize the institutional gains of European integration; (3) Contracts doctrines are assuming new prominence in both private and public international law, lending legitimacy and credibility to the politically vulnerable institutions of free trade.

In light of these examples, Part III analyzes a number of classical private law images, structures and discursive associations that facilitate the conversion of diffuse powers into new institutional hierarchies. Historically rooted upon natural law, private-law rights are endowed with absolute rhetorical strength and independent of positivist justification. If based on jus-natural private-law logic, radical institutional developments may gain the appearance of legal necessity. Secondly, private law's celebration of individual autonomy does not necessarily lead to dispersion. It can also lend support to centralized institutions, portrayed as necessary to ensure the uniform and predictable enforcement of individual promises. Private law's endemic aspiration to internal coherence often justifies the emergence of centralized institutions, invested with tasks of legal harmonization. Lastly, the triumph of distributive neutrality – a typical feature of

classical private law rhetoric – may lend post-national authorities the appearance of necessity and legitimacy.

Part IV is a final reflection on the normative implications of private law arguments as currently used in a global landscape. In many ways, private law discourse is a tool with untapped potential that may point at novel modes of post-national governance. But at times the power of its rhetoric silences the already feeble voices of democracy in the context of globalization, where more – not less – voices should be heard.

#### I. PRIVATE LAW IN TRANSATLANTIC DISCOURSE<sup>18</sup>

i. *Horizontality and neutrality in classical private law.* - The discourse at stake in these pages is the commonality of private-law categories and modules intuitively shared by lawyers, judges, bureaucrats, and legal scholars in modern western history.<sup>19</sup> The

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<sup>18</sup> As applied in social sciences, “discourse” refers to a unified set of words, symbols and metaphors corresponding to a given world-view. It is often built upon broad generalizations, and indifferent to detail. When a mode of discourse establishes itself as the common way of speaking in a given community, it both reflects and contributes to the reality from which it originates. Discourse generates consensus about basic conceptual categories, allows debate to occur, and in many ways pre-determines deliberative outcomes. See Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 663 (1989), for the Foucaultian intuition that ““how we think about law” and “the law we think about” are not really two different things; definition creates reality as much as it orders it.” See also Vivien A. Schmidt, *Values and Discourse in the Politics of Adjustment*, in 1 WELFARE AND WORK IN THE OPEN ECONOMY: FROM VULNERABILITY TO COMPETITIVENESS 229 (Fritz W. Scharpf & Vivien A. Schmidt eds., 2000).

<sup>19</sup> See Duncan Kennedy, *Towards an Historical Understanding of Legal Consciousness*, 3 RES. L. & SOC. 3, 6 (1980) (“[P]eople can have in common something more influential than a checklist of facts, techniques, and legal opinions. They can share premises about the salient aspects of the legal order that are so basic that

community of reference, for the purposes of this essay, is the western legal family, comprising both civil- and common-law systems, and characterized by a clear distinction between law on one hand, and politics or religion on the other.<sup>20</sup> The kind of private law that enjoys much currency in global legal discourse is historically based upon a particular mode of legal thought, conventionally termed “classical.” In this version, private law can be sketched as follows.

Private law rules apply to horizontal relations between citizens of formally equal powers (as opposed to relations between citizens and their sovereign)<sup>21</sup> and aim at solving private disputes between two litigants (as opposed to pursuing the common good of a

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actors rarely if ever bring them consciously to mind.”); and David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SIDNEY L. REV. 5 (2005).

<sup>20</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION. THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, at 23, fn. 62 (1997): “The homogeneity of the western legal tradition is largely due to two ... “great ideological separations”: the separation between law and politics and the separation between law and religious and/or philosophical tradition.” In proposing an alternative to the usual “Euro-American centric” taxonomy of legal families in comparative law, Mattei concedes that “Western-style rule of law could be an alternative way” of defining his “rule of professional law.” The dominant status of the western tradition in global legal relations is in many ways arbitrary, and the product of an intellectual history based on strategic selection and biased genealogies. See P.G. Monateri, *Black Gaius: A Quest for Multicultural Origins of the “Western Legal Tradition,”* 51 HASTINGS L.J. 479 (2000). This tradition, however, is contributing significantly to the growing ‘legalization’ of transnational interactions.

<sup>21</sup> HANS Kelsen, *PURE THEORY OF LAW* 280-281 (Max Knight trans., 2d ed. 1967) (1934) (reporting, with criticism, that according to a prevalent classification, “private law represents a relationship between coordinated, legally equal-ranking subjects; public law, a relationship between a super- and a subordinated subject [...]. Private law relationships are called simply “legal relationships” in the narrower sense of the term, to juxtapose to them the public-law relationships as “power relationships” or relationships of “dominion.”” Kelsen opposed this traditional dualism, and postulated the identity of state and law. *Id.* at 318-319.

given constituency).<sup>22</sup> This definition produces a seemingly orderly and predictable course of adjudicatory practices. It explains, for instance, that a nuisance dispute between neighbors concerning the proper use of adjacent properties will be adjudicated exclusively on the basis of their respective rights, with no regard to public policy concerns for zoning, urbanization, environment, etc.<sup>23</sup> It is also characterized by internal coherence, meant as the peaceful, analytical coexistence of few conceptual pillars upon which the entire regulatory design is orderly built.

In the U.S., the legal world-view of Christopher Columbus Langdell is often characterized as embracing this model with enthusiasm.<sup>24</sup> In European legal historiography, this form of private law discourse is associated with the German

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<sup>22</sup> Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002) (“Common-law rules and adjudication are structured around discrete transactions between strangers. The prevailing, classically liberal, model of tort, contract, and property cases features atomistic individuals who interact only at the point of a discontinuous event, sharply limited in space and time.”) In continental private law the emphasis on “discrete transactions” is just as strong. See e.g. R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW (Cambridge University Press 1992), Preface to the English language edition, vii (“Private law is concerned with *individual* men and women...” (emphasis added).)

<sup>23</sup>The introduction of social considerations into the code, such as the weighing of conflicting socio-industrial interests introduced in the regime of nuisance in the Italian civil code, do not signify opening to politics, but rather a recommendation to the judge towards the solution of one dispute at the time, between two private parties at the time. “It is settled case law that [the regime of nuisance in the civil code] on one hand, and the statutes and regulations governing productive activities or noise limits on the other, pursue different goals and have different applications. The former relates to private property rights and aims at balancing the interests of neighboring land owners. The latter pursue public interest goals.” Corte suprema di Cassazione, Case No. 10735 of August 3, 2001.

[http://www.diritto.it/sentenze/magistratord/sent\\_10735\\_01.html](http://www.diritto.it/sentenze/magistratord/sent_10735_01.html) (my translation).

<sup>24</sup> Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). GRANT GILMORE, THE DEATH OF CONTRACT (1974).

historical school, which systematized the bits and pieces of Roman law as elaborated through the Middle Ages.<sup>25</sup>

This model created a watertight separation between private and public law. At the start of the 20<sup>th</sup> century, comparative law scholars of the western world could count on one stable similarity between civil and common-law systems – the private/public distinction.<sup>26</sup> When crossing the Atlantic Ocean or the Channel, jurists from the old Continent would find comfort in the thought that, at home or abroad, private law was a distinct set of rules based on individual rights and aimed at settling horizontal disputes, while public law pertained to sovereign governance in pursuit of collective goals.<sup>27</sup> Self-

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<sup>25</sup> Franz Wieacker explains: “Under Pandectism private law constituted a coherent system. [...] Private lawyers embraced the ethics of autonomy with which Kant endowed the renaissance legal science around 1800, and saw private law as a system of spheres within which morally autonomous individuals were free to act as they chose [...] This view informed the central institutions of classical private law: individual rights were an area for the expression of will-power, acts-in-law were the result of unconstrained intention, contracts constituted a tight bond between independent beings, and property rights of all kinds conveyed in principle a total and absolute power of dominion and exclusion.” WIEACKER, *supra* \_\_\_, 484-485; *see also* 341-349.

<sup>26</sup> KENNEDY, *RISE & FALL*, *supra* note \_\_\_, at 38-39: “When the common lawyers theorized about private law, they drew on European sources in the tradition of natural rights, according to which all of private law was the rational working out of immutable, divinely established principles. [...] To Classical eyes, private law natural rights theorizing further aggravated the split between public and private law, since the positivist, legislatively oriented principles of constitutionalism would not square with the anti-state, mystically based approach of the natural lawyers.”

<sup>27</sup>A. CLAIR CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* 42-43 (Cambridge University Press 2003) (explaining how the private/public distinction developed, albeit differently, both in civil and in common law.) Sanford Levinson, *Escaping Liberalism: Easier Said Than Done*, 96 HARV. L. REV. 1466, 1467 (1983) (reviewing DAVID KAYRES, ed., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, and locating the distinction of private and public “worlds” at the core of liberal legalism).

contained and sharply differentiated from public law, private law was perceived as capable of keeping common-good considerations out of private adjudication.

When reduced to an orderly taxonomy of legal concepts, which are placed in a relation of mutual reference and indifferent to social considerations, private law is a game of chess. It must be played out on a board divided into a fixed number of slots. The pieces on the board are predetermined and move according to very firm operational rules. Within these rules, players are allowed to devise innumerable combinatorial strategies. The game allows for very creative moves, and, in fact, promotes the use of wit and genius. But each game begins and ends within the chessboard, as if it were a self-contained universe. This model exerts an eternal fascination among jurists of all worlds. As is the case with chess, its popularity is undying.<sup>28</sup> In one way or another, it recurs as a pattern in private law rhetoric.

The survival to this day of classical private law as a mode of discourse is somewhat surprising. In the first half of the twentieth century, the private/public distinction came under vehement attack across the western world. In political milieus, private law had to make room for elements of social policy and redistributive considerations. The emergence of labor law with its socialized contracts rules, the re-conceptualization of property in light of its social function, and the use of tort law for clearly public regulatory purposes inexorably questioned the soundness of time-honored

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<sup>28</sup> Cf. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (referring to the famous attack to formalism launched by Rudolf von Jhering, *In the Heaven of Legal Concepts* (\_\_\_) in F. Cohen & M. Cohen, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 678-89 (1951)).

dichotomies.<sup>29</sup> The classical structure slowly incorporated corrections to bargaining inequality, interferences with freedom of contract, and constraints upon private ownership.<sup>30</sup> Slowly but surely, private law began to reveal its regulatory implications, its ties to constitutional dilemmas, and the many cracks in the purity of its design. Innocence was lost, and private law faced the unavoidable complexity of adulthood. This development occurred through parallel processes in a number of different nations, and within a relatively short span of time.<sup>31</sup>

Legal scholarship adjusted in various ways to these changes. In the US, legal realists devoted much work to deconstructing the private/public distinction,<sup>32</sup> and to contesting private law's autonomy from other fields of law and government.<sup>33</sup> In

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<sup>29</sup> Morton Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, esp. at 1426 (1982).

<sup>30</sup> Charles Donahue, Jr., *The Future of the Concept of Property Predicted from its Past*, in PROPERTY 43-44 (J. R. Pennock and J. W. Chapman eds., New York University Press 1980) (explaining that in the US “[b]y the middle of the 1930s ... federal and state regulation of the economy could no longer be challenged on the ground that it constituted a deprivation of property rights without substantive due process of law (unless it could be shown that the legislative scheme failed to meet a minimum test of rationality); and the direct restrictions on the use of property in the form of comprehensive zoning and planning ordinances had been sustained even though they involved considerable loss of value to the property owner, so long as they could be denominated a ‘regulation’ rather than a ‘taking.’”)

<sup>31</sup> See Duncan Kennedy, *Two Globalizations of Law and Legal thought: 1850-1968*, 3 SUFFOLK U. L. REV. 631, 648 ff. (2003) (describing the ‘socialization’ of private law in both Europe and the US as a veritable wave of globalization at the dawn of the 20<sup>th</sup> century.)

<sup>32</sup> See as an example of such attacks Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, esp. at 562 (1933) (portraying private contracts adjudication as a matter of public policy making.)

<sup>33</sup> See, critically, Ernest J. Weinrib, *Book Review: Restoring Restitution*, 91 VA. L. REV. 861 (2005) (reviewing HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION*, Cambridge University Press, 2004, and regretting that “[T]he traditional internal analysis of common-law doctrine [...] is precisely what the legal realists and their heirs of all varieties aimed to subvert. The academic triumph of legal realism brought into disrepute the notion that private law involves the articulation of an immanent process of legal reasoning that aspires to work itself pure. Instead, private law came to be seen in the United States as the

continental Europe, scholars began to question the possibility of pure deduction, and advocated the use of techniques meant to steer purely deductive reasoning in socially meaningful directions.<sup>34</sup> Traditional partitions lost the intuitive appeal of clarity, and were forever doomed to contestation and complexity.<sup>35</sup> Scholarly and judicial efforts to inject social considerations in private-law methodology featured prominently in the whole western world for a large part of the 20<sup>th</sup> century.<sup>36</sup>

Today, domestic private law strives to figure out its own identity and to preserve what is left of its once sharp defining features. The private/public boundary is by no means a bright line,<sup>37</sup> and provides no sure prediction of judicial outcomes.<sup>38</sup> Even in

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receptacle of independently desirable goals that are to be infused from the outside. Accordingly, the juridical exercise of elaborating the law's internal normative impulses was effaced by the political exercise of identifying and reconciling the goals that are to be given official sanction.” See also Duncan Kennedy & Marie Claire Belleau, *François Geny aux Etats Unis*, in FRANÇOIS GÉNY, MYTHES ET RÉALITÉS, Yvon Blais ed., 2000 (exploring the links between American legal realism and anti-formalism in European legal discourse in early 20<sup>th</sup> century).

<sup>34</sup> Marie-Claire Belleau, *The “Juristes Inquiets”*: *Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379.

<sup>35</sup> An important part of Wieacker’s story is that this architecture could only maintain its purity in the absence of social, regulatory elements. WIEACKER, *supra* note \_\_, at 485. In the 20th century, “the social state has revolutionized our legal thinking. [...] Courts and scholars must respond to the disintegration of private law produced by these upheavals, and it will be no easy task, for they have not only destroyed the internal coherence of private law but also undermined the distinction between private and public law, which our legal system still took for granted at the end of last century.” WIEACKER, *supra* \_\_ at 438.

<sup>36</sup> Kennedy, *Two Globalizations*, *supra* \_\_

<sup>37</sup> The decline of the traditional administrative state has allowed negotiated self-regulation to allocate public resources (See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000)) and to define civic responsibilities (see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004)). Governance through contract is on the rise. It is now commonly understood that regulatory norms need not be imposed by centralized authorities, but can rather stem from the

continental Europe, where formalism holds a tighter grip on legal academia and on the judiciary, jurists are at the very least confronted with the increasingly significant overlap between private law and constitutional entitlements.<sup>39</sup> In the US, the legacy of legal realism makes main-stream scholars skeptical of anything resembling the purity of classical legal thought.<sup>40</sup> Even the most ambitious reconstructive projects, aimed at bringing common law doctrines to internal coherence,<sup>41</sup> accept as a datum the existence of competing values, to be weighed and organized along firm theoretical guidelines.<sup>42</sup>

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decentralized self-regulation of private parties. See HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE. PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (Hart 2005)\_\_\_; Picciotto, *Introduction*, supra \_\_ at 2.

<sup>38</sup> Individual property can be subject to eminent domain even when it stands in the way of projects led by private parties, in so far as these promise positive externalities. The idea that public purposes can be pursued through private initiative is now widely accepted. *Kelo v. New London*, 125 S. Ct. 2655 (2005).

<sup>39</sup> Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, at 585, fn 64 (1999) (“[L]egal realism has never taken firm hold in Europe and [...] the European legal culture as a whole has remained more conservative than its American counterpart.”)

<sup>40</sup> See ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (1997), and even E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS*, 37 (1998) (“The instances in which promises should be enforced are too varied to be shoehorned into the confines of a single rationale.”)

<sup>41</sup> See e.g. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995); Weinrib, *Restoring Restitution*, supra \_\_; Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005) (proposing “a unified theory of property predicated on the insight that property law is organized around creating and defending the value inherent in stable ownership.”)

<sup>42</sup> See Randy E. Barnett, *Private Law: The Richness of Contract Theory* (reviewing ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW*, 1997) 97 MICH. L. REV. 1413, 1419 (1999) (criticizing Hillman for “speak[ing] of the complexity of contract law as though anyone with whom he disagrees is unaware of this complexity” and for failing “to realize that one function of contract theory is to understand and sort out complexity...”).

So why does classical private law still circulate among legal jurists as a conceptual category with actual currency? Multiple answers are plausible.

ii. *The extraordinary resilience of classical private law: a) neo-formalism; b) innocence regained; c) the rhetoric of dispersion.* - The vast diffusion of a formalist version of private law, indifferent to questions of constitutional values or social engineering, can be tentatively attributed to a number of causes – namely, the revival of legal formalism in national scholarly contexts, the necessary impoverishment of private-law methodology resulting from its wide transnational circulation, and in the legacy of post-WWII neo-liberal agendas.

a) Neo-formalism. - Formalism is undergoing considerable revival in contemporary legal discourse.<sup>43</sup> Classical private law assumes a basic faith in the possibility of solving legal disputes by mere application of principles to facts, with very limited room for judicial discretion.<sup>44</sup> This form of adjudication by deduction is a pillar of legal formalism. Politically, neo-formalism in private law discourse is often associated with the conservative agenda of portraying the market of private actors as ideologically neutral,

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According to reconstructive private law doctrine, the competing values that must be balanced in the process of adjudication (such as efficiency, protection of reliance, predictability...) are ideologically neutral and non-distributive.

<sup>43</sup> See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988), at 516 (noting that “While theorists associated with legal process, rights theory, and law and economics all attempt to absorb the insights of legal realism, they also attempt to create a new foundation for legal principles and decisions to replace the discredited foundations of legal formalism.”)

<sup>44</sup> Classical private law is by definition indifferent to the realization of social goals or public policy. See recently ERNEST J WEINRIB, *THE IDEA OF PRIVATE LAW* 19 (Harvard University Press 1995). Cf. Kenneth W. Simons, *Justification in Private Law*, 81 CORNELL L. REV. 698 (1996).

refractory to regulation, and indifferent to social considerations.<sup>45</sup> But there is also a progressive strand of neo-formalism, which dates back to Max Weber's defense of legal rationality.<sup>46</sup> In this case, the return to form stems from a profound disillusionment with the early 20<sup>th</sup> century idea that private law could be 'socialized' by means of 'soft' communitarian principles, informally woven into the fabric of private law adjudication.<sup>47</sup> Critics of this 'social' project identify as symptoms of its failure such phenomena as the ever-thinner role of the unconscionability doctrine, or the impossibility of pursuing socially progressive results by invoking the general clause of good faith in contractual disputes.<sup>48</sup> They plead, therefore, for "hard" rules and limited judicial discretion, instead of soft adjudicatory standards.<sup>49</sup> Perhaps not least among the causes for neo-formalist revivals are the enduring aesthetic appeal of form,<sup>50</sup> and the eternal passion of analytical minds for the logical game of deduction.

Outside the borders of domestic legal systems, the endurance of classical private law arguments is obviously based on their good health and resilience at home. Other

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<sup>45</sup>See critically KERRY RITTICH, RE-CHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM (2002).

<sup>46</sup> Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031 (2004).

<sup>47</sup> Anna Di Robilant, *Genealogies of Soft Law*, \_\_ AM. J. COMP. LAW \_\_ (2006).

<sup>48</sup>Ugo Mattei, *Hard Code Now!*, 2:1 GLOBAL JURIST FRONTIERS (2002), available at [www.bepress.com/gj/frontiers/vol2/iss1/art1](http://www.bepress.com/gj/frontiers/vol2/iss1/art1)

<sup>49</sup> Mattei, *Hard Code Now*, supra \_\_

<sup>50</sup> Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFFALO L. REV. 973, 1027 (2005) (defining formalism "not as an epistemological or political position, but as an aesthetic propensity, a genre of self-presentation, of engagement with argument and text.")

bases, however, may explain the particularly high currency of classical private law among international legal actors.

b) Innocence regained. - Immigrants, even when highly successful in their host country, remain captive to stereotypes and caricatures. Because subtleties are lost in translation, the immigrant's speech comes across as somewhat discontinuous. Listeners fill the gaps with pre-conceived understandings, folklore and bias. When private law abandons its nation-based home and migrates to globaland, it meets the immigrant's fate. Sometimes, it is subject to superficial treatment and misunderstanding. More often, it gets reduced to stereotype and fancied in old-fashioned clothes, which it has long outgrown. This process is not necessarily demeaning.<sup>51</sup> Private law may rediscover the power of its tradition. Its regained simplicity may allow it moves which its actual level of sophistication would not permit, and which the inhabitants of the host country cannot afford. If skillfully recruited by host rulers, it may serve as an optimal vehicle for social change. In globaland, it may become the hero of the day.

Moving outside the state, perhaps thanks to the fact that jurists involved in large state matters have no time for post-classical vagaries,<sup>52</sup> private law seems to have

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<sup>51</sup> See DIEGO EDUARDO LÓPEZ MEDINA, *TEORÍA IMPURA DEL DERECHO. LA TRANSFORMACIÓN DE LA CULTURA JURIDICA LATINOAMERICANA*, 2004 (analyzing the transmutation of western legal theory after its transplant in the legal culture of Latin America).

<sup>52</sup> Judges in international law courts are most often recruited among jurists specialized in international law, who tend to be better versed in foreign languages. Many of them have previously held office in public administrations or national cabinets, thereby gaining particular fluency with public-law arguments. Judges' lack of familiarity with private law theory may contribute to explain the particular style of private law arguments in such courts. See, for data on appointments to the ECJ, Sally J. Kenney, *The Members of the Court of Justice of the European Communities*, 5 COLUM. J. EUR. L. 101, esp. at 107 (1999).

regained the original strength and bright contours of its earlier stages. Current transnational discourse is dominated by classical private-law rhetoric. In international law more often than in domestic circles, private law is defined as a source of utterly non-political arguments, and therefore a bulwark of legitimacy for any decision-making body both inside and outside the nation-state.<sup>53</sup> Even if flawed, this definition is capable of producing momentous legal changes by virtue of its artificial simplicity. In its horizontal and apolitical dimension, private law can produce unassailable arguments, and change the nature of any dispute from hotly ideological to seemingly neutral and objective. This unparalleled rhetorical power makes private law arguments attractive to international courts and tribunals characterized by questionable legitimacy, political ambivalence, and lack of democratic credentials.

c) The rhetoric of dispersion. – Yet another reason why the alleged neutrality of private law enjoys much currency in global discourse is the fact that the medieval image of *lex mercatoria*, quintessentially independent from the state both in terms of production and at the level of enforcement, is experiencing a veritable revival in neo-liberal literature.<sup>54</sup> Scholars from many fronts tend to agree that the proliferation of cross-border commerce

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<sup>53</sup> On the absence of a Realist-type critique of the distinction in international law see Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 467 (2000).

<sup>54</sup> SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (Columbia U P 1996) at 15, and –most critically – di Robilant, *Genealogies*, *supra* \_\_ (emphasizing the fact that today's 'lex mercatoria' operates against the background –and with the endorsement– of the state, rather than in the absence of state powers as in medieval times.)

prompts the decline of centralized institutions and a serious dispersion of authority.<sup>55</sup> In zero-sum fashion, the growth of private rule-making by business actors is conceptualized in many quarters as a net decline in state regulation.<sup>56</sup> The indifference of private deals to

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<sup>55</sup> Of course, there is no dearth of qualifying statements in legal scholarship. There is a sense in which the growth of transnational business, even though quantitatively impressive, does not really diminish the role and function of the nation-state. To begin with, it is still the case that the bulk of litigation between cross-border parties is submitted to ordinary judicial fora. Conflict-of-law regimes are state-based devices designed to assign trans-national disputes to competent state courts, with the only caveat that judges may have to apply foreign rules. If such rules reflect only the ‘private’ law of foreign states and therefore can be understood as utterly non-political (according to the views of Joseph Story and then Von Savigny: see Michaels, *Globalizing Savigny?*, supra \_\_ at p. 5) there is no reason to hypothesize a weakening of the host state’s control over adjudication policies. Secondly, when parties agree to defer their disputes to arbitration, they still need traditional courts to enforce arbitral awards. As is well known, courts retain certain forms of control over awards – most significantly, the ability to vacate arbitral findings that conflict with considerations of *ordre public*. Again, the state remains ultimately in charge of private-law adjudication. Thirdly, states are still the exclusive providers of legal services which constitute the necessary back-drop of any trade regime, such as the recognition and enforcement of contract and property rules. See SASSEN, supra\_\_ at 25-26 (noting that “national legal systems remain as the major, or crucial, instantiation through which guarantees of contract and property rights are enforced.”) The centrality of the state is also reinforced by the massive participation of mixed (partly private, partly public) corporations in transnational commerce. See Michael B. Likosky, *Compound Corporations: The Public Law Foundations of Lex Mercatoria*, in 3 NON-STATE ACTORS AND INTERNATIONAL LAW 251 (2003).

<sup>56</sup>As a matter of fact, the regulatory monopoly of territorially defined areas is no longer a prerogative of Westphalian sovereigns. Illustrations abound. The contract clauses negotiated by foreign investors dealing with largely state-owned Russian companies force the Russian government to embrace standards of corporate accounting and transparency that have no domestic equivalent in formerly soviet regimes. D. McBarnet, *Transnational Transactions: Legal Work, Cross-border Commerce and Global Regulation*, in TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 98, 105-06 (Michael B. Likosky ed., Butterworths 2002). Hollywood’s hiring of foreign cheap labor creates political links between foreign film-industry workers and Californian unions, prompting social unrest and political upheavals in developing countries. See Michael B. Likosky, *"Dual Legal Orders: from Colonialism to High Technology"*, 3 GLOBAL JURIST TOPICS, No. 2, 22 and 29 (2003), <http://www.bepress.com/gj/topics/vol3/iss2/art2>. In all such instances, the globalizing force of private commerce intersects local political dimensions.

redistributive concerns is hailed as a triumph of freedom from unnecessary governmental intervention.<sup>57</sup>

This tendency to underestimate the regulatory or redistributive implications of private transactions finds theoretical support in the liberal separation between (private) market and (public) government. Private law categories have been used since World War II to signal the disjuncture between international commerce and national laws. By this account, commerce is private in so far as it relies on disaggregated, discrete transactions between actors motivated by profit-maximizing agendas, and therefore indifferent to state politics or government.<sup>58</sup>

This neo-liberal view has long been criticized for actually contributing to, rather than simply describing, the disentanglement of international commerce from national mechanisms of social and democratic control.<sup>59</sup> Neo-liberal dichotomies also fail to acknowledge the possibility of new regulatory regimes, stemming from horizontal networks.<sup>60</sup> They ignore, for instance, that the deployment of domestic private laws in

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<sup>57</sup>Klaus Peter Berger, *Transnational Commercial Law in the Age of Globalization*, Centro di Studi e Ricerche di Diritto Comparato e Straniero, directed by M.J. Bonell, Rome, 2001, Seminar Paper # 42, p. 11.

<sup>58</sup> RITTICH, *supra*, \_\_

<sup>59</sup> A. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REV. INT'L POL. ECON. 261, 262 (1997). See Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002) (referring critically to this phenomenon as 'liftoff.')

<sup>60</sup> Both network theory (*supra* \_\_) and norms scholarship share with neo-liberalism the tendency to shift the emphasis away from the state, and onto discrete clusters of private action. On the links between continental network theory and US-based norms scholarship see Robert D. Cooter, *Law, Economics, & Norms: Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1647 (1996). Both schools diverge significantly from neo-liberalism, however, when they point at the tremendous regulatory spill-over of such clusters, and describe their self-

cross-border litigation (as in the case of transnational tort claims against multinational companies) can promote desirable redistributive policies.<sup>61</sup> These critiques

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reflexive rule-making activity as real law by sociological standards. See Teubner, *Global Bukowina*, supra at 4 (describing the emerging global law as “a legal order in its own right” not to be measured “by the standards of national legal systems.”) These schools generate, in turn, multiple normative stances. According to some authors, rule-making by private networks should be hailed as a welcome grass-roots expression of regulatory goals that traditional democratic processes have failed to identify. See SCHEPEL, supra note \_\_, at 408 (arguing that “[t]here is, in principle, a normatively plausible case to be made for private governance beyond the state.”) Hugh Collins, *The Freedom to Circulate Documents: Regulating Contracts in Europe*, 10 EUR.L.J. 787, and HUGH COLLINS, *THE LAW OF CONTRACT* (London: Weidenfeld and Nicolson 1986), 208, (but see critically Jack Beermann, *Contract Law as a System of Values*, 67 B.U.L. Rev. 553 (1987)). Scholars emphasize that because regional or global institutions tend to suffer from one form or another of democratic deficit and regulatory under-capacity, dispersed private law-making bodies may provide alternative, or at least concurrent, loci of law production. See e.g. Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 EUR. L.J. 273 (1997). Most prominent in this respect is the theoretical architecture of deliberative democracy – a complex post-national coordination of grass-root deliberative levels, within an overarching constitutional design still populated by centralized authorities. J. HABERMAS, *BETWEEN FACTS AND NORMS – CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 350 (Cambridge: MIT Press 1995): “The constitutional structure of the political system is preserved only if government officials hold out against corporate actors and bargaining partners and maintain the asymmetrical position that results from their obligation to represent the whole of an absent citizenry...” Others, by contrast, deem private ordering a tool exploited by economic and political elites to consolidate their dominance, to establish codes of conduct that favor their interests only, and to bypass all forms of democratic control. See e.g. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (Harvard University Press 2000); James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hard-Wired Censors*, 66 U. CIN. L. REV. 177 (1997); Katerina Sideri, *Questioning the Neutrality of Procedural Law: Internet Regulation in Europe through the Lenses of Bourdieu's Notion of Symbolic Capital*, 10 E.L. J. 61 (2004); Shalakany, supra \_\_ (noticing how the private/public distinction, operating as a bias in the minds of international arbitrators, ends up confirming the subordination of developing countries.)

<sup>61</sup> Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INTL. L.J. 471 (2005). See also Craig, Scott & Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational ‘Private’ Litigation*, in Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., *TRADITIONAL GOVERNANCE AND CONSTITUTIONALISM* 287, 290 (Hart 2004): “[T]he existence of a multiplicity of international and

notwithstanding, the neo-liberal separation between *private* global commerce and *public* local government still offers a convenient backdrop for many analytical projects, whereby the private and public levels remain conceptually distinct and formally independent from one another.

From the stand-point of these pages, the problem with this line of scholarship is one of emphasis. An excessive focus on the spontaneity of private interactions underestimates the role of private law categories in the restructuring of post-national government. The contribution of private law discourse to the coagulation of sovereignty into new institutions with many state-like features remains all too often in the shade.

iii. *The homogeneity of private law discourse and the common/civil-law divide.* -

The commonality of private-law discourse throughout the western world – a basic assumption of this article – is by now an acknowledged phenomenon.<sup>62</sup> The celebrated dichotomy between judge-made common law and civil-law statutes is blurring away.<sup>63</sup> European code-based systems give increasing prominence to judicial precedents, even making room for policy arguments in hard cases.<sup>64</sup> The sharing of conceptual categories

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domestic legal institutions provide venues that are points of potential conflict and dispute between different systems of interests and values. The end of the pre-eminence of state law and the failure of any world government is not yet so dramatic as to end the need to consider familiar venues and styles of law-making and disputing.”

<sup>62</sup> See BERMAN, *LAW AND REVOLUTION*, supra \_\_\_. AUGUSTO CANNATA & ANTONIO GAMBARO, *LINEAMENTI DI STORIA DELLA GIURISPRUDENZA EUROPEA II*, 4<sup>th</sup> ed. 1989, Torino, 129-135.

<sup>63</sup> Mitchell de S.O.L'E. LASSER, *Judicial (Self-) Portraits: Judicial Disclosure in the French Legal System*, 104 *YALE L.J.* 1325, (1995); Martin A. Rogoff, *The French (R)evolution of 1958-1998*, 3 *COLUM. J. EUR. L.* 453, (1997).

<sup>64</sup> MITCHEL DE S.-O.-L'E. LASSER, *JUDICIAL DELIBERATIONS. A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY*, OUP 2005. See also Cooter, supra \_\_ 1651 (noticing that interpretation

is increasingly visible.<sup>65</sup> In the new as in the old Continent, private law is a blend of the same constituent elements – a natural-law basis, abundant layers of rationalist organization, systemic qualities, and a constant oscillation between formalism and functional adaptation to societal change. What seems to remain different in the way in which private law is conceptualized on the two sides of the Atlantic is its relation to sovereignty and constitutional structures.<sup>66</sup>

In Europe, where traditional ‘public’ matters such as judicial review and federalism are undergoing major supranational restructuring and re-conceptualization, scholars are busy revisiting national private law doctrines, reconstructing their

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of civil codes often coincides with a search for social norms); ROBERTO PARDOLESI & BRUNO TASSONE, I GIUDICI E L’ANALISI ECONOMICA DEL DIRITTO, Bologna 2003 (tracking the use of economic arguments in civil adjudication in Italian courts.)

<sup>65</sup> On the profound connections between European and American legal academia in the inter-war and post-WWII periods *see* Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 206 (1994).

<sup>66</sup> This argumentative stance does not ignore stylistic differences and the divergent impact of cultural heritage on the legal traditions of common and civil law. On such differences see most forcefully Pierre Legrand, *European Legal Systems are not Converging*, 45 INT’L. & COMP. L.Q. 52 (1996), and Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63 (2001). See also, amongst most recent contributions, Philippe A. Schmidt, *The Economic Dimension of Legal Systems: Civil Law and Common Law*, 51 LOY. L. REV. 27 (2005) (emphasizing the broader diffusion, higher predictability, and firmer theoretical structure of the Civil Law); Markus G. Puder, *Beer Wars - A Case Study: Is the Emerging European Private Law Civil or Common or Mixed or Sui Generis?*, 20 TUL. EUR. & CIV. L.F. 37, 53-54 (2005) (noticing, among others, differences in terms of style of legal thinking and reasoning). I aim, however, at linking the comparativists’ debate on civil/common-law differences to the question of the relation between private law and governance. On this question see, most recently, Kevin Kordana and David Tabachnick, *Rawls & Contract Law* (February 2005), University of Virginia Legal Working Paper Series, University of Virginia John M. Olin Program in Law and Economics Working Paper Series, Working Paper 15 (<http://law.bepress.com/uvalwps/olin/art15>), and the Virginia Law Review Symposium on Contemporary Political Theory and Private Law, February 17-18, 2006.

genealogies, reconsidering their implications for the welfare of EU citizens and assessing their regulatory potential.<sup>67</sup> The connection between private law and government is paramount and self evident in light of historical legacies. Private law absolved a prominent state-making function in 18<sup>th</sup> and 19<sup>th</sup> century continental Europe. Napoleon's imperial vision relied both on military victories and on the success of his codification design.<sup>68</sup> In the revolutionary project of breaking away from feudal constraints and judicial superpower, sovereignty implicated the ability to ensure the smooth running of private activities along the lines of pre-defined criteria, such as individual freedom and private property. The emphasis on private law codification was accompanied by rhetoric that downplayed the role of judges and portrayed the command of the legislator as determinative of adjudicatory outcomes.<sup>69</sup> By funneling the infinite varieties of human disputes through a limited set of organizing categories, and apparently ensuring the predictability of their outcomes, private-law codification allowed the incipient state to perform an allegedly essential function of government. Elsewhere in Europe, other sovereigns of grand visions undertook the task of guaranteeing predictability in the adjudication of private disputes. A uniform system of private law within precise territorial borders became a main ingredient of the modern nation-state. Like France, many other European nations linked the definition of a coherent body of private law to

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<sup>67</sup> See Hugh Collins, Editorial: *The Future of European Private Law: An Introduction*, 10 EUR.L.J. 649 (2004).

<sup>68</sup> For important qualifications see James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459 (1994).

<sup>69</sup> See e.g. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 374-431 (1968); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 36-42 (1969). Cf. Mitchel de S.-O.-l'E. Lasser, *The European Pasteurization of French Law*, 90 CORNELL L. REV. 995 (2005) (providing a critical revision of this traditional portrait of French civil law).

state unity, constitutional breakthroughs,<sup>70</sup> and national identity.<sup>71</sup> As a result of these legacies, “private law systems” are usually meant to be comprehensive bodies of rules whose source and enforcement are distinctly public, because legislators and judges clearly belong to the institutional apparatus of the modern state. This kind of private law, rather than breaking away from traditional state sovereignty, has often performed a significant state-making function in Western legal history. Eastern Europe’s rush to (re)codification in the aftermath of democratization highlights the vitality of this legacy.<sup>72</sup>

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<sup>70</sup>The Austrian civil code of 1811 was also promoted by rulers of powerful personality, at a time in which the empire was struggling to control the resistance of an ethnically varied population. See FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE WITH PARTICULAR REFERENCE TO GERMANY* 266 (Tony Weir trans., Oxford University Press, 1995). Wieacker uses the label “natural codes” to describe the code Napoleon, the Austrian ABGB of 1811 and the Prussian ALR of 1794. WIEACKER, *supra*, at 258 ff. See also VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO PRIVATE LAW*, *supra* \_\_ 125 (“Sovereigns regarded the promulgation of national codes as an essential component of their policies of unification.”) By the same token, Italy’s unification in 1860 was quickly followed by a codification of private law heavily inspired by French models. WIEACKER, *supra*, at 275 (noting that “the Codice civile of 1865 was the fruit of the movement for national unity.”)

<sup>71</sup> The German experience of codification differed from those of the ‘natural codes.’ The enactment of the BGB (1896) followed German unification by several decades. See C. Joerges, *The Science of Private Law and the Nation-State*, in F. SNYDER ed., *THE EUROPEANIZATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION* 47-82, at 48 (2000). Joerges explains that although German private law found its formal unity in the nation state, the autonomy and coherence of German private law was to be traced not to the positive enactment of the BGB but rather to the elaboration of law as science by the legal scholars of the 19<sup>th</sup> century. Cf. Reiner Schulze, *A Century of the Burgerliches Gesetzbuch: German Legal Uniformity and European Private Law*, 5 COLUM. J. EUR. L. 461, 462 (1999) (emphasizing that the BGB was in any case “a symbol of the consolidation of the nation-state and national unity.”).

<sup>72</sup> Alexander Biryukov, *The Doctrine of Dualism of Private Law in the Context of Recent Codifications of Civil Law: Ukrainian Perspectives*, 8 ANN. SURV. INT’L & COMP. L. 53 (2002).

In the U.S., the role of the common law (of property, torts, and contracts) in legal discourse is seemingly different. Common law is considered a “strong supplement”<sup>73</sup> of political democracy, but not a constituent or defining element of sovereignty. Federalism has disjoined the state monopoly of common law adjudication from a number of Washington-based functions of government.<sup>74</sup> The option of private law codification was contemplated in 19<sup>th</sup>-century America, but the very idea of ‘creating’ by legislative fiat laws that should only be ‘found’ in pre-existing truths encountered principled opposition,<sup>75</sup> and was blocked by conservative forces.<sup>76</sup> The values of continuity with the past and adaptability to future social developments triumphed over the opposite virtues of certainty and predictability. The ‘soft’ codification practice of the restatements, given its emphatically non-binding nature, does not formally break with tradition. The common law can still be conceptualized as an organic creature<sup>77</sup> in constant tension between its

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<sup>73</sup> “Anglo-American common law has been a strong supplement to political democracy. The courts enhance democracy by [... upholding] such nonpolitical rights as rights of property, procreation, parental authority, marital privacy, travel, and personal security.” Philip Selznick, *Communitarian Jurisprudence*, in David E. Carney ed., *TO PROMOTE THE GENERAL WELFARE* 3, 29 (1999).

<sup>74</sup> Most famously in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>75</sup> See Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 *BUFF. CRIM. L. REV.* 691, 766 (2003) (explaining that “The leader of the anti-codifiers in New York, James C. Carter, rejected any codification of private law, since, for Carter, the common-law judge was not ‘a maker, but a seeker, among divine sources for pre-existing truth.’ And if the truths of private law preexisted adjudication, they could not be ‘made’ by a legislature any more than by a judge. They could only be found, and only by the fact-intensive, evolutionary methods of adjudication. In the divine sources, the judge could only find private law, and even then the socially situated judge could only apply law that conformed to that society’s ‘social standard, or ideal, of justice.’” [footnotes omitted]).

<sup>76</sup> Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 *YALE J. INT’L L.* 435, 510-511 (2000).

<sup>77</sup> See F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER*, 134-136 (1973).

past and its future, irreducible to rigid schemes and therefore refractory to legislative intervention.<sup>78</sup>

As a result the connection between private law and the exercise of centralized sovereignty, so deeply rooted in European history, remains less visible and less intuitive in the U.S. In common-law jargon, the wording “private law system” is often understood to be the product of private law-making sources – as in the case of closely-knit business communities developing self-reflexive norms of interaction for their members.<sup>79</sup> The state-breaking implications of private autonomy gain utmost visibility in the now extensive literature on “norms” or “private ordering.”<sup>80</sup> The old law-merchant of the Middle Ages provides a convenient genealogy for this discursive strand, whereby private disputes are resolved not on the basis of legislative fiat, but rather according to pre-positive norms to be found in morals or reason.<sup>81</sup>

Norms are private guidelines of conduct, which, by definition, are not subject to judicial enforcement, and therefore antipodal to private-law rules produced by and enforced through the state.<sup>82</sup> Norms are attractive because of their decentralized,

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<sup>78</sup> On anti-positivism in US private law see Ugo Mattei, *Why the wind changed*, supra \_\_ at 205 (noting that “American legal culture has never been positivistic for the simple reason that the law taught in national law schools was not the law applied in the different American states.”)

<sup>79</sup> David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

<sup>80</sup> Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

<sup>81</sup> See di Robilant, *Genealogies*, supra \_\_.

<sup>82</sup> “Private” also indicates the fact that disputes among group members will not be referred to state-controlled courts, but rather resolved informally within the community. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60-62 (1963) (contract enforcement often occurs outside courtrooms), and Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC’Y REV. 719, at 742-45 (1973) (on rule enforceability in the absence of state power).

emergent character, which is allegedly best attuned to the needs and efficiency concerns of discrete communities.<sup>83</sup> Norm scholars disagree – today as in the times of Llewellyn – as to the merits of elevating private norms to the status of enforceable rules by either incorporating them in statutes or instructing courts to follow them in formal adjudication.<sup>84</sup> Yet they all conceive of law production as appropriately independent from the state at least at its inception.

iv. *State-making and state-breaking in western private law.* - This tension between the new and the old Continent – namely, the outlined contrast between centripetal and centrifugal trends in private law discourse – does not take away from the substantial homogeneity of western private law.

A constant feature of private law in its global manifestations is its ambivalence. Like a coin of the Roman empire, private law displays, in its transnational circulation, either of two sides. One side points at purely local, centrifugal dimensions (in Roman coins, religious rituals or symbols of harvest). But the flip side shows, unmistakably, the head of the Emperor, and links even the most discrete, peripheral form of exchange to a powerful centralized infrastructure.

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<sup>83</sup> ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 52-56 (Harvard University Press 1991).

<sup>84</sup> Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (arguing that norms are best dealt with by refusing to enforce them in court); Richard H. McAdams, *Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 391 (1997-1998) (“[A]n important function of law is to shape or regulate norms.”) See also ELLICKSON, *supra* \_\_\_ at 249-58; David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 426-30 (1990); and Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 155-60 (1996).

The two inseparable strands of classical private law discourse synergize and produce a powerful legitimating function in transnational settings. Private law can easily permeate the international arena and acquire high currency when deployed in its pre-positivist, disaggregating mode, which presupposes the lack of centralized hierarchies, and emphasizes spontaneity and dispersion of sovereignty. This mode prevails in global settings. Once popular and widely diffuse, however, private law discourse can emphasize the values of coherence, internal logic, symmetry of concepts, and the virtues of a system that aspires to channel all human interactions into patterns of moral or economic soundness. In this technical and seemingly neutral mode, private law can produce the non-intuitive effect of reinforcing centralized authorities as they struggle to emerge in a post-national scenario.

With this image in mind, it is possible to take a fresh look at the world of post-national developments, in order to identify a number of most interesting coin-flips.

## II. STATE-MAKING THROUGH PRIVATE LAW IN THE INTERNATIONAL SPHERE:

### CASE STUDIES

1. *Private law and the rise of new institutions.* - The on-going proliferation of non-governmental adjudicatory bodies of international law is an increasingly important topic in both academic and political circles.<sup>85</sup> In contrast to the traditional realist view of international law, whereby diplomacy, raw politics, and states' self interest dominate the

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<sup>85</sup> Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999).

scene of intergovernmental relations, scholars are placing growing emphasis on the role of international courts and tribunals. In such adjudicatory bodies, international law might 'harden' and finally produce a quasi-constitutional architecture for smoother relations in a global community.<sup>86</sup>

The few courts and tribunals that allow access to private parties provide the highest forms of 'judicialization' on the international scene. In such fora, individual rights can be used as shields against governmental takings or trespasses, in apparent disregard of political arguments. The European Court of Justice (ECJ) in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg have long implemented this model. In a totally different context, but again with the object of replacing gun-boat diplomacy with rule-of-law adjudication, NAFTA has more recently provided foreign investors with the opportunity to handle their disputes with host states before impartial arbitral panels.<sup>87</sup> Scholars have observed, however, that even when non-state actors are given access to international courts, governments still design non-domestic adjudicatory

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<sup>86</sup>Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003), observing that "the sheer volume of transnational disputes generated by a globalizing economy has brought national judges into contact with one another as never before, marking a difference not only in the degree, but also in the nature of their interactions," (193) and predicting that "Over the longer term, a distinct doctrine of "judicial comity" will emerge: a set of principles designed to guide courts in giving deference to foreign courts as a matter of respect owed judges by judges..." (194).

<sup>87</sup> For an analogy between NAFTA Chapter 11 and human rights regimes granting individual standing see Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 MIAMI INTER-AM. L. REV. 303 (1997); for an analogy between the 'constitutionalization' brought about by NAFTA Chapter 11 and the supranational regime established by European Community Law in the past 50 years see Ari Afilalo, *Constitutionalization through the Back Door: A European Perspective on NAFTA's Investment Chapter*, 34 N.Y.U. J. INT'L L. & POL. 1, at 7 (2001), arguing that "[S]uch a deep level of constitutionalization is inappropriate for NAFTA."

systems in such a way as to leave themselves political safety valves.<sup>88</sup> For international adjudication to appear credible and overcome such critiques, more than a generic appeal to the rule of law is necessary. Where the consolidation of international law into hard, predictable rules is desirable, it is important that disputes be handled in an “adversarial setting between two clearly identified litigants.”<sup>89</sup> In other words, horizontality enhances the credibility of adjudication.

Private law discourse, in the simplified version so popular in international circles, is horizontal by definition. The following pages provide three different accounts of the way in which private law can effectively consolidate the power of international adjudicatory systems, by lending them the appearance of impartiality, adherence to the rule of law,<sup>90</sup> and deafness to the noise of international politics.

We start with the contribution of private law discourse to the creation of new powerful institutions in post-WWII Europe. For roughly 50 years, the economic and political integration of the old Continent has been facilitated by the adoption of a legal structure often referred to as supranationalism. In this model, inter-state obligations are

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<sup>88</sup> Some critics point out that, for the most part, such fora are only accessible to state actors, and still dominated by the old logic of diplomacy and power games rather than by an objective and impartial rule of law. Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 415 (2003). Even in “court-like” settlement mechanisms such as those set up by the WTO, dispute resolution is all but blind to governments’ concerns or free from diplomatic interference Alvarez, the new dispute settlers. *Id.* at 414. Judicialization – the critique goes – does not necessarily displace politics. The WTO dispute settlement mechanism is more “court-like” than –say – the UN Compensation Commission, which hears international claims involving economic loss, or than most international human rights bodies. Even so, it is still the case that “WTO dispute settlement is political both at its inception and at its end.” (*Id.* at 414-415).

<sup>89</sup> Alvarez, *The New Dispute Settlers*, *supra* \_\_ 414-415.

<sup>90</sup> WEINRIB, THE IDEA OF PRIVATE LAW, *supra* \_\_ at 231, suggests that private law might be an example of “the autonomy that we associate with the rule of law.”

reinforced by states' specific obligations towards their own citizens, recognized and enforced by local courts. The collaboration of national enforcement authorities lends strength to otherwise toothless international commitments.<sup>91</sup>

The first illustration of this phenomenon pertains to the judicial discourse of the ECtHR, which partakes of several supranational features. This court's jurisdiction extends over a geographic and political area significantly larger and less homogeneous than the European Union, and is often called to adjudicate human rights matters against the background of political revolutions and *coups d'état*. We shall observe how the use of private law paradigms may help this court bypass thorny issues of international politics and handle state-citizen relations as if simply governed by rule-of-law criteria.

In a sense, this illustration is marginal. The role of private law discourse in the Strasbourg court is minor, subliminal, and indirect. The entire worldview of the actors involved (parties, governments and judges) is shaped by public law considerations. But the example is nonetheless quite telling. Even when buried in the subtext, private law can strangely depoliticize the context of human rights disputes and allow for otherwise unpalatable, ideologically colored holdings.

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<sup>91</sup> Helfer & Slaughter, *supra* \_\_ at 287. Typical traits of supranational structures are the presence of an ad-hoc Court, meant to enforce the states' commitments toward one-another; the possibility for individuals to obtain judicial redress against their own states directly in national courts, or through the cooperation of home-based enforcement authorities; and the power to make enforceable decisions even without the full cooperation of all member states (see HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 46-48 (4th rev. ed., 2003)). It is thanks to these features that supranational institutions achieve a level of effectiveness usually inconceivable outside domestic arenas. The logic of supranationalism is highly appealing to international lawyers preoccupied with the traditional ineffectiveness of international law. Supranational models of adjudication have successfully been applied in the field of international human rights.

Arranged in a crescendo, the second illustration pertains to a much more overt use of private law doctrines to strengthen the institutional design of the EU. Over the years, Community law has increasingly populated the realm of disputes between private parties, and utilized the ideologically neutral strength of private law remedies in state courts to enhance its effectiveness. In many ways, this has proven a highly effective way of bypassing political resistance to the expansion of ‘federal’ powers and to the constitutional establishment of the EU legal order.

The third illustration is the most explicit of the three, and is set on a stage fully dominated by private law considerations. It focuses on *lex mercatoria*, and explores yet another mode in which private law can contribute to constitutionalize otherwise feeble legal systems. In transnational commerce, private contracts are sufficient to devise substantive rules and to establish private arbitration bodies, seemingly independently from state-based institutions.<sup>92</sup> Once legitimized by this triumph of private autonomy, new substantive law and new quasi-judicial fora may lead, as if by necessity, to the creation of powerful post-national institutions.

ii. *Private law and state-making in human rights adjudication.* - International human rights regimes that are exclusively based on the purely contractual paradigm of intergovernmental treaties tend to be weak.<sup>93</sup> By contrast, granting individuals direct access to a supranational court, whose jurisdiction and authority are fully recognized by

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<sup>92</sup> W. LAWRENCE CRAIG, WILLIAM W. PARK, JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 657-658 (3d ed., Oceana Publications 2000).

<sup>93</sup>Helfer & Slaughter, *supra* note \_\_, 285-286.

member governments, has created the most successful enforcement of human rights against states.<sup>94</sup>

Though substantially more resilient than traditional intergovernmental agreements, this supranational model of human rights enforcement still bears weakening traits. The vertical relationship between a sovereign state and its rights-bearing citizens is necessarily characterized by a great deal of discretion. It is common, and in fact mandatory, for a government to define the area of individual rights in such a way as to maximize the public good. The amount of restrictions that can be legally imposed upon fundamental liberties is a function of a state's definition of both collective needs and individual entitlements.<sup>95</sup> Deciding what amounts to a human rights violation and what remains, by contrast, a legitimate use of state power is often a matter of political sensibility. A supranational human rights court preoccupied with preserving its legitimacy and authority always walks a fine line between lawful use of judicial discretion and encroachment upon sovereign political choices.<sup>96</sup> When dealing with relations among sovereign governments, such a court also runs the risk of privileging the

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<sup>94</sup> Jose E. Alvarez, *The New Dispute Settlers*, *supra* \_\_, 412 (“[T]he number of international tribunals which have, to date, effectively opened their doors to NGOs or individuals is small indeed. The principal significant examples remain the Luxembourg and Strasbourg Courts as well as, to a lesser extent, the Inter-American Court of Human Rights.”)

<sup>95</sup> Governments, for instance, commonly respond to threats to public security by narrowing the scope of individual freedom by means of regulatory constraints of varying intensity, depending on circumstances and political judgment. The European Court of Human Rights' "margin of appreciation" doctrine is meant to grant states some discretion in such matters. See Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 450-466 (2001).

<sup>96</sup> See Oliver Gerstenberg, *Private Law and the New European Constitutional Settlement*, 10 EUR. L. J. 766 (2004).

world-view of certain signatory states while penalizing others, and therefore abdicating its role of *super partes* enforcer. Faced with highly politicized questions and conflicting views in the international community, the court may often decide to deny claims on preliminary grounds of admissibility. Alternatively, judges will admit petitioners' applications, but then engage in a more or less intentional quest for formalist solutions and objective adjudicatory guidelines, exonerating them from charges of ideological bias.

In the famous *Loizidou* case, discussed and adjudicated by the ECtHR at different points in time throughout the 1990's, the rhetoric of private law effectively performed the function of de-politicizing controversial issues, making decisions possible and conferring them legitimacy in the eyes of the international community.<sup>97</sup>

Ms. Loizidou, a resident of Nicosia, owned land in the Northern part of Cyprus, but could not access or develop it according to her wishes, because of the known political split of the island.<sup>98</sup> In 1989, Ms. Loizidou had taken part in a march organized by the

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<sup>97</sup> The ECHR has always proffered strict adherence to the rule of law. Protecting individual rights from politically motivated encroachment is the core mission of this and other courts born out of the ashes of WWII. The Council of Europe, established in 1948, instituted the European Court of Human Rights in 1950, with the clear mission of ruling out the possibility of genocide and other atrocities against individuals enacted by Nazi and Fascists authorities. A. H. ROBERTSON & J. G. MERRILLS, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 3-4 (4th ed., Manchester University Press 2001) The Italian "Corte Costituzionale" and the German Bundesverfassungsgericht, contemplated by the constitutions of 1948 (Italy) and 1949 (Germany), are expressions of the same ideology and stem from the same historical momentum.

<sup>98</sup> The Cypriot question is notoriously intractable, and far too complex to be summarized here. *See* for a detailed illustration of the conflict: DAVID HANNAY, *CYPRUS: THE SEARCH FOR A SOLUTION* (I.B. Tauris & Co. Ltd. 2005) and for a brief discussion: Gustave Feissel, *The United Nations Efforts for a Settlement of the Cyprus Problem*, in *SOCIETIES IN CONFLICT: THE CONTRIBUTION OF LAW AND DEMOCRACY TO CONFLICT RESOLUTION*, 167 ff (Council of Europe Publishing 2000). Notwithstanding intense diplomatic efforts the island is still politically divided. Its northern part is governed by the Turkish Republic of

“Women Walk Home” movement, meant to assert the right of Greek Cypriot refugees to return to their land in the Northern part of the island. The demonstration had involved crossing the UN buffer zone and, for some women, even reaching past the Turkish forces’ line.<sup>99</sup> During the demonstration, Ms. Loizidou had been arrested and detained by Turkish soldiers, and was now seeking redress before the Strasbourg court. The case had the usual vertical dimension, with an aggrieved individual petitioning against a signatory state (Turkey).<sup>100</sup> The facts of the case, however, took place in the Turkish Republic of Northern Cyprus (TRNC), which is neither a party to the European Convention nor, by most accounts, a state.<sup>101</sup> Turkey disclaimed any official involvement in the actions of the TRNC.<sup>102</sup> Against this background, how could the Court offer Ms. Loizidou

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Northern Cyprus, an entity that the international community, with the exception of Turkey, refuses to recognize as a state. HANNAY, *supra*, at 8.

<sup>99</sup>Secretary-General of the United Nations, report of May 31<sup>st</sup>, 1989 on the United Nations Operation in Cyprus (for the period 1 December 1988 - 31 May 1989) (Security Council document S/20663) para. 11, as reported in *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 518-19, para. 15 (1997) (Merits).

<sup>100</sup> The European Court of Human Rights deals only occasionally with conflicts between signatory states Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, *opened for signature* May 11, 1994, art. 33, Europ. T.S. No. 155, 5 [hereinafter Protocol No. 11]; *Cyprus v. Turkey*, 23 Eur.H.R. Rep. 244 (1997) (Commission Decision). Like *Loizidou*, Most of the cases on its docket concern vertical relations between states and individuals. The parties must have already exhausted all other remedies. The court can only be invested with the adjudication of a given dispute when it is clear that the petitioner enjoys no legal remedy under national law. Protocol No. 11, *supra* note 36, art. 35 I, Europ. T.S. No. 155 at 5; *Cyprus v. Turkey*, 23 Eur. H.R. Rep. 244, 283 (1997) (Commission Decision).

<sup>101</sup> To this day, the international community does not recognize the TRNC as a State. *See* HANNAY, *supra* \_\_, at 8.

<sup>102</sup> *See* *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 535 (1997) (Merits) (Concurring opinion of Judge Wildhaber, joined by Judge Ryssdal): “In the instant case, the Court is faced [...] with the respondent Turkish Government which alleges a right to self-determination of the "TRNC" in order to disclaim responsibility for a violation of certain Convention guarantees; and with an international community which refuses to recognize the entity which claims a right to self-determination (the "TRNC").” According to the

protection without disputing in any way the lawfulness of Turkey's military presence on the island? How could it find Loizidou's application admissible, and yet avoid venturing in "a highly political area"?<sup>103</sup>

The applicant lamented the violation of a number of Convention articles (prohibition of inhuman and degrading treatment, right to liberty and security, right of respect for private and family life), but the Court systematically rejected her claims.<sup>104</sup>

The applicant's property rights were all that carried the day for her.

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Turkish government, Turkey's invasion of Northern Cyprus on July 20, 1974 was a legitimate response to the 1974 coup d'état by Greek officers of the Cypriot government which the Turkish government regarded as tantamount to de facto enosis. Marios L. Evriviades, *The Legal Dimension of the Cyprus Conflict*, 10 TEX. INT'L L.J. 227, 262 (1975). The coup amounted to a breach of Art. II of the Treaty of Guarantee, signed on Aug. 16, 1960, U.K.-Greece-Turkey-Cyprus, 382 U.N.T.S. 3 [hereinafter Treaty of Guarantee] which was designed to guarantee the status quo of the Republic of Cyprus and which prohibited any efforts "aimed at promoting ... either union of Cyprus with any other State or partition of the Island." Treaty of Guarantee, art. 2. The Turkish government justified the second phase of the invasion which led to the occupation of Northern Cyprus and its continued presence in Cyprus arguing that as a Guarantor Power it had the right to rebuild the destroyed state on a sounder basis and to protect the human rights of the Turkish Cypriot minority. D.S. Constantopoulos, *Summary: International Law Aspects of the Turkish Invasion of Cyprus*, 21 GERMAN YB OF INT'L L. 308, 308 (1978); KYPROS CHRYSOSTOMIDES, *THE REPUBLIC OF CYPRUS: A STUDY IN INTERNATIONAL LAW* 131 (Kluwer Law International 2000). The court bypassed Turkey's preliminary objection on the basis of the one thing that Turkey did not dispute: the actual deployment of its military forces in Northern Cyprus. The court established that "the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory." *Loizidou v. Turkey*, 20 Eur. H.R. Rep. 99, 130, para. 62 (1995) (Preliminary Objections), as recalled by the court itself in *Djavit An v. Turkey*, no. 20652/92, ECHR 2003-III, para. 52.

<sup>103</sup> *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 547-48 (1997) (Merits) (Dissenting opinion of Judge Gölcüklü, para. 1).

<sup>104</sup> *Loizidou v. Turkey*, 20 Eur. H.R. Rep. 99, 113ff, para. 46ff (1995), incorporating the report of the European Commission of Human Rights (Commission Report III, para. 46ff). Ms. Loizidou's application (App. No. 15318/89, lodged on 22 July 1989) complained that her arrest and detention involved violations of Convention Articles 3 (prohibition of torture and inhuman or degrading treatment or punishment), 5

A protocol added to the Convention in 1952 devotes its first article to the “Protection of Property.” Property is a philosophical and political concept with many dimensions. Within the relatively narrow universe of positive law, property is at the same time governed by private law, constitutions, and human rights charters. Conventionally, in the western world, constitutions protect ownership from arbitrary government takings, and make lawful takings conditional upon payment of compensation. The constitutional guarantee of property pertains, in other words, to vertical relations between states and citizens, and attempts to strike a balance between individual ownership and public interests. By contrast, the regulation of property by means of private law addresses horizontal disputes between two or more parties claiming conflicting entitlements to the same ‘thing.’ While constitutional property clauses pertain to discretionary exercise of state powers, classical private-law doctrines are allegedly aimed at solving only conflicts between litigants.<sup>105</sup> When using these doctrines in court, judges may exercise judicial discretion in balancing the interests of the parties involved, but they may not directly account for public interests or redistributive policies of any kind.

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(Right to liberty and security) and 8 (right to respect for private and family life). Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] She also claimed violations of her right of access to property Article 8 and Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Mar. 20, 1952, Europ. T.S. No. 9 [hereinafter Protocol No. 1]. *Loizidou v. Turkey*, 20 Eur. H.R. Rep. at 113 para. 34 (1995) (Preliminary Objections). The Court found that Ms. Loizidou’s detention had been lawful, as in compliance with rules established to safeguard the buffer zone separating the two parts of the island for reasons of safety. *Loizidou v. Turkey*, 20 Eur. H.R. Rep. 99, 117-18, para. 76-85 (1995) (Preliminary Objections).

<sup>105</sup> Daryl J. Levinson, *supra* \_\_\_, 1313.

The property clause of the Convention's protocol, for the most part, addresses vertical conflicts between sovereign states and their subjects, and has a distinct constitutional flavor:

[...] No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The ECtHR regularly interprets this provision in the context of most varied disputes. Case subjects range from rent-control legislation in Italy to confiscation of private property in Romania.<sup>106</sup> Each time, in unmistakably constitutional jargon and with constant recourse to balancing tests, the Court determines whether the respondent state has overreached in its definition and pursuit of the public interest.<sup>107</sup>

In the *Loizidou* case, this vertical dimension yielded nothing for the applicant. The court acknowledged that Ms. Loizidou had been refused access to her land since 1974 and that she had “effectively lost all control over, as well as all possibilities to use and enjoy, her property.”<sup>108</sup> This interference with her property rights, however, could

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<sup>106</sup> See e.g. *Vasilescu v. Romania*, 73 Eur. Ct. H.R. (ser. A) at 1043 (May 22, 1998), 1998 Y.B. Eur. Conv. On H.R. 280, 28 Eur. H. R. Rep. 241, and *Brumarescu v. Romania*, 33 Eur. H.R. Rep. 862 (1999).

<sup>107</sup> *Fredin v. Swedin*, 13 Eur. Ct. H.R. (ser. A) at 784 (Feb. 18, 1991), 13 Eur. H. R. Rep. 784. “The Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the individual's fundamental rights. Inherent in the whole system of the Convention is the assurance of such balance which is reflected also in the structure of Article 1 of Protocol I.” For an analysis of the ECtHR's jurisprudence in matters of property see Sanja Djajic, *The Right to Property and the Vasilescu v. Romania Case*, 27 SYRACUSE J. INT'L L. & COM. 363, esp. at 369-378 (2000).

<sup>108</sup> *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 533 para. 63 (1997) (Merits).

not “be regarded as either a deprivation of property or a control of use”<sup>109</sup> because Turkey, the respondent government, simply lacked the legal capacity to expropriate anyone on Cypriot land.<sup>110</sup> This was a vertical dispute with no vertex.

The case could have ended there, and go to history as yet another dismissal of private owners’ claims to land situated in occupied territories.<sup>111</sup> Such a holding would also have met with the approval of several members of the court.<sup>112</sup> But the Grand Chamber’s majority concluded otherwise, and thought it feasible to adjudicate the case along legal, non-political lines. The proper textual basis for Ms. Loizidou’s complaint was to be found not in the above-quoted portion of the Convention’s property clause, but rather in its opening line: “Every natural or legal person is entitled to the peaceful

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<sup>109</sup> *Id.*

<sup>110</sup> *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 528, para. 49 (1997) (Merits): As submitted by Ms. Loizidou and echoed by the Cypriot government, “the authorities alleged to have interfered with the right to the peaceful enjoyment of possessions are not those of the sole legitimate government of the territory in which the property is situated.”

<sup>111</sup> Individual claims for compensation, brought before international tribunals, tend to be successful only *after* the inter-national dispute is fully solved, and only on the basis of peace treaties between occupying and occupied countries. See Eyal Benvenisti and Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 A.J.I.L. 295, 331-332 (1995).

<sup>112</sup> Six out of the seventeen judges composing the Grand Chamber produced a total of 5 forceful dissenting opinions; two other judges wrote a concurring opinion. Judge Gölcüklü, in particular, thought that allowing Loizidou’s claim to prevail would equal to venturing in a highly political area, far beyond the jurisdiction of the court. *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 547-48 (1997) (Merits) (Dissenting opinion of Judge Gölcüklü, par 1). Gölcüklü is the Turkish member of the Court. In his view, Ms. Loizidou’s victory in court would imply an impermissible assessment of “the capacity in which Turkey is present in northern Cyprus” or of “the legal existence of the Turkish Republic of Northern Cyprus.” *Id.* “[I]n the present case” – Gölcüklü warned his brethren — “... it is impossible to separate the political aspects of the case from the legal aspects.” *Id.* at 551, Par 4. *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 536 (1997) (Merits). The dissenting opinion of judge Bernhardt joined by judge Lopes Rocha, at para. 1, contained analogous remarks: “A unique feature of the present case is that it is impossible to separate the situation of the individual victim from a complex historical development and a no less complex current situation.”)

enjoyment of his possessions.” This switch of textual basis – from *de jure* “deprivation...in the public interest” to *de facto* interference with “peaceful enjoyment”<sup>113</sup> – empowered the Court to review the same facts according to more stringent criteria. Turkey’s actions did not amount to *legal* expropriation or taking of Loizidou’s property. Yet as a matter of sheer fact, possession had been disrupted. At this level, the Court was willing to reject Turkey’s political justifications as wholly insufficient.<sup>114</sup>

Interestingly, the distinction between ownership and possession is firmly based on private law doctrines.<sup>115</sup> Moreover, “peaceful enjoyment of possession” is private law jargon, heard often in the context of neighbors’ disputes, and is aptly used in the context of such torts as nuisance or trespass on land.<sup>116</sup> It also characterizes tenants’ complaints against landlords,<sup>117</sup> lessees’ grievances against lessors,<sup>118</sup> and relatives’ disputes concerning the use of family property.<sup>119</sup> Strasbourg’s property clause is mostly aimed at vertical relations, but its beginning alludes to such basic canons of private law as the owner’s *ius excludendi* – the right to exclude all others from his land and its corollary

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<sup>113</sup> On the distinction between these two different dimensions of Article 1 Protocol 1, as articulated in other cases of the ECtHR, see IAIN CAMERON, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 94-95 (1995).

<sup>114</sup> Turkey’s justifications were based on the doctrine of necessity, on the fact that at the time the two parts of the island were engaged in “intercommunal talks” in pursuit of diplomatic solutions, and on the need to rehouse displaced Turkish Cypriot refugees after the Turkish intervention in the Island in 1974. *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 533 para. 64 (1997) (Merits).

<sup>115</sup> See James Gordley & Ugo Mattei, *Protecting Possession*, 44 AM. J. COMP. L. 293 (1996) (tracking the distinction between possession and ownership in civil law.)

<sup>116</sup> *Bedell v. Goulter*, 199 Ore. 344, 362-363 (1953); 261 P.2d 842, 850.

<sup>117</sup> *Rowland v. Klies*, 223 Mont. 360 (1986); 726 P.2d 310.

<sup>118</sup> *Evangelical Lutheran Church v. Stanolind Oil & Gas Co.*, 251 F.2d 412 (8th Cir. 1958).

<sup>119</sup> *In re Marriage of Patricia Tober and Rees Lloyd*, B150943, 2004 Cal. App. LEXIS 8072.

right of action against trespassers. The Turkish Government was liable not because of any discretionary exercise of sovereign powers that could be imputed to it; rather, it was liable because its soldiers happened to interfere with the applicant's peaceful enjoyment of her possession, just as a noisy neighbor or an intrusive landlord might have done. Ms. Loizidou's problems stemmed simply from "an individual act of Turkish troops directed against her property."<sup>120</sup> Reduced to this anodyne horizontal dimension, Turkey's condemnation in Strasbourg became plausible and palatable.<sup>121</sup>

In time, the *Loizidou* judgment paved the way to a series of judicial<sup>122</sup> and legislative<sup>123</sup> developments that greatly expanded the scope of Greek Cypriots' entitlements in Northern Cyprus. But it took private law jargon to alleviate the judges' fear of touching this political third rail.

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<sup>120</sup>See *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 536 (1997) (Merits) (Dissenting opinion of the vice-president of the court, Judge Bernhardt, joined by Judge Lopes Rocha) (criticizing the majority's reductionist view of the case).

<sup>121</sup> Following the judgment on the merits, in 1998 the Court awarded Loizidou both pecuniary and nonpecuniary damages "in respect of the anguish and feelings of helplessness and frustration which the applicant must have experienced over the years in not being able to use her property as she saw fit." *Loizidou v. Turkey*, (Article 50), 1998-IV (1998), para. 39. Loizidou finally received 457,084.83 CYP in compensation. *Loizidou v. Turkey*, 26 Eur. H.R. Rep. D5, D10 (1998) (Just Satisfaction).

<sup>122</sup> The Court made it clear that the holding was specifically tailored to Ms. Loizidou's peculiar circumstances, and did not implicate the general situation of the property rights of Greek Cypriots in northern Cyprus (*Loizidou v. Turkey*, 26 Eur. H.R. Rep. CD 9, para. 40 (1998) (Just Satisfaction)). However, later holdings in Strasbourg have been much harsher against Turkey in matters of Greek Cypriots' property rights. See e.g. *Cyprus v. Turkey*. 35 Eur.H.R. Rep. 30 (2002) (Merits) (especially para. 77, where the court greatly expands the definition of Turkey's liability stemming from *Loizidou* principles); see also *Djavit An v. Turkey*, App. No 20652/92, ECHR 2003-III, at para. 23.

<sup>123</sup> Case of Eugenia Michaelidou Developments Ltd. and Michael Tymvios v. Turkey, App. No. 16163/90, [2003] ECHR 418, para. 14 (31 July 2003): "On 30 June 2003 the "Parliament of the Turkish Republic of Northern Cyprus" enacted the "Law on Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus", which entered into force on the same day."

iii. *European Integration through Private Law*. - In the 1980s, a path breaking project of the European University Institute entitled “Integration through Law” launched a series of inquiries on the legal strategies that could most effectively promote political and economic cooperation among traditionally independent sovereign states.<sup>124</sup> The main focus of that project was the ongoing progression of European nation-states toward a quasi-federal model, in which competencies and powers would be transferred to central authorities while keeping sovereignty in the hands of constituent members. Though the European Economic Community (EEC) did not aim to become a federal government, its aspirations were indeed State-building, at least in the loose sense of the term adopted in these pages. The legislative institutions established in 1957 by the Treaty of Rome lacked the usual democratic credentials of national parliaments. In order to operate effectively, they had to gain further legitimacy in the eyes of the peoples of Europe. The surprising activism of the Community’s only judicial body, the ECJ, begged for institutional justification. Because the European architecture needed reinforcement to continue to exist and to expand further, a new legal system had to be built.<sup>125</sup>

The fully fledged legal order established over the past fifty years and now known as the EU is commonly understood as a creature of public law. Its history and institutions can be explained with the jargon and conceptual categories of public law’s three main articulations – international, constitutional, and administrative law. The project of

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<sup>124</sup> CAPPELLETTI, SECCOMBE & WEILER Eds, *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* (1986).

<sup>125</sup>See Joseph H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991) (esp. at 2410 ff., analyzing the foundational work of the ECJ that gave the Community, “in stark change from the original conception of the Treaty, its basic legal and political characteristics.” )

integrating the six founding members began with what looked like a classic international treaty, signed by State representatives and characterized by abundant homage to State sovereignty. The institutional status of the Treaty of Rome – most noticeably the direct enforceability of many Treaty provisions in national courts – lacked precedents in the history of intergovernmental relations, and required new international-law conceptualization.<sup>126</sup> Where international lawyers could not reach, constitutionalists stepped in, and explained that national constitutions had or could make room for areas of shared or delegated sovereignty.<sup>127</sup> The judicial reviewability of Brussels-made legislation – another fundamental trait of the European legal structure – was based on a French model of administrative law.<sup>128</sup>

Private lawyers were nowhere to be seen. In the 1980s, it was still not clear that private law could have anything to contribute to this form of State-making. Throughout its two volumes, *Integration through Law* paid only tangential attention to civil codes and incipient private-law harmonization.<sup>129</sup> Two decades later, it is instead apparent that

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<sup>126</sup> See Weiler, *Transformation*, supra \_\_ 2413 (observing that, by attaching “direct effect” to a number of Treaty provisions, and making such provisions enforceable on behalf of individual parties in disputes before national courts, the ECJ “reversed the normal presumption of public international law whereby international legal obligations are result-oriented and addressed to states.”) Cf. Joseph H.H. Weiler, *Rewriting Van Gend & Loos: Towards a Normative Theory of ECJ Hermeneutics* (2006, manuscript on file) (offering a new reading of the doctrine of direct effect and demonstrating its compatibility with most orthodox international law.)

<sup>127</sup> See e.g. P. Kirchhof, *The Balance of Powers between National and European Institutions*, 5 EUR. L. J. 225, 227-228 (1999).

<sup>128</sup> Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 661 (1999).

<sup>129</sup> See e.g. 1 INTEGRATION THROUGH LAW, supra note \_\_, at 35 (discussing the need to approximate private laws of competition and torts); 2 INTEGRATION THROUGH LAW, supra note \_\_, at 160 (“There is very little which has been done so far by private institutions in order to achieve greater integration among European

private law methodologies have contributed a great deal to the creation of supra-national legal structures in the EU. The establishment of a supranational entity requires achieving two different goals. The first one, state-breaking, consists of softening the sovereignty of the entity's constituent members at the margins. The second one, State-making, involves endowing the new entity with a set of substantive rules of law capable of binding both constituent governments and individual citizens. As the legal history of the Union illustrates, private law achieves both.

The main private-law steps on the path to Europeanization can be summarized as follows. The first move consisted of allowing Brussels' law into the realm of inter-private disputes. Already in 1976, the ECJ held that such Treaty provisions as the prohibition of gender discrimination (EEC Article 119) were to be obeyed not only by the Community's member-States (the immediate addressees of Treaty commands), but also by private employers in purely horizontal relations.<sup>130</sup> The possibility that Treaty provisions would have horizontal direct effect seriously upset the custom of keeping international norms out of the purview of inter-private litigation.<sup>131</sup> Yet this holding squared perfectly with the celebrated consistency of private contract rules, which are meant to bind in identical fashion both the state – whenever it acts in the capacity of private employer – and its

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States.”); *Id.* at 256 (“[P]olitical and technical obstacles may make it impossible for the harmonization of substantive law to keep pace with the dismantling of economic frontiers.”); 3 INTEGRATION THROUGH LAW, *supra* note \_\_, at 372-374 (on the impossibility of reviving doctrinal legal unity in Europe).

<sup>130</sup> *Defrenne v. SABENA*, Case 43/75, [1976] ECR 455, par. 39: “[T]he prohibition on discrimination between men and women ...also extends... to contracts between individuals.”

<sup>131</sup> GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 251 (2<sup>nd</sup> ed., 2002) (noting that, beside the prohibition of gender discrimination (now in TEC Art. 141), the following EC Treaty provisions have been found to have direct horizontal effect: TEC Artt. 81-82, (prohibition of anticompetitive agreements and of abuse of market dominance) and TEC Art. 39 (prohibition of nationality discrimination against workers from other EC states).

citizens. Thanks to the private-law axiom of across-the-board consistency, European integration smoothly conquered the land of private contracts. Its entrenchment in states' legal systems, as a result, became immensely more significant.

Next came the battle for remedies. Born out of the agreement of six equally sovereign nations, Community law bore the stigma of unenforceability typical of international treaties. To redress this fundamental weakness, first the ECJ requested that national courts grant the remedy of restitution to citizens who had paid money into State coffers, when such payments turned out to be contrary to Community law.<sup>132</sup> Restitution is a typical public-law remedy invoked by citizens in vertical disputes when public agencies have imposed illegal charges. A much fuller range of remedies, however, could only be found in private law, which allows for recovery of reliance and even expectation damages when contracts are broken, and occasionally opens the door to deterrence when torts are redressed. The ECJ therefore demanded, in purposely general terms, that rules stemming directly from Community law be equipped with as full a range of remedies as attached to analogous state-based rules.<sup>133</sup> Since then, the ECJ has doggedly promoted the doctrine of effective compensation for losses suffered by any individual as a result of Community law infringements. The result applies with equal force in vertical and

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<sup>132</sup> *Rewe-Zentralfinanz EG v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] ECR 1989.

<sup>133</sup> This is known as the principle of equivalence. *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] ECR 1989, para. 5. Its complement is the principle of effectiveness: remedies must be overall adequate to compensate plaintiffs' actual losses: *Case 14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891, para. 28. Effectiveness may demand that national courts stretch significantly the remedial reach of applicable national provisions. See e.g. *Marshall II*, Case C-271/91, [1993] ECR I-4367.

horizontal relations.<sup>134</sup> It is now well established, for instance, that defendants in private litigation may have to pay tort and/or contract damages if found to have breached European antitrust norms.<sup>135</sup> Community law adds causes of action to the roster of civil law rights and arms them with the full remedial apparatus of private law enforcement. Even though cloaked in anodyne jus-naturalist jargon (*ubi jus ibi remedium*),<sup>136</sup> this is a momentous institutional development for the Union. Most significantly, the reach of European law well into the realm of private disputes is generally understood as the only way to achieve an altogether different and superior level of effectiveness.

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<sup>134</sup> Professor Van Gerven, formerly Advocate General for the ECJ, explains that the guidelines for finding liability when the party in breach is a “public” entity (i.e. a member State or an EU institution) are somewhat different from private law. Liability may be ruled out depending on the amount of authoritative discretion enjoyed by the public entity involved; private parties in breach of EC law, by contrast, do not enjoy the latitude of this standard. In point of monetary recovery for the injured parties, however, the ECJ has made it clear that ‘public’ and ‘private’ torts lead to substantially similar consequences. See Walter van Gerven, Private Enforcement of EC Competition Rules. Provisional Background Paper, p. 3. Joint EU Commission/IBA Conference on Antitrust Reform in Europe: a Year in Practice, Brussels, 10-11 March 2005.

<sup>135</sup> Liability in tort for breach of TEC Art. 82 (prohibition of abuse of dominant market position) stemmed from the move of equating any breach of Community law to a common breach of statutory duty, to be dealt with as usual in state courts. This meant, along private law lines, that a breach of community law would generate liability in tort. The House of Lords internalized this principle in a forceful opinion. Lord Diplock explained that a plaintiff invoking article 86 (now 82) of the Treaty could seek remedies in British “private law”, and that the breach of a Treaty provision would be treated as a breach of a domestic statute. *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130, [1983] 3 WLR 143, [1983] 2 All ER 770. For damages in private disputes relating to contracts entered in breach of EC competition law see, recently, *Crehan* [2001] ECR I- 6297.

<sup>136</sup> See e.g. Opinion of Mr Advocate General Geelhoed delivered on 13 December 2001, Case C-253/00, *Antonio Muñoz y Cia SA and Superior Fruticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd.*, para 60: “[I]t cannot be the case that a private person on whom rights are conferred under a provision should be wholly dependent for the vindication of those rights on the readiness of a supervisory authority to take enforcement action.”

The latest move conducted through private-law strategies is the ongoing project of producing a uniform European private law – either in piecemeal fashion, by way of harmonization directives of narrow scope, or in the comprehensive style of a supranational civil code. Harmonization by directives is by now a frequent course of action. The project of codification, by contrast, is still in its early stages, but it is gaining political momentum.<sup>137</sup> It may not be considered ‘State-making’ in so far as it stems from the somewhat spontaneous work of legal academia, engaged in the free pursuit of studying the common roots of the several private laws of the member states.<sup>138</sup> Equally spontaneous may be the grass-root attempts to produce uniform rules meant to govern private transactions across state borders, so as to facilitate trade and promote free movement.<sup>139</sup> Jurists involved in the project appear sometimes to proceed in the mode of the historical school of 19th-century Germany, which systematized and refined German legal science in a purely scholarly spirit, and only incidentally produced the building blocks of what would later become the German civil code.<sup>140</sup> But it is worth

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<sup>137</sup>For critical observations see Martijn W. Hesselink, *The Politics of a European Civil Code*, 10 EUR.L.J. 675-697 (2004).

<sup>138</sup> See e.g. Reinhard Zimmerman, *Civil Code and Civil Law – The “Europeanization” of Private Law within the European Community and the Re-Emergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63 (1994/95).

<sup>139</sup> See Christian v. Bar, *From Principles to Codification: Prospects for European Private Law*, 8 COLUM. J. EUR. L. 379 (2002).

<sup>140</sup> See Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149, 157- 59 (2004) (explaining that the von Bar code project is not, at least in light of its stated intentions, a state-building project. It is rather in line with Windsheid’s view of a code as the product of careful scholarship, distilled and distinct from political motives.)

remembering that the German civil code, once adopted, was heralded as a symbol of national unity – a state-making artifact *par excellence*.<sup>141</sup>

For the past twenty years, Brussels has engaged in private-law harmonization, aligning member state rules on such subjects as products liability, unfair terms in consumer contracts, and time-shared ownership. EU legislators base the harmonization of private law on the necessity of allowing smoother inter-state transactions and leveling the playing field for business entities throughout the internal market. This functionalist logic weighs against states' attachment to traditionally local private-law rules and supports the ECJ's judicial repression of national resistance to harmonization.<sup>142</sup> The further unification of European private law might seem only a natural extension of such discrete initiatives. It is obvious, however, that the promulgation of a European civil code would perform a symbolic function of much greater proportions.

iv. *Transnational commerce: State-making through lex mercatoria and foreign investment arbitration.* - It is now time to switch the focus of these pages away from the relatively homogeneous field of European law and to see how the state-making power of private law can also be deployed in the broader context of transnational commerce.

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<sup>141</sup> See Schulze, *A Century of the Bürgerliches Gesetzbuch*, supra \_\_ (remarking that “[t]he national legal character of the BGB was emphasized ... by a decorative page in the German lawyers' journal [Deutsche Juristen-Zeitung 1900, Nr.1] when the code came into force in the year 1900, entitled "One People, One Reich, One Law."")

<sup>142</sup> On such resistance see Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 EUR. L.J. 3 (1997). For a recent discussion of French resistance to the sweeping harmonization of products liability rules resulting from EC directives see Marie-Eve Arbour, *Compensation for Damage caused by Defective Drugs: European Private Law between Safety requirements and Free Market Values*, 10 EUR. L. J. 87 (2004).

Widely practiced in the Middle Ages, then buried for a long time under a dominant Westphalian logic,<sup>143</sup> *lex mercatoria* is again in vogue.<sup>144</sup> The success of private arbitration rests upon the intuition that when private parties deal with one another across state borders, there are good reasons to depart from state-based rules or courts, and to switch instead to private mechanisms for law making and dispute resolution.<sup>145</sup>

The new law merchant consists of rules and principles developed by arbitral bodies (as opposed to national or international courts) in the context of national as well as transnational disputes. Both the authority of the arbitrators and the applicability of the norms they invoke depend on the mutual consent of private and/or public entities dealing with one-another, often across national borders.<sup>146</sup> *Lex mercatoria* is only binding in so

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<sup>143</sup> See Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317, 319-20 (1984) (explaining that “[a]s the modern nation-state developed during the 16<sup>th</sup> century, rulers of sovereign states began to regard the autonomous *Lex Mercatoria* as an external threat to internal cohesiveness.... Merchant courts were merged into national court systems[, and] the innovations of the *Lex Mercatoria*... were assimilated into national law.”) See also KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF LEX MERCATORIA* 1 (Kluwer Law International 1999).

<sup>144</sup> Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration*, 14 AM. U. INT'L L. REV. 657, 658 (1999).

<sup>145</sup> Ignorance of foreign law and distrust of foreign institutions rank amongst the most important reasons for this switch. See William W. Park, *supra*\_\_

<sup>146</sup> Typical matters of *public* international law (such as the law of the sea, international boundary disputes, State responsibility for injury to aliens, or use of international rivers ), even when referred to arbitration, are not considered *lex mercatoria*, because they most obviously depend on “sensitive political considerations” and require recourse to “diplomatic skills.”

<http://www.cov.com/download/content/brochures/publicinternationallaw.pdf> at p. 3.

far as the parties to a dispute have decided, when assuming reciprocal obligations, to be subject to it. In other words, *lex mercatoria* finds its legitimacy in contract.<sup>147</sup>

Beyond such general remarks, one finds a wide array of opinions on the nature and significance of substantive *lex mercatoria*.<sup>148</sup> Some authors deem it “an autonomous legal order” based on “definite rules of law.”<sup>149</sup> On the other end of the spectrum are the jurists who emphasize the extremely scattered nature of the myriad transnational rules applied by arbitrators, which fail to produce a “legal system” in any traditional, positivist sense.<sup>150</sup> In this minimalist version, *lex mercatoria* is simply a cluster of “international trade usages sufficiently established to warrant that parties to international contracts – whether generally or by *category* of contracts – be considered bound by them.”<sup>151</sup> The lawfulness of such usages does not depend on their enactment by any legislative body, but rather on their good repute and recognition in given commercial communities.

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<sup>147</sup> See Teubner, *Global Bukowina*, *supra* note \_\_, at 10 and 18 (noting that “From Savigny onwards, contract has been denied the dignity of a legal source”. By contrast, in *lex mercatoria*, “contracting is even the primary source of law and the basis for its own rudimentary quasi-adjudication and quasi-legislation.”) See Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 *IND. L.J.* 425, 433 (1988), describing arbitration as a “creature of contract.”)

<sup>148</sup> We refer here to “the law under which the merits of the dispute are decided”, rather than to the rules determining “the binding effect of the actions of the parties or the arbitrator (in agreeing to arbitrate, in choosing rules of procedure or the applicable substantive law, in determining jurisdiction or arbitrability, in issuing an award).” CRAIG, PARK & PAULSON, *supra*, at 626.

<sup>149</sup> CLIVE MAXIMILIAN SCHMITTHOFF, *INTERNATIONAL TRADE USAGES* (Paris: ICC Pub. 1987), at p. 45, Par. 68, and p. 47, Par. 70. For further references to scholars endorsing this viewpoint see, critically, CRAIG, PARK & PAULSON, *supra* \_\_ at 626 and 630.

<sup>150</sup> Maniruzzaman, *supra* note \_\_, at 706-708.

<sup>151</sup> CRAIG, PARK & PAULSON, *supra*, at 633. Such usages are no more than “a complement to otherwise applicable law.” *Id.* at 623. They only apply when the parties to an arbitrated dispute have not inserted a choice-of-law clause in their agreements, or when they have opted out of traditional choice-of-law-rules.

Arbitral awards are portrayed as non-systemic and orthogonal to supranational authority.<sup>152</sup>

Interestingly, the more *lex mercatoria* is understood as a peculiarly disassembled and soft version of private law, the more significant its State-making role is at a global level. The apparently scattered and non-hierarchical nature of such rules makes them appealing as quintessentially neutral, non-territorial, and indifferent to governmental interests, and therefore suitable to produce objective and impartial adjudication in both international and transnational contexts.<sup>153</sup> Arbitration's legitimacy thrives on the deepening of the private/public divide in transnational legal discourse.<sup>154</sup>

Private arbitration by independent tribunals has slowly but surely acquired enough dignity to qualify as an allegedly ideal way to solve not only merchants' disputes, but also serious questions of sovereignty, such as those involved in disputes between private foreign investors and host states. This global trend is represented by over 2,000 bilateral

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<sup>152</sup> At least according to the technical taxonomy proposed by Cesare Romano (*Proliferation*, *supra* \_\_) arbitration is the conceptual opposite of an international court or tribunal, because international courts aim at hardening state commitments flowing from an international treaty, and set themselves necessarily above state parties.

<sup>153</sup> See CUTLER, PRIVATE POWER, *supra* note \_\_, at 49 (discussing the liberalist myth that, at the end of WWII, associated private international trade law with apolitical and neutral economic transactions, and took the distinction between private and public international law as an article of faith.)

<sup>154</sup> See Shalakany, *supra* \_\_ at 455 ("Practitioners assume, in short, that arbitration is about the cooperative coming together of equals to resolve contract law questions arising from disputes over property rights. This conception of arbitration is firmly rooted in the tradition of opposing public and private spheres, and imagining the latter as an apolitical, uncoercive space where people coordinate their economic interests away from the threatening powers of the state.")

investment treaties (BITs) and by several multilateral treaties.<sup>155</sup> BITs grant investors special treaty rights (most commonly the right to national, non-discriminatory and/or fair and equitable treatment), in addition to whatever contractual rights, property or other entitlements investors may obtain in the host states either through contracts with the government<sup>156</sup> or because of local constitutional protection of proprietary entitlements.<sup>157</sup> In the absence of arbitration, investors' rights or entitlements would be a matter for local adjudication in pertinent state courts. But because a breach or any other fault of the host state can also amount to a breach of treaty rights, investors' claims may be ultimately decided by arbitral tribunals.

Allowing foreign investment disputes to go to arbitration, rather than to the courts of the host state, was a move intended to push aside governmental interests and politics, and to protect investors' rights through full and impartial justice. To this day, arbitration scholars remind us of the bad old days in which private parties remained at the margins of foreign investment disputes and could only invoke the diplomatic protection of their governments. In that scenario, investor nations, by controlling the arbitral resolution of state-to-state disputes, could obtain a systemic advantage over host countries. Equally undesirable would be devolving such disputes to the national courts of the host country,

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<sup>155</sup> Most noticeably NAFTA and the Energy Charter Treaty. See Bernardo M. Cremades and David J.A. Cairns, *Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes*, in NORBERT HORN & STEFAN KRÖLL, *ARBITRATING FOREIGN INVESTMENT DISPUTES*, 2004, 325, at 325-326.

<sup>156</sup> The relations between governments and individual foreign investors are often governed by contracts. This is regularly the case when foreign private firms are entrusted with the performance of services of public interest – a common occurrence in the age of privatization. Host states may also provide investors with constitutional rights or administrative safeguards. These types of investors' claims may be enforced in national courts. As it happens, national courts are generally more sympathetic than arbitrators to particular socio-political circumstances that render State performance excessively onerous.

<sup>157</sup> Cremades & Cairns, *supra* note \_\_.

due to a more or less rational fear that biased judges would side with national interests. Well-established arbitral bodies and a newly acquired culture of arbitral neutrality can allegedly guarantee independence from (inter)governmental politics.<sup>158</sup>

To be sure, contrary to the practice of international commercial arbitration, foreign investment tribunals are not officially in the business of applying private law.<sup>159</sup> Scholars painstakingly explain that, even in the presence of ‘umbrella’ clauses,<sup>160</sup> a treaty violation cannot result simply from any breach of contract,<sup>161</sup> and that the states’ conduct

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<sup>158</sup> Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365 (2003).

<sup>159</sup> See most clearly Thomas W. Wälde, *The “Umbrella” (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and recent Cases*, 1:4 TRANSNATIONAL DISPUTE MANAGEMENT (October 2004), footnote 79 and corresponding text (analogizing direct investor-state arbitration to ‘vertical’ judicial review of administrative decisions in civil-law countries – whereby “only the citizen has the right, not the state” – and contrasting it with international commercial arbitration – which is rather horizontal and symmetrical.)

<sup>160</sup> Many BITs contain so-called “umbrella clauses,” also known as “pacta sunt servanda” clauses. When this is the case, at least certain obligations toward investors, as spelled out by contract or stemming from host states’ laws, may deserve particularly strong enforcement, because the umbrella clause grants them international status. See, with much detail and historical perspective, Wälde, *The “Umbrella” Clause*, supra.

<sup>161</sup> See Wälde, *The “Umbrella”*, supra, ...p. 21. There is a significant trend among certain arbitrators to equate the contractual breach of a State to a per-se violation of BITs obligations, especially in the presence of an umbrella clause. See most recently *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (Jan. 29, 2004), available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>, at para. 127 [...] In an important dictum, the tribunal stated that even simple contract breaches by the host state may equal BIT violations when the relevant BIT contains an umbrella clause. According to Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT’L L. REV. 465, at 474 (2005), such dicta are in line with “The trend in international law over the last half century [...] to support investors and encourage investment by weakening state power and authority.” The Tribunal concluded, however, that the relevant contract between the parties reserved simple contract disputes to Philippines courts, and deferred to the will of the

will have to be evaluated by investment arbitrators according to flexible standards (such as fair treatment, non-discrimination, or fair compensation in case of takings.)<sup>162</sup> In principle, the system does not envisage any mechanistic enforcement of investors' natural rights.<sup>163</sup> In at least two ways, however, private law lends legitimacy to foreign investment arbitration.

First, deference to arbitral tribunals stems from governments' express consent at the time in which each investment treaty is stipulated, or if necessary at the time of the dispute.<sup>164</sup> Arbitral awards are legitimized by this private, contractual logic.

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parties. Cf *SGS-Pakistan*, where the ICSID Tribunal refused to find, as a matter of principle, that any simple breach of contract would also be a violation of the Swiss-Pakistani BIT's umbrella clause.

<sup>162</sup> Cremades & Cairnes, *supra*, at 339 (“[P]ublic international law has a prominent role in investment arbitration.”)

<sup>163</sup> Many arbitral awards in matters of foreign investment are characterized by a great degree of sensitivity to context, and do not pursue the deterministic enforcement of contractual obligations. See, e.g., *Waste Management, Inc. v Mexico*, ICSID Case No. ARB(AF)/00/3 para 114 (p. 40) (giving much weight to the political difficulties encountered by Mexico in complying with its obligations towards the foreign investor, and concluding that “NAFTA Chapter 11 is not a forum for the resolution of contractual disputes.” See also *Azinian et Al. v. Mexico*, Case No. ARB(AF)/97/2, ICSID Review - Foreign Investment Law Journal. The arbitrators rejected Claimants' contention that “the City's wrongful repudiation of the Concession Contract violate[d] Articles 1110 (“Expropriation and compensation”) and 1105 (“Minimum Standard of Treatment”) of NAFTA” (p. 20, para 75); “a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and *still not be in a position to state a claim under NAFTA.*” (p. 23 para 83). To be sure, even within these epistemic parameters, contract-based arguments continue to carry a heightened degree of legitimacy and are utilized whenever possible to justify an arbitral finding. See *Mondev International LTD v. USA*, Case No. ARB/(AF)/99/2 p. 47-48, par 134 (approving the Supreme Judicial Court of Massachusetts for rejecting the contractual claim of a foreign investor not because of any “governmental prerogative to violate investment contracts” – such a prerogative “would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance” – but because “normal principles of the Massachusetts law of contracts” happened to excuse the City's breach.)

<sup>164</sup> See Wälde, *The Umbrella Clause*, *supra* \_\_\_, and Cheng, *supra*, at 473.

Secondly, arbitration performs the discursive function of leveling state interests with investors' individual rights along an imaginary horizontal line.<sup>165</sup> The intuitive analogy between investment arbitration and law-merchant tribunals, even though incorrect,<sup>166</sup> is rhetorically powerful. Disputes between host states and foreign investors, rather than being treated as matters of sovereign governance, are now handled by private arbitrators and, according to prevailing discourse, treated with the impartiality and indifference to (inter)governmental politics typical of commercial arbitration.<sup>167</sup>

Claire Cutler has aptly highlighted the *fil rouge* connecting the rise of lex mercatoria with the consolidation of new political bodies of transnational importance.

The trend towards soft regulation appears to be inconsistent with the deepening of hard disciplines under the WTO and NAFTA ... However, notwithstanding such apparent discontinuities, it is crucial to recognize that [...t]he growing legitimacy of privatized lawmaking and dispute resolution is strengthening the material, institutional and ideological unity and hold of the mercatocracy.<sup>168</sup>

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<sup>165</sup> The case of Argentina is particularly significant. Many claims filed against Argentina and currently pending before the International Center for the Settlement of Investment Disputes were brought by private companies in charge of the delivery of public services that were privatized during the 1990s. The economic crisis of 2001 has made it impossible for Argentina to honor its contracts with such companies. See Carlos E. Alfaro, *Argentina: ICSID Arbitration and BITs Challenged by the Argentine Government*, 21 December 2004 <http://www.alfarolaw.com/ima/tapa/alfaro3.htm>. The Federal Supreme Court of Argentina has recently held that reasons of public policy, properly invoked in local courts, may supersede the deference to arbitral awards mandated by BITs. *Jose Cartellone Construcciones vs. Hidroelectrica Norpatagonica S.A.*, Causa J - 87, XXXVII R.O.

<sup>166</sup> See Wälde, *supra*, fn 79 and corresponding text.

<sup>167</sup> Alvarez, *The New Dispute Settlers*, at 408: "The spread of new dispute settlers ... signifies, to many international lawyers, the victory of the rule of law over diplomatic wrangling and the triumph of the lawyers over the politicians [...]."

<sup>168</sup> CUTLER, *supra* \_\_, at 31.

Cutler's reference to NAFTA is particularly significant. NAFTA is a relatively recent project of economic integration between the three North American countries. It has not brought about anything like the level of pooled sovereignty characterizing European integration. On paper, it looks like an ordinary intergovernmental treaty, informed by a Westphalian understanding of state sovereignty.<sup>169</sup> But NAFTA resorts heavily to a structured arbitration process, not only to resolve disputes between governments in such public-law matters as anti-dumping duties,<sup>170</sup> but also to adjudicate the individual rights of private foreign investors. NAFTA has therefore embraced the logic of the many bilateral investment treaties which now inhabit the land of global commerce.<sup>171</sup> It is generally understood that Chapter 11, relating to the protection of private investments in any of the three sovereign parties, is where the real bite of NAFTA lies.<sup>172</sup> Chapter 11 sends litigants off into the realm of private arbitration, and offers them a choice among already existing arbitral structures.<sup>173</sup> The dispersion of foreign investment disputes over the most centripetal form of adjudication – the multitude of arbitral fora – is exactly what

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<sup>169</sup> In the US, in spite of highly vocal political opposition, NAFTA was approved through the fast-track mechanism. See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 158 (1992).

<sup>170</sup> NAFTA Chapter 19 (Antidumping and Countervailing Duty final determinations).

<sup>171</sup> BITs seem to be too many to count. See Antonio Parra, *ICSID and Bilateral Investment Treaties*, 17 ICSID NEWS (2000) (giving an account of the world-wide proliferation of BITs in the past half-century, and outlining their content.)

<sup>172</sup> The implementation of Chapter 11 over the past few years has upset many. See Jeffrey Atik, *NAFTA Chapter 11: Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques*, 3 ASPER REV. INT'L BUS. & TRADE L. 215, 216 (“Chapter 11 attracted little attention during its negotiations. Indeed, it is now viewed as having been something of a Trojan horse: seemingly unthreatening upon first delivery, but later understood to have wrecked enormous damage to national democratic institutions.”)

<sup>173</sup> ICSID, ICSID Additional Facility, and UNCITRAL. Atik, *supra* \_\_\_, at 224. Governments have no say on the composition of the arbitral panel or on the law arbitrators will apply.

See <http://www.worldbank.org/icsid/about/about.htm>

turns an otherwise common international agreement into a veritable system with profound constitutional implications.<sup>174</sup> Decision-making moves away from traditional state-based institutions and is entrusted to the non-ideological community of arbitrators, through which pro-NAFTA forces can truly gain political ground.<sup>175</sup> Rather than simply eroding the sovereignty of the parties, NAFTA re-configures sovereignty at a different, denationalized level.<sup>176</sup> The shift is substantive. Heavily tangled bundles of items of governance, not just narrow commercial disputes, are transferred to new adjudicatory bodies.<sup>177</sup> The contribution of private law discourse – with its emphasis on de-

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<sup>174</sup> See Afilalo, *Constitutionalization through the Back Door*, supra \_\_. In order to adhere to NAFTA, Mexico had to alter in controversial ways its constitutional provisions on property, and Canada had to abandon its traditional tendency to limit foreign investment. See David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757 (2000).

<sup>175</sup> This point requires a qualification. Wary of the risks of leaving the community of arbitrators unbridled, NAFTA parties have devised mechanisms of political control. The Free Trade Commission, established pursuant to NAFTA Article 2001, is composed of cabinet-level representatives of NAFTA parties or their designees. One of its functions is the resolution of disputes concerning the interpretation and application of NAFTA. (Article 2001(2)(c)). Article 1131(2) specifies that FTC interpretations shall be binding on arbitral Tribunals. See Atick, supra, at 216 n.5 (2003), (noting that “the “interpretation” by the three NAFTA Parties to cut back on Chapter 11’s reach [NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001)] ... has been described as a de facto amendment of Chapter 11.”

<sup>176</sup> See Tai-Heng Cheng, *Power, Authority, and International Investment Law*, supra \_\_ at 492 (arguing that “The power and authority that international investment law drains from states does not evaporate, and is often transferred to a wide range of decision makers [...]. Among these transferees, the greatest beneficiaries are foreign and international tribunals and investors.” )

<sup>177</sup> Both scholars and civil society have criticized the use of arbitration in matters of foreign investment for applying a crude private-law matrix to deeply political problems. Arbitrators are ill-equipped to take into account the regulatory and social preoccupations of the host state. Domestic investors in a national court would see their individual rights weighed against a number of policy considerations, and most importantly against the government’s pursuit of the common good. See Wai, *Transnational Liftoff*, supra \_\_ 263 (noting that while “State-based private law often includes protection of third parties and social interests among its substantive objectives, [...] private adjudicators [may tend] to ignore arguments about the protection of

politicization and triumph of the rule of law over state interests – is once more essential to this development.

### III. GLOBALIZATION AND PRE-POSITIVISM

1. *Back to the future.* - In continental Europe, the nineteenth-century codifications established firm links between private law and national territorial jurisdiction. Since then, private law has enjoyed positivist foundations. Based on express legislative enactments, private law in domestic fora needs no further source of legitimacy than the codes or statutes in which it is enshrined. In the common-law world, property, contracts and torts rules find their roots in a long line of judicial precedents, handed down by courts endowed with territorial jurisdictions.

Private law, however, existed – either as a pluralist cluster of medieval laws, or as a learned system of rules and doctrines – long before becoming part of state-making agendas. Its pre-positive justifications changed over time, evolving from classical natural law to modern rationalism, claiming roots alternatively in history or in the allegedly scientific nature of its system.<sup>178</sup>

Private law now lives a life of its own outside the nation-state. It is invoked, as we have observed, to justify momentous legal changes and to precipitate institutional developments. In this post-national dimension, private law arguments cannot claim

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individuals and groups not party to the actual decision in their interpretation of these laws. This may result from a form of "democracy deficit" in denationalized legal regimes.”)

<sup>178</sup> Joerges, *The Science of Private Law*, *supra* note \_\_, at 47.

positivist grounding. It is not surprising, therefore, that pre-positive justifications resurface again, out of context and oftentimes in random combinations, to lend private-law arguments the necessary persuasive authority. It is to these justifications – the absolute force of individual rights, the sacredness of promises, the essential coherence of private law systems, and the distributive neutrality of private-law adjudication – that we shall now turn.

ii. *Natural rights as trumps.* - Beyond state confines, the logic and even the lexicon of private law discourse are strikingly reminiscent of pre-modern times. Where centralized ‘public’ authorities are in scarce supply, cross-border transactions between individual or corporate entities do not seem to partake of the logic of states’ government. In a global context, private law is often described as utterly indifferent to regulatory and political designs. Private law rhetoric exalts grass-roots norm production as independent from and indifferent to sovereign state powers.<sup>179</sup> Its sources – from local merchant communities to global digital networks – are kept emphatically separate from national law-making institutions. The emphasis is on discrete, disaggregated, private loci of law production, which can compete with – and even undermine – state-based regulatory processes, but can never really *be* forms of state sovereignty in any traditional sense.

This non-systemic, pre-positive strand of private law discourse finds its origin in 17<sup>th</sup>-century natural law.<sup>180</sup> According to this philosophical school, human reason and

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<sup>179</sup>See di Robilant, *supra* \_\_.

<sup>180</sup> Grotius is commonly associated with the start of the modern school of jus-naturalism. His work established the coincidence between the tenets of law –based on moral and theological grounds – and the common dictates of conscience to be determined by the logical workings of human reason. Pufendorf – a

nature itself were the ultimate sources of law. Law was therefore independent of, and superior to, the dictates of national legislators. Jus-naturalism identified a number of foundational private law concepts, including the idea that individuals are endowed with inalienable rights, with no regard, and if necessary in contrast, to the sovereign laws of the time.<sup>181</sup>

The unmediated, absolute force of natural rights is clearly at work in contemporary private law arguments deployed in non-national settings. While state-based property and liability rules are constrained by overarching constitutional frames,<sup>182</sup> the kind of private law invoked by trans-national actors seems disentangled from such limits. For instance, the EU doctrine of state liability –whereby a breach of Community law must lead to full and effective individual remedies in national courts—stretches significantly the limits of tort law as understood within the member states.<sup>183</sup> The constitutional development brought about by this doctrine has often found its rhetorical justification in a superior, apolitical, pre-positivist understanding of individual entitlements, based on the jus-naturalist axiom “ubi jus ibi remedium.”<sup>184</sup>

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second-generation modern jus-naturalist – refined and further secularized the rationalism of Grotius’s philosophy. WIEACKER, *supra* note \_\_, 213-214

<sup>181</sup> Grotius’s work was in fact a reaction to sovereigns’ political misjudgment during the 30 years war. See Cornelius F. Murphy, Jr, *The Grotian Vision of World Order*, 76 AM J. INT’L L. 477, 480 (1982).

<sup>182</sup> See e.g. Italian Civil Code 832, defining property rights as a set of prerogatives of ownership duly identified and limited by (statutory) law.

<sup>183</sup> Daniel J. Meltzer, *Member state liability in Europe and the United States*, 4 INT’L J CONST. L. 39 (2006).

<sup>184</sup> Walter Van Gerven, *Harmonization of Private Law: Do we need it?*, 41 C.M.L.Rev. 505, 517-518 (2004) (noting that the general principles of non-contractual liability of the member states certainly would not support the logic that a court can demand payment of damages from the state when the state’s fault is in legislating.)

A similar theme runs through the *Loizidou* case. The protection of individual ownership from state interference is a classic function of international law grounded upon John Locke's conceptualization of property as a pre-political, natural institution based on the labor of man.<sup>185</sup> This core concept must notoriously come to terms with its antithesis - namely, Jeremy Bentham's notion of property as a creature of the state.<sup>186</sup> But insofar as state reasons can be kept out of the picture, and the conflict reduced to a seemingly horizontal dispute, jus-natural axioms can carry the day. Thanks to the clever argumentation of the *Loizidou* court, natural law justifications could play out in a private-law contest, lending extraordinary strength to the petitioner's claim.

By the same token, in transnational contexts, individual rights are invoked as trump cards<sup>187</sup> and boosted by sheer jusnatural rhetoric. As the state effaces, natural law triumphs. Private autonomy can express itself without the clutter of state intervention. Prominent arbitration scholars explain:

“[I]n the field of transnational business activities [...] the force of the contractual consensus can flourish and develop its law-making quality, unhampered by

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<sup>185</sup> J. LOCKE, THE SECOND TREATISE OF GOVERNMENT § 27, in TWO TREATISES OF GOVERNMENT 283 (P. LASLETT ed. 1970). See L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L L. REV. 263, 266-67 (1997). Several international law instruments embody this idea. See *Id.* at 323, on the Hague and Geneva Conventions.

<sup>186</sup>Ederington, *supra* \_\_\_ at 270-274. Bentham's notion is also well established in modern international law. In this positivist dimension, private property is subject to re-definition depending on the outcome of interstate conflicts. When this view prevails, the claims of individual property owners against occupying forces meet with no success whatsoever.

<sup>187</sup> Joel P. Trachtman and Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221 (2003) (criticizing the use of rights rhetoric to promote the direct effect of WTO, i.e. the possibility for individuals to sue states in breach of WTO rulings.)

consumer protection laws and notions of distributive justice that go beyond the general principle of ‘good faith and fair dealing in international trade.’”<sup>188</sup>

Given its conceptual simplicity and historical pedigree, this paradigm aspires to providing the purest, truest form of private-law justice, and to prompting institutional changes of the sort exemplified above.

iii. *State-making and state-breaking in “Pacta sunt Servanda.”* - The jusnatural maxim *pacta sunt servanda*, featuring prominently to this day in both private and international law,<sup>189</sup> is based on morals and reason. Natural law precedes the birth of the state and assumes that consent is binding by nature even in the absence of coercive authorities. Each individual’s act of contractual autonomy can generate rules which he will be expected to follow not because of any sovereign command, but because he consented to them.<sup>190</sup> As observed above, this logic holds sway in contemporary legal discourse. It carries with it profound state-breaking implications, in so far as it shifts the

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<sup>188</sup> Klaus Peter Berger, *Transnational Commercial Law in the Age of Globalization*, supra \_\_ p. 11.

<sup>189</sup> Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT’L L. 405 (1994) explains that the origins of the formula “pacta sunt servanda” are to be found in the work of Pufendorf (who extrapolated it from Digest materials) and Grotius. The concept of private autonomy and enforceability of *nuda pacta* was born in the context of *lex mercatoria*.

<sup>190</sup> Individual autonomy, a fundamental tenet of classical private law, was a central pillar in Immanuel Kant’s philosophy, where it defined the very foundations of justice. See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 34 (John Ladd trans., 1965) (1797) (“Justice is ... the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom.”)

locus of law production away from central authorities and down to the level of consent between equally situated subjects.<sup>191</sup>

Public international law is conventionally based on a jus-naturalist faith in private autonomy. Sovereign governments, understood as glorified individuals, can willingly enter treaties and bind themselves to spontaneously undertaken obligations.<sup>192</sup> This basic contractual paradigm operates in a loose, disaggregated legal order, with no world legislator or court with real bite. The proverbial softness of classical international law is based on the impossibility to enforce, in any judicial sense, the obligations spelled out in treaties.<sup>193</sup> In so far as private law inspires or governs bi- or multilateral treaties, it

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<sup>191</sup>See Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFFALO L. REV. 49, 130 (1997) remarking that "Arbitration agreements ... diminish the reach of government to supervise and control dispute resolution through the process of in-court adjudication. By carving out spheres of "private government," parties establish their own tribunal, and shape their own decisionmaking process. They do not appear in court and thus do not participate in the state's legal institution. Rather than following the directions of a judge, a state official, they entrust the dispute to private citizens, the arbitrators of their choice." (Footnotes omitted.)

<sup>192</sup> Murphy, *supra* note \_\_, at 483 (attributing to Grotius the postulate of identity of States and individuals). Treaties are quintessentially contractual. The Vienna Convention on the interpretation of Treaties mirrors civil code provisions governing the construction of contract clauses. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340. On the analogy between international treaties and contracts, and on the limits of this analogy, see Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999).

<sup>193</sup> The story of the International Court of Justice is rich in episodes that prove the difficulty of enforcing agreements against signatory governments whenever such governments decide to renege on their commitments. *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27). If compliance is not technically mandatory, it may result anyway from utilitarian calculus. Complying with Treaties may enhance a nation's wealth of states by yielding peace, favoring foreign investment, or increasing the chance of obtaining financial or political credit. See Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941 (2002) (observing that countries may be "rewarded for positions rather than effects - as they are when monitoring and enforcement of treaties are minimal and external

simply emphasizes the autonomy of nations, and does not yield state-like models of enforcement on the international plane.

On the other hand, the binding force of consent is at the core of the will theory, on which the whole modern system of private law was allegedly built.<sup>194</sup> Sovereigns may be entrusted with the mission of making sure that their subjects' private autonomy be allowed to thrive in practice. The apparatus of the state does not replace consent as a source of private law, but provides consent with the enforcement tools necessary to its establishment as binding law. In the past, this logic has often invested the state with a monopoly over the adjudication of private disputes, along the lines of central tenets and values that are endorsed by its courts throughout its territory. Today, the same logic supports the creation of centralized coercive authorities, and can lend legitimacy to new post-national institutions. The celebration of consent as the only legitimate source of obligations in a post-national age can justify the emergence of new authorities, endowed with the allegedly neutral and merely procedural role of channeling and reinforcing the human practice of consensual dealing. As observed in the foregoing pages, this recurrent pattern of institutional development in the age of globalization is facilitated by the rhetorical ambiguity of the jus-natural sacredness of consent.

iv. *Centripetal patterns: from dispersion to system.* – The private law envisaged by the designers of transnational architectures often starts as dispersed and refractory to

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pressure to conform to treaty norms is high.”) But the very relevance of utilitarian motives in the decision to abide by treaties proves their essentially non-binding nature.

<sup>194</sup> Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 COLUM. L. REV. 94 (2000).

centralized control. The smallest unit of transnational commerce is the discrete business relation between two parties situated in different legal regimes. If this relation generates disputes, they will most often be settled, or lead to arbitral awards characterized by secrecy and therefore oblivion. With the quantitatively thin exception of those arbitral awards that parties choose to challenge in court, all disputes will remain as private and beyond state reach as inter-spousal quarrels.

History tells, however, that in matters of private law, individual cells tend to coalesce into full-blown organisms. The endemic aspiration to coherence, typical of private law in any of its manifestations, will eventually lead law-making bodies to consolidate ‘efficient’ and ‘desirable’ products of private ingenuity into ‘codes’ or systems of a kind. First, if an individual contractual device is successful, it will spread out to become a common business practice.<sup>195</sup> Lawyers will promote the same business scheme to further clients, and these will in turn apply what they have learned in their new business ventures. Then, in the name of certainty, predictability, transparency etc., someone will skillfully close all loopholes and iron all seams.

Private law’s aspiration to coherence generally manifests itself in either of two ways. Private law may coalesce into a code that will reflect the values of a legal system, as identified and defined by an enlightened legislator. Even though the drafting of such codes depends on time-honored accretions of practical wisdom and fancy juridical work,

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<sup>195</sup> See e.g. Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT’L & COMP. LAW 401, 421 (1995) (describing the diffusion of franchising in Mexico as the “creation of a new jus commune through the design of legal models generated by private business.” Zamora attributes the jus-commune analogy to Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 236-46 (1991).

they are meant as top-down mandates channeling private transactions through one well-defined and desirable course.

The other path to coherence is a patient systemization of existing norms developed over time by grass-root legal work, based on the belief that the spontaneity of human interaction and the wisdom of piece-meal adjudication will lead to both reasonable and efficient sets of rules.<sup>196</sup> This model is traditionally associated with the common law and exemplified to this day by the U.S. culture of restatements. The emphasis on rationalization is as strong here as in the code model<sup>197</sup> and will at times require adjustments or reformulations of certain rules as developed at grass-root level.<sup>198</sup> Coherence is a diffuse preoccupation among common law jurists, and despite the demise of classical formalism, the rationality of the system is still of paramount importance.<sup>199</sup>

On a global scale, the latter model is clearly in control.<sup>200</sup> The codification of transnational private law, in the rhetoric of its promoters, is portrayed as a marginally refined and slightly edited version of whatever the base (of practicing lawyers, arbitrators

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<sup>196</sup> See e.g. George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

<sup>197</sup> Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979).

<sup>198</sup> See e.g. Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995).

<sup>199</sup> Within US legal discourse, Feinman, *supra* note \_\_\_, at 676 identifies two different types of coherent classification of common law rules. One is characterized by an extreme emphasis on the relevance of systems' internal logic, and is mostly represented by scholarly work (Feinman cites CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (Harvard University Press 1981); and Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986), as prominent examples of the tendency to organize rules on the basis of unifying and cogent concepts). The other type of classification, "widespread in judicial and scholarly literature," is less driven by the urge toward doctrinal purity, but still based on the idea that "law's claim to authority still rests in part on logic, order, and consistency."

<sup>200</sup> See critically Mattei, *Hard Code Now*, *supra* \_\_\_.

and business actors) has produced. Scholars are paying increasing attention to the dynamics of bottom-up norm production, both within national contexts<sup>201</sup> and on a transnational scale.<sup>202</sup> Even in the ‘soft’ realm of *lex mercatoria*, we can observe ongoing phenomena of systemization. Such efforts aim at closing exit points, guaranteeing predictability, and therefore enhancing the trust of private parties in arbitral adjudication.<sup>203</sup> International scholars from many different quarters are now pleading for some sort of rationalization of *lex mercatoria*.<sup>204</sup> They attribute the need for uniformity to a broader concern for the overall reliability of arbitration as a dispute-resolution mechanism. Because of the inconsistency and low predictability of arbitration outcomes

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<sup>201</sup> See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

<sup>202</sup> See e.g. SCHEPEL, *supra* note \_\_, 406. Schepel provides a good illustration of the ambiguity of the rhetoric of spontaneity when he explains that national governments and supranational structures follow either of two patterns. The first consists of adopting or codifying what private bodies have developed, so as to give them a varnish of constitutionality and to convey the impression that “we” have legislated. The second, alternative strategy is to deny any involvement in the production of private norms, so as to disengage from their regulatory implications.

<sup>203</sup> BERGER, CREEPING CODIFICATION, *supra* \_\_. “Codification” of transnational commercial law is accomplished by international conventions or “soft law” which includes model laws, restatements, and standard contract forms. Traditionally, international conventions were the favored method of formulating international commercial law primarily due to their binding force once ratified. Sandeep Gopalan, *The Creation of International Commercial Law: Sovereignty Felled?*, 5 SAN DIEGO INT’L L.J. 267, 306 (2004). Soft law, however, is more flexible and has become increasingly important in the ‘codification’ process. *Id.* at 310. The most successful international conventions in terms of their adoption are the New York Convention on the Recognition of Foreign Arbitral Awards, 1958, and the United Nations Convention on Contracts for the International Sale of Goods (CISG), 1980. *Id.* at 309. Successful soft law projects include the UNIDROIT Principles of International Commercial Contracts, the UNCITRAL Model Law on International Commercial Arbitration, and the Lando Commission’s Principles of European Contract Law. Current codification efforts are concentrated on harmonizing civil procedure, receivables financing, space asset financing, and insolvency law. *Id.* at 269 with additional citations.

<sup>204</sup> See Cremades & Plehn, *The New Lex Mercatoria*, *supra* \_\_.

– the argument goes – practitioners regrettably continue to prefer national laws or traditional conflict-of-law rules to *lex mercatoria*.<sup>205</sup> This problem could be cured by harmonizing arbitration’s *procedural* rules.<sup>206</sup> But because “[s]ubstantive law is often born in the womb of procedure,”<sup>207</sup> uniformity of substance is bound to follow suit.<sup>208</sup> Ongoing projects of global codification are aimed at bringing transnational law into a system characterized by both coherence and closure.<sup>209</sup>

Such not-so-soft versions of codification help boost the role of arbitral fora as neutral and utterly non-political bodies, which in turn can serve the goal of new regional projects such as NAFTA. Scholars denounce the inconsistency of arbitral decisions in matters of foreign investment, and argue that the harmonization of private awards is essential to the legitimacy of foreign investment treaties. Recurrent terms in this type of arguments are “legitimacy, transparency, determinacy, and coherence.”<sup>210</sup> In typical

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<sup>205</sup> BERGER, CREEPING CODIFICATION, *supra* \_\_ at 31 (arguing that “in order to make the *lex mercatoria* acceptable for legal practice”, transnational legal processes must be brought within a “practical and workable concept.”)

<sup>206</sup> William W. Park, *Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, in 19:3 *ARB. INT’L* 279, 282-283 (2003) (insisting on the relevance of coherent, consistent procedural rules, and detecting a tendency to move from the unfettered arbitrator discretion typical of modern arbitration statutes to “more precise procedural protocols.”)

<sup>207</sup> SCHMITTHOFF, *INTERNATIONAL TRADE USAGES*, *supra* \_\_, p. 48, Par. 72.

<sup>208</sup> Katerina Sideri, *Questioning the Neutrality of Procedural Law: Internet Regulation in Europe through the Lenses of Bourdieu’s Notion of Symbolic Capital*, 10 *EUR.L.J.* 61 (2004).

<sup>209</sup> Or at least no less coherence or closure than national private law systems. For this nuance see BERGER, CREEPING CODIFICATION, *supra* note \_\_, at 89-100. On the several techniques employed for the ‘codification’ of *lex mercatoria* see Graf-Peter Calliess, *Reflexive Transnational Law. The Privatisation of Civil Law and the Civilisation of Private Law*, 23:2 *ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE* 185-216 (2002) (p. 13 of the typescript, text corresponding to fn 72-78).

<sup>210</sup> Susan D. Franck, *The Legitimacy Crisis in investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005).

private-law progression, a body of law originally built upon dispersion and spontaneity ends up depending on the harmony and coherence of its substantive rules.<sup>211</sup>

As noted above, the ongoing scholarly elaboration of a European civil code partakes of this systemic logic. In the face of a number of topical private-law interventions of EU legislators, implemented by means of discrete directives, many scholars vouch for a return to system and coherence (in the spirit of Pandectism), or for a common code that would correct the historical accident of national particularities (as the Code Napoleon replaced pre-extant legal Babels).<sup>212</sup> The basis of such attitudes is not necessarily a political dream of European federalism, but rather a scholarly understanding of the proper role and design of private law.<sup>213</sup>

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<sup>211</sup> Franck, *supra* \_\_ at 1524 (proposing “the establishment of an independent, permanent appellate body with the authority to review awards rendered under a variety of investment treaties. In this manner, legitimacy, transparency, determinacy, and coherence can be reintroduced into the entire network of investment treaty disputes...”). See also Calliess, *supra* \_\_ p. 22 of the typescript (text corresponding to fn 120 ff.) (proposing the establishment of a “World Commercial Court” capable of putting forth a pluralist “constitution of international commerce.”)

<sup>212</sup> This step boasts prominent private-law origins. The promulgation of the French civil code in 1804 went hand in hand with the project of uniting the nation. The code was a response to the 1789 demand by the États-Généraux that one law common to all French citizens replace the many existing varieties of customary law. (WIEACKER, *supra* note \_\_, at 270). The totalizing aspiration of the code stemmed from the need to suppress any trace of preexisting regimes, which might lead to political fractures and dispersion of power. The positivist stroke of the legislator’s pen erased all that pre-existed. Gaplessness was essential to the success of Napoleon’s political project.

<sup>213</sup> Through the 19th century, German scholars elaborated on the concept of gaplessness and freed it from its functionalist connection with imperial goals. Pandectism assembled the pillars of classical private law under an overarching conceptual structure that both depended on and contributed to their stability. Thanks to the solidity of its scientific design, the structure stood independently of positive enactment or political endorsement. On continuities and differences between natural law and the German Historical School or Pandectism, see CANNATA & GAMBARO, *supra*, 277-280.

v. *The rhetoric of neutrality*. – The illustrations in Part II have highlighted private law’s ‘ordering’ function, namely, its ability to generate apparently coherent systems, seemingly firm boundaries between law and politics, and ostensibly strong versions of “the rule of law.” The appeal of private law discourse in many fora lies in its apparent distance from ideological contestation. Private law arguments seem apt to move passionate debates onto an abstract plane where only ‘neutral’ policies – such as efficiency, protection of reliance, or predictability – will be invoked.<sup>214</sup> In its post-national dimension, private law is all too often portrayed in the most classical of fashions: horizontal and dispersed, or self-contained and systemic, but usually orthogonal to distributive considerations. The power of this discourse and the role of its line-drawing rhetoric in the legitimization of new forms of sovereignty are remarkable.

These pages have kept a critical distance from this kind of private-law discourse, mostly due to its striking indifference to the factual and conceptual complexity of private-law adjudication. Obviously, the Pandectist architecture is no longer extant. Post-classical private law is characterized by “its linkages with regulatory and distributive policies and its opening to social values and human rights.”<sup>215</sup> “Linkages” and “openings” disrupt the close, self-referential nature of classical private law.<sup>216</sup> This is true not only in national systems, but wherever private law attempts to reassert its

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<sup>214</sup> I am suspending here the critical intuition that the balancing of such neutral policies in any given dispute will ultimately involve taking distributive stances in adjudication. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE]*, 1997.

<sup>215</sup> Joerges, *Challenges of Europeanization*, *supra* note \_\_, at 149.

<sup>216</sup> See David W. Leebron, *The Boundaries of the WTO: Linkages*, 96 AM. J. INT’L L. 5 (2002).

logic.<sup>217</sup> The arbitrators entrusted with the task of adjudicating foreign investment disputes know perfectly well how difficult it is to tell the difference between a city's breach of contract and an expropriation in the public interest, or how deeply a state-granted immunity can redefine the contours of interference with contractual relations.<sup>218</sup> In the EU, the regulatory and redistributive function of private law rules is emerging starkly as the process of integration forces national legislators to rethink, rationalize and change their civil codes.<sup>219</sup> The Strasbourg Court must also work its way through a quagmire of political complexities before it can isolate pure property issues in the *Loizidou* case.

On a global scale, just as within the borders of national legal communities, classical partitions slowly evaporate, and the unavoidable overlap of private and public categories occurs again within the newly created systems. But when that happens, it is too late to call into question the very existence of new sovereign entities.

#### IV. CONCLUDING REMARKS: LOOKING BEYOND DISPERSION AND NEUTRALITY

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<sup>217</sup> Wai, *Transnational Liftoff*, *supra* note \_\_, at 262. *See also* Teubner, *Global Bukowina*, *supra* \_\_, 22 (arguing that *lex mercatoria* cannot “retain its idyllic private law status”. It “has been unable to protect itself from the maelstrom of international politics. And it will be less able to do so in the future.”)

<sup>218</sup> *See* William W. Park, *Private Disputes and the Public Good: Explaining Arbitration Law*, 20 AM. U. INT'L L. REV. 903, 904 (2005) (explaining that, in exchange for judicial support in award enforcement, arbitrators must keep in mind “community interests” and be sensitive to “government efforts to protect those members of society whose welfare might be affected by private decision-makers.”)

<sup>219</sup> *See* Christian Joerges, *The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines - An Analysis of the Directive on Unfair Terms in Consumer Contracts*, 3 EUR. REV. PRIV. L. 175 (1995).

The ‘State-making’ role of private law in the age of globalization begs careful analysis. Outside the nation state, private law is moving along the same stages of development that it has experienced within state borders for over two centuries – codification into orderly systems, contribution to state-making projects, and eventual enmeshment with policy and ideology. In many different contexts, private law stands for much more than the disaggregated resolution of transnational private disputes. In full blown classical logic, the alleged coherence and purity of private law discourse is invoked to identify and or/reinforce emerging supra-national authorities, in a fashion oddly resembling European codifications and evoking the birth of the nation state. Most remarkably, post-classical complexities are kept out of the picture. Private law is deployed as the powerful line-drawing instrument it once was – a symbol of neutrality and indifference to power and ideology, and therefore an invaluable source of legitimacy for nascent post-national institutions.

Focusing on the ‘State-making’ side of the private-law coin, I have intentionally departed from a prominent trend in contemporary legal scholarship that only focuses on private law’s spontaneity, disaggregated patterns, and bottom-up normativity. This literature assumes as a given the dismemberment of the bundle of sovereignty into a million disjointed sticks. The divide between spontaneity and order, however, is thin and elusive. Wherever parallel conduct gels into visible, predictable normative patterns, private law reproduces its complex and unbreakable relation with traditional forms of sovereignty. Each private-law microcosm breeds – or foresees the reproduction of – usual clusters of regulatory functions and political implications, ready to feed into new institution-building agendas. Post-national governance is not only an emerging network

of discrete knots,<sup>220</sup> nor just a pond where each stone makes ripples.<sup>221</sup> It is also a place where the wheel of state sovereignty gets reinvented at new levels, often with old tools and evergreen rhetorical devices.

Throughout this article, I have aimed at showing the flip-side of the rhetoric of dispersion. A second focus of these pages has been the extraordinarily powerful rhetoric of neutrality characterizing private law discourse in a global context. A paradox has emerged: on one hand, private law provides globally a mode of legal argumentation that is most abstract from ideologies of distribution and most distant from questions of centralized sovereignty. On the other hand, due to its very rhetoric of neutrality and dispersion, private law discourse happens to accelerate the formation of highly political global institutions.

This use of private law discourse escapes, per se, normative evaluations. Private law is a form of language, as it were, and there is nothing either good or bad in any given language or expressive tool – it all depends on what it is used for.<sup>222</sup> As a matter of fact, the rhetorical move of switching to private law categories can offer a refreshing break-

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<sup>220</sup> See Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, supra \_\_ 483-484 (noticing that Teubner's "elegant model" over-emphasizes the independence of the nodes in his networks.)

<sup>221</sup> See Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARVARD L. REV. 1015, 1057-1058 (2004) (noticing that, contrary to traditional views, common-law adjudication of disputes between private parties is not "self-contained" but rather "polycentric," and therefore just as apt as public-law litigation to produce ripple effects throughout the legal system.)

<sup>222</sup> I embrace a "non-deterministic perception of the law" (Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*, 15 EUR. J. INT'L L. 197, at 208) and endorse the idea that the hybrid mix of private and public levels of commercial and political interaction across national borders may embody "both oppressive and potentially emancipatory social relations." (CUTLER, supra note \_\_, at 103-104).

through in case of ideological gridlock. Tilting the table when the ball is stuck may happen to be the only way forward in a pinball game. What matters is to realize that recasting a dispute in private law terms is a plausible move *within* a game which is and remains both legal and political, not an escape onto a parallel universe where pure rule-of-law criteria can solve all conflicts. At the end of the day, in each of the illustrations of Part II above, private law arguments produce irreversible institutional change and profound power shifts. The rhetoric of abstraction is not a vehicle of distributive neutrality.

By contrast, in the foregoing pages we have repeatedly observed the practice of borrowing syllogistic strength from private law doctrines in order to portray institutional and ultimately political developments as a matter of legal necessity. A switch to private law jargon is certainly no solution to the many normative problems posed by post-national sovereignty. In no way can private rights discourse, for instance, provide unequivocal answers to such diverse questions as whether to expand private rights of actions against states when they fail to comply with international trade obligations,<sup>223</sup> or

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<sup>223</sup> The ECJ has repeatedly dealt with the question whether an individual has the right to challenge, before a national court, the incompatibility of Community measures with WTO rules. For an analysis of latest holdings on this matter see Delphine de Mey, *The Effect of WTO Dispute Settlement Rulings in the EC Legal Order: Reviewing Van Parys v Belgische Interventie- en Restitutiebureau (C-377/02)*, 6 GERMAN L J No. 6 - 1 June 2005. Even if private parties usually cannot count on the "direct effect" of WTO rulings (for an endorsement of this trend see Trachtman & Moremen, *supra* \_\_\_, and Alan O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005)), they can lobby their governments into initiating WTO disputes on specific trade issues. See GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003).

whether to increase the viability of cross-border class actions to redress mass torts.<sup>224</sup> Such choices can only be based on context-sensitive empirical analysis and on an appreciation of the distributive implications of each plausible strategy in context.<sup>225</sup> Shifting from a loose level of coordination between regulatory sources to a level of firmly legal hierarchies – State-making, as I have termed the process in these pages – may happen to be, in context, a commendable form of institutional restructuring. But the use of private law rhetoric to portray State-making as technically necessitated unduly stifles political debate, and may mask profound redistributive implications.<sup>226</sup> Ultimately, this essay is a plea for more dialogue and political confrontation in and around the institutions of globalization.

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<sup>224</sup> This problem was confronted by scholars in the aftermath of the Union Carbide disaster at Bhopal. See Mark Galanter, *Law's elusive promise: learning from Bhopal*, in MICHAEL LIKOSKY ED., *TRANSNATIONAL LEGAL PROCESSES. GLOBALIZATION AND POWER DISPARITIES*, 2002, at 172.

<sup>225</sup> For context-based arguments against the use of private lawmaking See e.g. Jochen von Bernstorff, *The Structural Limitations of Network governance: ICANN as a case in point*, in JOERGES, SAND & TEUBNER, *supra* note \_\_, at 257, and Francesca Bignami, *Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network*, 26 MICH. J. INT'L L. 807 (2005). See also Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171 (2005) (analyzing certain undesirable redistributive effects of parental involvement in the workings of special education agencies.)

<sup>226</sup> For the argument that the increasingly legalized institutions of globalization need more rather than less politics see, in the context of WTO, Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 9 (2005) (advocating heightened “participation, loyalty, and support, not just of governmental trade elites and technocrats but also of consumers and citizens at large.”)