

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

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I. INTRODUCTION

The current world order is characterized by an intricate mix of cross-border dealings between individuals and public entities.¹ The sovereign nation state, as we have come to know it for over three centuries, is not necessarily central to this picture.² Many transactions take place within loose regulatory schemes provided by international networks of public agencies³ or by horizontal clusters of transnational market actors.⁴

1. 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 (2006); Peer Zumbansen, *The Parallel Worlds of Corporate Governance and Labor Law*, 13 IND. J. GLOBAL LEGAL STUD. 261, 263 (2006) ("The transterritorialization of company activities that span the globe . . . challenges traditional regulatory aspirations of nation states and other political bodies.").

2. 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, 235-36 (2002).

3. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 4-5, 48-49, 171-77 (2004).

In this context, private law is a central subject in globalization discourse and contributes in many ways to the decline of the state.⁵ Private law performs a significant state-breaking 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—the phenomenon 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.⁶ These post-

4. 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 Bukovina: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE*, 3 (Gunther Teubner ed., 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. *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., 2002).

5. 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. 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* 22, 24-26 (Duke Law School Legal Studies Research Paper Series, Research Paper No. 74, 2005), available at <http://ssrn.com/abstract=796228> (explaining why “not all law is state law anymore” and analyzing the decline of state-based corporate law in Europe). Secondly, the diffusion of private arbitration decreases the role of state-based institutions in matters of adjudication. See *infra* Part II.C.2. Lastly, a lot of law-making now stems from networks of economic operators acting independently of official governments. See Teubner, *supra* note 4, at 4.

6. The age of globalization is witness to 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

national institutions differ profoundly from national governments and need not even be identified by geographical borders. The traditional state, territorially confined and monopolistically endowed with all functions of government, bears little resemblance with the multi-level governance models embodied in such entities as the EU or regional human rights courts. For this reason, post-national institutions are usually not referred to as states.

Yet there is no doubt that such institutions constrain the political will of state sovereigns.⁷ They are fully recognized by the international legal community and endowed with regulatory and/or adjudicatory functions once reserved solely to states.⁸ In such cases, sovereignty sheds the appearance of horizontal dispersion. Its many pieces, disassembled by globalizing forces, coalesce around public, official, vertical power

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, 55 J. LEGAL EDUC. 446 (2005) (reviewing ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004) (noting that “The number of such institutions rose dramatically in the postwar era, and their ambit is wide.”), available at <http://ssrn.com/abstract=880798>).

7. See SLAUGHTER, *supra* note 3, at 144-45 (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 organizations endowed with real sovereignty, whereby “supranational officials can harness the coercive powers of national officials”).

8. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 287 (1997) (emphasizing the fact that supranational courts are “empowered to exercise directly some of the functions otherwise reserved to states.”).

structures.⁹ It is in this context that the term “State” is occasionally invoked by way of analogy.¹⁰

In this Article, for the purpose of establishing a conceptual analogy with the nation-building process in eighteenth- and nineteenth-century Europe, the process of reassembling vertical power within new post-national institutions is termed “State-making.” The word “State” with a capital S refers to post-national institutions. A lower case initial indicates sovereign states as conventionally understood in modern international law.

In the literature on global State-making, traditional private law—understood as a coherent set of rules for the centralized 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 sub-

9. 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 centerpiece 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 fifty 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*, 6 CHI. J. INT’L L. 725, 737-739 (2006). 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, n. 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.

10. See VIVIEN A. SCHMIDT, *DEMOCRACY IN EUROPE: THE EU AND NATIONAL POLITICS*, Chapter 1 (2006) (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.).

ject of political theory¹¹ and constitutional or international law.¹²

Against the background of such common understandings, this Article aims at highlighting the insufficiently explored connection between (old) private law and (new) post-national sovereignty. The claim is that, for better or worse, traditional private-law discourse facilitates the emergence of new forms of institutional sovereignty in the age of globalization. This Article illustrates how and why this is the case.

State-making through private law has famous historical precedents. The rhetoric of private law was notoriously relevant to the construction of European nations. At least according to popular iconography, the *Code civil* was an essential component of Napoleon's state-making agenda.¹³ 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 and often politically contested.¹⁴ In this context, private law performs badly needed justificatory functions and bolsters the institutional strength of such entities.

11. For a review of this literature see Afilalo & Patterson, *supra* note 9, at 727-28.

12. See Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L.J. 1 (2000).

13. See *infra* Part I.C.1.

14. SLAUGHTER, *supra* note 3, at 219-21 (reviewing the charges of unaccountability moved against global government networks); ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM 81 (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 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, 188-203 (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) ("[T]he WTO suffers from a lack of popular support, loyalty, and input legitimacy . . ."); Teubner, *supra* note 4, at 19 (noting, in the context of transnational arbitration, that "lack of institutional autonomy makes [lex mercatoria] vulnerable to political pressures for its . . . 'legitimation.'").

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.¹⁵ 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.¹⁶

This Article offers a counterpoint to a conspicuous strand of contemporary legal literature. In the context of globalization, scholars are intensely preoccupied with the state-breaking function of private law.¹⁷ They tend to emphasize the spontaneity of cross-border transactions between individual actors, their independence from centralized authorities, and their aggregate capacity to build meaningful norms through

15. 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 (1998) (unpublished manuscript, on file with the NYU Journal of International Law and Politics), available at http://duncankennedy.net/documents/r&f_clt/).

16. 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 Y.B. 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 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).

17. See *infra*, Part I.B.3.

dialogue and grassroots participation.¹⁸ 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.

This Article aims to outline the missing conceptual link between private law and emerging institutions of governance. It aims, as well, to denounce the insufficient transparency of the ongoing State-making process and to explain how private-law arguments may in fact contribute to political opacity. The project is articulated in four parts.

Part II 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, which is 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. Technical, indifferent to power, and utterly non-political, this distinctively "private" mode of legal discourse still enjoys much currency. Part II proceeds to identify two discursive strands within this form of private-law discourse—one pointing at individual 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 analysis is meant to show how quickly the coin can flip and how conveniently the state-breaking rhetoric of one side can feed into the State-making logic of the other.

Part III provides three examples of State-making through private law, 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

18. See *infra*, Part I.B.3.

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 IV 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 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 shelter post-national authorities from political contestation.

Part V 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 fewer, voices should be heard.

II. PRIVATE LAW IN TRANSATLANTIC DISCOURSE¹⁹

The discourse at stake in these pages is the commonality of private-law categories intuitively shared by lawyers, judges,

19. 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 Foucauldian intuition that “‘how we think about law’ and ‘the law we think about’ are not really two different

bureaucrats, and legal scholars in modern Western history.²⁰ The 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.²¹ In this part of the Article, section A describes the main features of private law in the Western world, tracks their origin in classical legal thought, and follows their evolution in contemporary legal discourse. Section B investigates the reasons for the resilience of classical private-law categories in the age of globalization. Section C explains that the civil- and common-law worlds have very different understandings of the relation between private law and centralized government. Then it accounts for the commonality of Western private-law discourse in spite of such differences and explains how the ambivalent relation of private law to government enhances its rhetorical power in global settings.

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).

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

21. HAROLD J. BERMAN, LAW AND REVOLUTION. THE FORMATION OF THE WESTERN LEGAL TRADITION 7-8 (1983). See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 23, (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." *Id.* at 19 n. 62. 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, 482 (2000) (denouncing the "exclusion of non-Europeans from the foundation of the 'Western' [legal] tradition."). This tradition, however, is contributing significantly to the growing 'legalization' of transnational interactions.

A. *Horizontality and Neutrality in Classical Private Law*

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)²² and aim at solving private disputes between two litigants (as opposed to pursuing the common good of a given constituency).²³ 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.²⁴ It is also character-

22. HANS Kelsen, *PURE THEORY OF LAW* 280-81 (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 318-19.

23. 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* (D. E. L. Johnston trans., Oxford Univ. Press 1992) (1988) (“Private law is concerned with *individual* men and women”) (emphasis added.).

24. 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 Cas-*

ized by internal coherence, meant as the peaceful, analytical coexistence of few conceptual pillars upon which the entire regulatory design is orderly built.²⁵

In the United States, the legal worldview of Christopher Columbus Langdell is often characterized as embracing the classical version of private law with enthusiasm.²⁶ In European legal historiography, this form of private-law discourse is associated with the German historical school, which systematized the bits and pieces of Roman law as elaborated through the Middle Ages.²⁷

Classical legal thought assumed a watertight separation between private and public law.²⁸ At the start of the twentieth century, comparative law scholars of the Western world could count on one stable similarity between civil- and common-law systems—the distinction between private and public.²⁹ 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

sazione, Case No. 10735 of August 3, 2001, *available at* http://www.diritto.it/sentenze/magistratord/sent_10735_01.html (author's translation).

25. Franz Wieacker identifies the conceptual pillars of classical private law as follows: “[I]ndividual 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.” FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE WITH PARTICULAR REFERENCE TO GERMANY*, 485 (Tony Weir trans., 1995).

26. Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); GRANT GILMORE, *THE DEATH OF CONTRACT* 12-14 (1974).

27. 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” WIEACKER, *supra* note 25, at 484. *See also id.* at 341-49.

28. Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982).

29. “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.” KENNEDY, *supra* note 15, at 38-39.

individual rights and aimed at settling horizontal disputes, while public law pertained to sovereign governance in pursuit of collective goals.³⁰ Self-contained and sharply differentiated from public law, private law was perceived as capable of keeping “common good” considerations out of private adjudication.

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 cast doubt on the soundness of time-honored dichotomies.³¹ The classical structure slowly incorporated corrections to bargaining inequality, interferences with freedom of contract, and constraints upon private ownership.³² Slowly but surely, private law began to reveal its regulatory implications, its ties to constitutional dilemmas, and the many cracks in its design. Innocence was lost, and private law faced the unavoidable complexity of adulthood. This development occurred through

30. A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* 42-43 (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 *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kayres ed., 1982) and locating the distinction of private and public “worlds” at the core of liberal legalism).

31. Horwitz, *supra* note 28, at 1426.

32. Charles Donahue, Jr., *The Future of the Concept of Property Predicted from its Past*, in *PROPERTY* 43-44 (J. R. Pennock & John. W. Chapman eds., 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’”).

parallel processes in a number of different nations and within a relatively short span of time.³³

Legal scholarship adjusted in various ways to these changes. In the United States, legal realists devoted much work to deconstructing the private/public distinction³⁴ and to contesting private law's autonomy from other fields of law and government.³⁵ In 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.³⁶ The intuitive appeal of clarity could no longer sustain traditional partitions, and these partitions were forever doomed to contestation and complexity.³⁷

33. See Duncan Kennedy, *Two Globalizations of Law & Legal thought: 1850-1968*, 3 SUFFOLK U. L. REV. 631, 657-67 (2003) (describing the "socialization" of private law as a veritable wave of globalization at the dawn of the twentieth century).

34. For an example of such attacks see Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933) (portraying private contracts adjudication as a matter of public policy making.)

35. See Ernest J. Weinrib, *Restoring Restitution*, 91 VA. L. REV. 861 (2005) (reviewing HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* (2004)), (regretting that "the 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 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*, (Claude Thomasset et al. eds, 2000) (exploring the links between American legal realism and anti-formalism in European legal discourse in early twentieth century).

36. See Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379, 421 (analyzing the critique of legal classicism articulated by a group of French jurists at the dawn of the twentieth century, and their belief that law "could be a progressive instrument of evolution.").

37. 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 25, at 485. In the twentieth 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 coher-

Scholarly and judicial efforts to inject social considerations in private-law methodology featured prominently in the Western world for a large part of the twentieth century.³⁸

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 marked with a bright line³⁹ and provides no sure guide to predicting judicial outcomes.⁴⁰ Even in 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.⁴¹ In the United States, the legacy of legal realism makes mainstream scholars skeptical of anything resem-

ence 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.” *Id.* at 438.

38. Kennedy, *supra* note 33, at 648-49.

39. The decline of the traditional administrative state has allowed negotiated self-regulation to allocate public resources and to define civic responsibilities. See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) (discussing changes in the administrative structure of the welfare system); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (discussing the use of a collaborative model to reform regulations). See generally 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 decentralized self-regulation of private parties. See HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE. PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* 30-31 (2005) (explaining that self-regulation within corporatist arrangements “is no longer considered as an alternative to state regulation; rather, the regulation of self-regulation is conceived of as regulation by other means”); see also Picciotto, *supra* note 4, at 2.

40. 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, 2663 (2005) (defining the concept of “public use” broadly enough to include privately initiated economic development of a City’s waterfront, based on the fact that “Without exception, our cases have defined that concept broadly”).

41. 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 n.64 (1999) (“[L]egal realism has never taken firm hold in Europe and . . . the European

bling the purity of classical legal thought.⁴² Even the most ambitious reconstructive projects, aimed at bringing common law doctrines to internal coherence,⁴³ accept the existence of competing values.⁴⁴

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

B. *The Extraordinary Resilience of Classical Private Law*

The vast diffusion of a formalist version of private law, indifferent to questions of constitutional values or social engineering, can be tentatively attributed to the revival of legal formalism in national scholarly contexts, the necessary impoverishment of private-law methodology resulting from its wide

legal culture as a whole has remained more conservative than its American counterpart.”).

42. See ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (1997), and 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.”).

43. 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* note 35, at 863; 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”).

44. See Chaim Saiman, *Realism as American Exceptionalism: The Case of Restitution in American and English Legal Consciousness*, n. 83 (Apr. 5, 2006) (unpublished draft, on file with the New York University Journal of International Law and Politics), available at <http://www.law.nyu.edu/tlhc/Saiman%204-5.pdf> (explaining the difference between pre-realist formalism and neoclassical projects); see also Randy E. Barnett, *Private Law: The Richness of Contract Theory* 97 MICH. L. REV. 1413, 1419 (1999) (reviewing ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (1997)) (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 . . .”). According to reconstructive private law doctrine, the competing values that must be balanced in the process of adjudication (such as efficiency, protection of reliance, and predictability) are ideologically neutral and non-distributive.

transnational circulation and the legacy of post-World War II neo-liberal agendas.

1. *Neo-Formalism*

Formalism is undergoing considerable revival in contemporary legal discourse.⁴⁵ 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.⁴⁶ 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 and indifferent to social considerations.⁴⁷ But there is also a progressive strand of neo-formalism. Within this strand, the return to form stems from a profound disillusionment with the early twentieth century idea that private law could be “socialized” by means of “soft” communitarian principles, informally woven into the fabric of private-law adjudication.⁴⁸ 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.⁴⁹ They plead, therefore, for “hard” rules and limited judicial discretion rather than soft adjudicatory standards.⁵⁰ Perhaps not least among the causes for neo-formalist

45. See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 516 (1988) (noting that “[w]hile 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”).

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

47. See KERRY RITTICH, *RE-CHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM* 71, 160 (2002).

48. Anna di Robilant, *Genealogies of Soft Law*, AM. J. COMP. LAW (forthcoming 2006).

49. See Ugo Mattei, *Hard Code Now!*, 2 GLOBAL JURIST FRONTIERS 1, 14 (2002), available at www.bepress.com/gj/frontiers/vol2/iss1/art1.

50. See *id.* at 18.

revivals are the enduring aesthetic appeal of form⁵¹ and the eternal passion of analytical minds for the logical game of deduction.⁵²

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

2. *Innocence Regained*

In international or supranational courts, the reduction of private law to classical paradigms⁵³ may be related to the professional identity of the judges in those courts. Judges are most often recruited among jurists specialized in international law, who tend to be better versed in foreign languages and diplomatic matters. Many of them have previously held office in public administrations or national cabinets, thereby gaining particular fluency with public-law arguments.⁵⁴ The linear character of private-law arguments in their courts may depend on lack of interest in or experience with contemporary private-law complexities.⁵⁵

51. 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”).

52. 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 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.

53. For illustrations of classical private-law paradigms in supranational courts’ opinions see *infra*, Part II.A.2 and Part II.B.2.

54. For data on appointments to the ECJ, see Sally J. Kenney, *The Members of the Court of Justice of the European Communities*, 5 COLUM. J. EUR. L. 101, 107 (1999).

55. There are, of course, exceptions. Walter Van Gerven, formerly Advocate General for the ECJ, is a notable one.

In arbitral settings, by contrast, there is no dearth of private-law professors and practitioners.⁵⁶ Yet the transnational nature of arbitral adjudication severs private-law rules from their linkages with state-based policies.⁵⁷ Disjoined from regulatory concerns and context-specific visions of governance, private law regains the original strength and sharp contours of its earlier stages.⁵⁸

As a result, in global settings more often than in domestic circles, private law is defined as a source of utterly non-political arguments and, therefore, as a bulwark of legitimacy for any decisionmaking body both inside and outside the nation-state.⁵⁹ 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 can 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 a lack of democratic credentials.

3. *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 concept of *lex mercatoria*,⁶⁰ quintessentially independent from the state both in terms of production and en-

56. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 119 (1996) (describing the prominent role of business lawyers in arbitration).

57. *Id.* at 311 (positing that “[i]nternational commercial arbitration as it developed around the ICC permitted business conflicts to be handled at a distance from . . . state interventionism”).

58. See *infra*, Part II.C.1.

59. 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).

60. *Lex mercatoria*, also termed Law Merchant, refers to “[a] system of customary law that developed in Europe during the Middle Ages and regulated the dealings of mariners and merchants in all the commercial countries of the world until the 17th century.” BLACK’S LAW DICTIONARY 903 (8th ed. 2004).

forcement, is experiencing a veritable revival in neo-liberal literature.⁶¹ Scholars from many fronts tend to agree that the proliferation of cross-border commerce prompts the decline of centralized institutions and a serious dispersion of authority.⁶² In zero-sum fashion, the growth of private rulemaking by business actors is conceptualized in many quarters as a net decline in state regulation.⁶³ The indifference of private deals to

61. SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 15 (1996); *see also* di Robilant, *Genealogies*, *supra* note 48 (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).

62. *See, e.g.*, Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149, 157 (1997) (noticing the insistence, in a number of scholarly contributions, on the disappearance of the state from transnational business transactions). 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* note 5, at 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* note 61, 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 INT'L L. 251 (2003).

63. 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 do-

redistributive concerns is hailed as a triumph of freedom from unnecessary governmental intervention.⁶⁴

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 which are motivated by profit-maximizing agendas and, therefore, indifferent to state politics or government.⁶⁵

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.⁶⁶ Neo-liberal dichotomies also fail to acknowledge the possibility of new regulatory regimes, stemming from horizontal networks.⁶⁷ They ignore,

mestic equivalent in formerly soviet regimes. Doreen McBarnet, *Transnational Transactions: Legal Work, Cross-border Commerce and Global Regulation*, in *TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES* 98, 105-6 (Michael B. Likosky ed., 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. 22, 29 (2003), available at <http://www.bepress.com/gj/topics/vol3/iss2/art2>. In all such instances, the globalizing force of private commerce intersects local political dimensions.

64. 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, 11 (2001), <http://w3.uniroma1.it/idc/centro/publications/42berger.pdf>.

65. RITTICH, *supra* note 47, at 68-73.

66. 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").

67. Both network theory and norms scholarship share with neo-liberalism the tendency to shift the emphasis away from the state, and onto discrete clusters of private action. See Teubner, *supra* note 4, at 3. On the links between continental network theory and US-based norms scholarship see Robert D. Cooter, *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

for instance, that the deployment of domestic private law in cross-border litigation (as in the case of transnational tort claims against multinational companies) can promote desirable redistributive policies.⁶⁸ These critiques notwithstanding,

at the tremendous regulatory spill-over of such clusters, and describe their self-reflexive rule-making activity as real law by sociological standards. See Teubner, *supra* note 4, 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, e.g., SCHEPEL, *supra* note 39, at 406 (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, 792-93 (204); HUGH COLLINS, *THE LAW OF CONTRACT* (Butterworths ed. 1993) (1986). But see, Jack Beermann, *Contract Law as a System of Values*, 67 B.U.L. Rev. 553, 563 (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—complex post-national coordination of grass-roots deliberative levels, within an overarching constitutional design still populated by centralized authorities. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 350 (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* (2000); James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired 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 EUR. L. J. 61 (2004); Shalakany, *supra* note 59, at 467 (noticing how the private/public distinction, operating as a bias in the minds of international arbitrators, ends up confirming the subordination of developing countries).

68. See, critically, Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INTL. L.J. 471 (2005); see also Craig, Scott & Robert Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational ‘Private’ Litigation*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 287, 290 (Christian Joerges et al. eds., 2004) (“[T]he existence of a multi-

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.

C. *The Homogeneity of Private-Law Discourse and the Common Law/Civil Law Divide*

The preceding pages have outlined the basic features of classical private law and their surprising resilience. A basic assumption of these pages has been the homogeneity of private-law discourse in civil- and common-law systems. The homogeneity of Western private law is increasingly acknowledged.⁶⁹ The celebrated dichotomy between judicially-created common law and statutorily-created civil law is blurring.⁷⁰ European code-based systems give prominence to judicial precedents, even making room for policy arguments in hard cases.⁷¹ The sharing of conceptual categories is increasingly visible.⁷² In the new and in the old Continent, private law displays the same features—a natural-law basis, abundant layers of rationalist organization, systemic qualities, and constant oscillation between formalism and functional adaptation to societal change. What seems to remain different in the way in which private law

plicity of international and domestic legal institutions provide venues that are points of potential conflict and dispute between different systems of interests and values.”).

69. See AUGUSTO CANNATA & ANTONIO GAMBARO, LINEAMENTI DI STORIA DELLA GIURISPRUDENZA EUROPEA II 129-35 (4th ed. 1989); Kennedy, *supra* note 33.

70. Mitchel de S.O.-L'E. Lasser, *Judicial (Self-)Portraits: Judicial Disclosure in the French Legal System*, 104 YALE L.J. 1325 (1995). See generally Martin A. Rogoff, *The French (R)evolution of 1958-1998*, 3 COLUM. J. EUR. L. 453 (1997/1998).

71. See generally MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS. A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (Paul Craig & Grainne de Búrca eds., 2004); see also Cooter, *supra* note 67, at 1651 (noticing that interpretation of civil codes often coincides with a search for social norms); ROBERTO PARDOLESI & BRUNO TASSONE, I GIUDICI E L'ANALISI ECONOMICA DEL DIRITTO (2003) (tracking the use of economic arguments in civil adjudication in Italian courts).

72. 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).

is conceptualized on the two sides of the Atlantic is its relation to sovereignty and constitutional structures.⁷³

This section breaks down the homogeneity assumption into its analytical components, first explaining and then reconciling important differences in the two systems' understanding of the relation between private law and government.

1. *Private Law and Government in Continental Europe*

In Europe, where traditional "public" matters such as judicial review and federalism are undergoing major supranational restructuring and reconceptualization, scholars are busy revisiting national private-law doctrines, reconstructing their genealogies, reconsidering their implications for the welfare of EU citizens, and assessing their regulatory potential.⁷⁴ 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 eighteenth and nineteenth century continental Europe. Napoleon's imperial vision relied both on military victories and the success of his codification.⁷⁵ 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 cri-

73. This argumentative stance does not ignore stylistic differences and the divergent impact of cultural heritage on the legal traditions of common and civil law. For the most forceful illustrations of such differences, see Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L. & COMP. L.Q. 52 (1996); 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, 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 & David Tabachnick, *Rawls & Contract Law*, 73 GEO. WASH. L. REV. 598 (2005).

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

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

teria, 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.⁷⁶ 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 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 state unity, constitutional breakthroughs,⁷⁷ and national identity.⁷⁸ As a

76. See, e.g., JOHN P. DAWSON, *THE ORACLES OF THE LAW* 374-431 (1968); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 36-42 (2d ed. 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).

77. 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 WIEACKER, *supra* note 25, at 266. Wieacker uses the label "natural codes" to describe the code Napoleon, the Austrian ABGB of 1811 and the Prussian ALR of 1794. *Id.* at 258. See also VAN CAENEGEM, *supra* note 23, at 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.")

78. 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 Christian Joerges, *The Science of Private Law and the Nation State*, in *THE EUROPEANISATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION* 47, 48 (Francis Snyder ed., 2000). Joerges explains that "[a]lthough 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 nineteenth century. Cf. Reiner Schulze, *A Century of the Bürgerliches 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").

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.⁷⁹

2. *Private Law and Government in the United States*

In the United States, the role of the common law in legal discourse is seemingly different. Common law is considered a “strong supplement”⁸⁰ of political democracy but not a constituent or defining element of sovereignty. Federalism has separated the state monopoly of common law adjudication from a number of Washington-based functions of government.⁸¹ The option of private-law codification was contemplated in nineteenth-century America, but the very idea of “creating” by legislative fiat laws that should only be “found” in pre-existing truths encountered principled opposition⁸² and was blocked

79. 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, 77 (2002) (explaining that the civil codes of Ukraine and other Newly Independent States (NIS) are “the most significant legislative acts in the recent history of these countries, and have provided a legal basis for transition to a democratic society and market transformation”).

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

81. Most famously in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

82. 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) (“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

by conservative forces.⁸³ 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 creature⁸⁴ in constant tension between its past and its future, irreducible to rigid schemes and therefore refractory to legislative intervention.⁸⁵

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 United States. In common-law jargon, the wording “private-law system” is often understood to be the product of private lawmaking sources—as in the case of closely-knit business communities developing self-reflexive norms of interaction for their members.⁸⁶ The state-breaking implications of private autonomy gain utmost visibility in the now extensive literature on “norms” or “private ordering.”⁸⁷ The old merchant law 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.⁸⁸

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.⁸⁹ Norms are attractive because of their decentral-

even then the socially situated judge could only apply law that conformed to that society’s ‘social standard, or ideal, of justice.’” [footnotes omitted]).

83. Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435, 510-11 (2000).

84. See FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 134-36 (1973).

85. On anti-positivism in US private law see Mattei, *supra* note 72, at 215 (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.”).

86. David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

87. See generally Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

88. See di Robilant, *supra* note 48.

89. “Private” also indicates the fact that disputes among group members will not be referred to state-controlled courts, but rather resolved informally

ized, emergent character, which is allegedly best attuned to the needs and efficiency concerns of discrete communities.⁹⁰ Norm scholars disagree—today as in the times of Llewellyn⁹¹—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.⁹² Yet they all conceive of law production as appropriately independent from the state at least at its inception.

3. *The Built-in Ambivalence of 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, one of two sides. One side points at purely local, centrifugal dimensions (on Roman coins, religious rituals or symbols of harvest). But

within the community. See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55, 60-62 (1963) (contract enforcement often occurs outside courtrooms); see also 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).

90. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 52-56 (1991).

91. Karl Llewellyn, a prominent figure in the project of sales law reform that led to the drafting of the Uniform Commercial Code, sought to incorporate customary business norms into the Code in an effort to make commercial law more reflective of commercial reality. Others thought that business practices would best be left informal and non-enforceable in court. See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 520 (1987).

92. See 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) (“[A]n important function of law is to shape or regulate norms.”); see also ELLICKSON, *supra* note 90, at 249-58; David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 426-30 (1990); 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 flip side shows, unmistakably, the head of the Emperor and links even the most discrete, peripheral form of exchange to a powerful centralized infrastructure.

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 achieve 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, 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.

III. STATE-MAKING THROUGH PRIVATE LAW IN THE INTERNATIONAL SPHERE: CASE STUDIES

The ongoing proliferation of non-governmental adjudicatory bodies of international law is an increasingly important topic in both academic and political circles.⁹³ In contrast to the traditional realist view of international law, whereby diplomacy, raw politics, and states' self-interest dominate the 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"

93. See 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) (offering a structural categorization of international tribunals). The intensity of the debate concerning the proliferation of such tribunals is evidenced by Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005).

and finally produce a quasi-constitutional architecture for smoother relations in a global community.⁹⁴

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 gunboat 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.⁹⁵

Scholars have observed, however, that even when non-state actors are given access to international courts, governments still design non-domestic adjudicatory systems in such a way as to leave themselves political safety valves.⁹⁶ For interna-

94. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193-94 (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,” *id.* at 193, and predicting that “[o]ver 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”).

95. For an analogy between NAFTA Chapter 11 and human rights regimes granting individual standing, see José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. 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 fifty 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, 7 (2001) (arguing that “such a deep level of constitutionalization is inappropriate for NAFTA”).

96. 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. See, e.g., José 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. *Id.* at 414-15. 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

tional 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.”⁹⁷ 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 consolidate the power of international adjudicatory systems and lend them the appearance of impartiality, adherence to the rule of law,⁹⁸ 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-World War II Europe. For roughly fifty 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.⁹⁹ In this model, inter-state obligations are reinforced by states’ specific obligations towards their own citizens, recognized and enforced by local courts. The collaboration of na-

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.*

97. *Id.* at 414-15.

98. Professor Weinrib suggests that private law might be an example of “the autonomy that we associate with the rule of law.” WEINRIB, *supra* note 46, at 231.

99. 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.

tional enforcement authorities lends strength to otherwise toothless international commitments.¹⁰⁰

The first illustration of the State-making impact of private law pertains to the judicial discourse of the ECtHR, which exhibits several supranational features. This court's jurisdiction extends over a geographic and political area significantly larger and less homogeneous than the EU, and the court 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, even when subliminal and indirect,¹⁰¹ may help this court bypass thorny issues of international politics and handle state-citizen relations as if simply governed by rule-of-law criteria. Though buried in the subtext, private law can strangely depoliticize the context of human rights disputes and allow for otherwise unpalatable, ideologically-colored holdings.

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 law¹⁰² 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 re-

100. Helfer & Slaughter, *supra* note 93, at 287.

101. The role of private law discourse in the ECtHR is minor. The entire worldview of the actors involved (parties, governments and judges) is ostensibly shaped by public-law considerations.

102. The EU and the European Community (EC or simply "Community") are not the same thing. The 1957 Treaty of Rome established the European Economic Community (EEC). Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. In 1992, EEC law underwent radical changes due to the Maastricht Treaty. Maastricht extensively reformed the EEC Treaty, renaming it to reflect an expansion of its competencies far beyond strictly economic subjects. It is now technically known as the Treaty Establishing the European Community, Nov. 10, 1997, 2002 O.J. (C 532/96) [hereinafter EC Treaty]. With the Maastricht reform, the EC became only the first of the three "pillars" of a much more ambitious and far-reaching supranational project, the European Union (EU). The existing harmonization of states' private law, started before the Maastricht Treaty, has been realized by the EEC or EC institutions in the exercise of first-pillar capacities. In this Article, "EU" is used to refer generically to the entire institutional apparatus of the European Union, while "EC" and "Community" refer to pre-Maastricht or first-pillar activities and institutions.

sistance 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 arbitral bodies, seemingly independently from state-based institutions.¹⁰³ 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.

A. *Private Law and State-Making in Human Rights Disputes*

International human rights regimes that are exclusively based on the purely contractual paradigm of intergovernmental treaties tend to be weak.¹⁰⁴ By contrast, granting individuals direct access to a supranational court, whose jurisdiction and authority are fully recognized by member governments, has created the most successful enforcement of human rights against states.¹⁰⁵

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 maxi-

103. W. LAWRENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 657-58 (3d ed. 2000).

104. Helfer & Slaughter, *supra* note 93, at 285-86.

105. Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. Int'l L. & Pol. 753, 780-81 (arguing that international adjudication is necessary to protect human rights. “Without access to impartial courts, human rights and the rule of law cannot prevail.”). To date, very few supranational tribunals are directly available to individuals. *See Alvarez, supra* note 96, at 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.”).

mize 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.¹⁰⁶ 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.¹⁰⁷ When dealing with relations among sovereign governments, such a court also runs the risk of privileging the worldview of certain signatory states while penalizing others and, therefore, abdicating its role of impartial 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 1990s, 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.¹⁰⁸

106. 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 ECtHR's "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, 450-66 (2001).

107. See Oliver Gerstenberg, *Private Law and the New European Constitutional Settlement*, 10 EUR. L. J. 766, 768-70 (2004).

108. The ECtHR 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 1959; one of the missions of this court was to prevent 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*

1. *The Loizidou Case*

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 political split of the island between Cypriots of Greek descent in Southern Cyprus and those of Turkish descent in Northern Cyprus.¹⁰⁹ In 1989, Ms. Loizidou had taken part in a march organized by the “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 United Nations buffer zone and, for some women, even reaching past the Turkish forces’ line.¹¹⁰ During the demonstration, Ms. Loizidou was arrested and detained by Turkish soldiers and now sought redress before the ECtHR. The case had the usual vertical dimension, with an aggrieved individual petitioning against a signatory state (Turkey).¹¹¹ The facts of the case, however, took place in the Turkish Republic of

RIGHTS 3-16 (4th ed., 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.

109. The Cypriot question is notoriously intractable, and far too complex to be summarized here. For a detailed illustration of the conflict, see DAVID HANNAY, *CYPRUS: THE SEARCH FOR A SOLUTION* (2005); and for a brief discussion, see 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 (2000). Notwithstanding intense diplomatic efforts the island is still politically divided. Its northern part is governed by the Turkish Republic of Northern Cyprus, an entity that the international community, with the exception of Turkey, refuses to recognize as a state. HANNAY, *supra*, at 8.

110. The Secretary-General, Report of the Secretary-General on the United Nations Operation in Cyprus, ¶ 11, U.N. Doc. S/20663 (May 31, 1989), quoted in *Loizidou v. Turkey*, 23 Eur. Ct. H.R. 513, 518-19 (1997).

111. The ECtHR 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]. See *Cyprus v. Turkey*, 23 Eur. H.R. Rep. 244 (1997). 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, art. 35 I, Europ. T.S. No. 155 at 5; *Cyprus v. Turkey*, 23 Eur. H.R. Rep. 244, 283 (1997).

Northern Cyprus (TRNC), which is neither a party to the Convention for the Protection of Human Rights and Fundamental Freedoms¹¹² (ECHR) nor, by most accounts, a state.¹¹³ Turkey disclaimed any official involvement in the actions of the TRNC.¹¹⁴ Against this background, how could the court offer Ms. Loizidou protection without disputing in any way the lawfulness of Turkey's military presence on the island? How

112. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The ECHR provides the textual basis for the ECtHR's review of state action. ECHR arts 19 & 48, *id.* at 234, 246.

113. To this day, the international community does not recognize the TRNC as a state. See HANNAY, *supra* note 109, at 8.

114. Loizidou, 23 Eur. Ct. H.R. at 535 (J. Wildhaber, concurring) ("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 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 article II of the Treaty of Guarantee, U.K.-Greece-Turkey-Cyprus, Aug. 16, 1960, 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 Y.B. OF INT'L L. 308, 308 (1978); KYPROS CHRYSOSTOMIDES, *THE REPUBLIC OF CYPRUS: A STUDY IN INTERNATIONAL LAW* 131 (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, ¶ 62 (1995) (Preliminary Objections), as recalled by the court itself in Djavit An v. Turkey, no. 20652/92, ECHR 2003-III, ¶ 52.

could it find Loizidou's application admissible and yet avoid venturing in "a highly political area"?¹¹⁵

The applicant lamented the violation of a number of ECHR 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.¹¹⁶ The applicant's property rights were all that carried the day for her.¹¹⁷

A protocol added to the ECHR 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, consti-

115. *Loizidou v. Turkey*, 23 Eur. H.R. Rep., at 548 (J. Gölcüklü, dissenting).

116. *Loizidou v. Turkey*, 20 Eur. H.R. Rep. 99, 113 (1995), incorporating the report of the European Commission of Human Rights (Commission Report III, ¶ 46). Ms. Loizidou's application (App. No. 15318/89, lodged on 22 July 1989) complained that her arrest and detention involved violations of ECHR articles 3 (prohibition of torture and inhuman or degrading treatment or punishment), 5 (Right to liberty and security) and 8 (right to respect for private and family life). She also claimed violations of her right of access to property as protected by article 1 of protocol no. 1 to the ECHR, 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 ¶ 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, ¶ 76-85 (1995) (Preliminary Objections).

117. International human rights law is showing increasing support for individual property rights against trespassing states. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 73-77 (Jun 9); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Protection of Human Rights, Working Paper: *The Return of Refugees' or Displaced Persons' Property*, Agenda Item 4 P 42, U.N. Doc. E/CN.4/Sub. 2/2002/17 (2002), (prepared by Paulo Sergio Pinheiro). The emergence of the right to housing and property restitution in the 1990s has been called "one of the more inspiring human rights developments of the past decade." *RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS*, 3 (Scott Leckie ed., 2003). The *Loizidou* case is, at first sight, in line with this development. What sets it apart, however, is the court's difficulty of identifying a proper respondent for Ms. Loizidou's complaint—a difficulty that the court bypassed only recurring to private-law categories and analogies. See *Loizidou v. Turkey*, 20 Eur. H.R. Rep. 99, 126-127 (1995).

tutions protect property owners from arbitrary government takings and make lawful takings conditional upon payment of compensation.¹¹⁸ The constitutional guarantee of property rights 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.¹¹⁹ 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.

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 interprets this provision in the context of varied disputes. Case subjects range from rent-control legislation in Italy to confiscation of private property in Romania.¹²⁰

118. “Taking property is lawful if it fulfills three basic criteria: it must be for a public purpose, be non-discriminatory and give rise to the payment of compensation. These basic principles have been universally accepted, and many countries refer to them these days as the legal basis for their national laws and practices.” UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2003, FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 110 (2003).

119. Levinson, *supra* note 23, at 1313.

120. *See, e.g.*, Sorrentino v. Italy, App. No. 40465/98, [2004] Eur. Ct. H.R. 50, <http://www.echr.coe.int/eng>; Brumarescu v. Romania, 33 Eur. H.R. Rep. 862, 879-82 (2001).

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.¹²¹

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.”¹²² This interference with her property rights, however, could not “be regarded as either a deprivation of property or a control of use”¹²³ because Turkey, the respondent government, simply lacked the legal capacity to expropriate anyone on Cypriot land.¹²⁴ This was a vertical dispute with no vertex.

The case could have ended there and be archived as yet another dismissal of private owners’ claims to land situated in occupied territories.¹²⁵ Such a holding would also have met

121. *Fredin v. Sweden*, 13 Eur. Ct. H.R. (ser. A) at 17 (1991), 13 Eur. H. R. Rep. 784, 795. “[A]n interference must achieve a ‘fair balance’ between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The search for this balance is reflected in the structure of Article 1 . . . there must be a reasonable relationship of proportionality between the means employed and the aim pursued.” 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, 369-78 (2000).

122. *Loizidou v. Turkey*, 23 Eur. H.R. Rep. at 533.

123. *Id.*

124. *Id.* at 528 (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.”).

125. Individual claims for compensation, brought before international tribunals, tend to be successful only *after* the international dispute is fully solved, and mostly on the basis of peace treaties between occupying and occupied countries. See Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT’L L. 295, 331-32 (1995). Analogously, the importance of the return to one’s home is well recognized in international law when proprietary claims are made against formerly enemy states following the end of a conflict. See Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT’L L. & POL. 441, 447 (2005) (“International observers have identified an emerging post-conflict right of property restitution, based on both generally applicable human rights norms and recent practice.”).

with the approval of several members of the court.¹²⁶ But the Grand Chamber's majority concluded otherwise and thought it feasible to adjudicate the case along legal, non-political lines. Uncovering its private-law subtext is essential to understanding the court's opinion.

2. *Private-Law Subtext and De-Politicization*

According to the majority opinion, the proper textual basis for Loizidou's complaint was to be found not in the above-quoted portion of the ECHR's property clause but, rather, in its opening line: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions." This switch of textual basis—from de jure "deprivation . . . in the public interest" to de facto interference with "peaceful enjoyment"¹²⁷—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.¹²⁸ 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.¹²⁹

126. Six out of the seventeen judges composing the Grand Chamber produced a total of five 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. 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." Gölcüklü warned his brethren: "in the present case . . . it is impossible to separate the political aspects of the case from the legal aspects." *Loizidou*, 23 Eur. Ct. H.R. at 548, 552. The dissenting opinion of Judge Bernhardt joined by Judge Lopes Rocha 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." *Id.* at ¶ 1 (Bernhardt, J., dissenting).

127. On the distinction between these two different dimensions of article 1 protocol no. 1, as articulated in other cases of the ECtHR, see IAIN CAMERON, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 105-7 (3d ed. 1998).

128. *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, 528, ¶ 49 (1997) (Merits). *See supra*, note 114 and corresponding text.)

129. 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

Interestingly, the distinction between ownership and possession is firmly based on private-law doctrines.¹³⁰ Moreover, “peaceful enjoyment and possession” is private-law jargon, heard often in the context of neighbors’ disputes, and aptly used in the context of such torts as nuisance or trespass on land.¹³¹ It also characterizes tenants’ complaints against landlords,¹³² lessees’ grievances against lessors,¹³³ and relatives’ disputes concerning the use of family property.¹³⁴ The ECHR’s property clause is mostly aimed at vertical relations, but its beginning alludes to such basic canons of private law as the owner’s *jus excludendi*—the right to exclude all others from his land and its corollary 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.¹³⁵ Loizidou’s problems stemmed simply from “an individual act of Turkish troops directed against her property.”¹³⁶

displaced Turkish Cypriot refugees after the Turkish intervention in the Island in 1974. *Id.* at ¶ 64.

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

131. *Bedell v. Goulter*, 261 P.2d 842, 850 (Or. 1953).

132. *Rowland v. Klies*, P.2d 310 (Mont. 1986).

133. *Evangelical Lutheran Church v. Stanolind Oil & Gas Co.*, 251 F.2d 412 (8th Cir. 1958).

134. *In re Marriage of Patricia Tober and Rees Lloyd*, No. B150943, 2004 Cal. App. LEXIS 8072, at *29 (Cal. Ct. App. Sept. 1, 2004).

135. The private-law logic of the Loizidou court is somewhat symmetrical to the reasoning of the US Second Circuit in *Filártiga v. Peña-Irala*, 630 F.2d 876 (1980) and in *Kadic v. Karadzic* 70 F.3d 232 (2d Cir. 1995), cert. denied, 116 S. Ct. 2524 (1996). In *Loizidou*, the state (Turkey) could only be found liable when its relation to the plaintiff was reduced to one among private parties. In *Filártiga*, and most explicitly in *Kadic*, the individual defendant could be found liable under the Alien Tort Claim Act because he was assimilated to a state actor. See Alan Frederick Enslen, *Filártiga’s Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with its Decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695, 722-24 (1997).

136. 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).

Reduced to this anodyne horizontal dimension, Turkey's condemnation in Strasbourg became plausible and palatable.¹³⁷

In time, the *Loizidou* judgment paved the way for a series of judicial¹³⁸ and legislative¹³⁹ 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.

In the background of the *Loizidou* saga stand two different developments. First, individual property is now prominent among protected human rights. The possibility of reparation, at least after the end of hostilities, for people deprived of housing during international conflicts is increasingly recognized in international law.¹⁴⁰ This development is occurring along purely vertical lines, with the usual pattern of individual complainants and well-identified sovereign respondents. Against this part of the background, Ms. Loizidou's ability to recover damages for loss of enjoyment of her property in Northern Cyprus might seem a typically vertical assertion of propertarian entitlements against an offending state (Turkey). *Loizidou*, however, stands out as a most interesting case because of the noted impossibility of identifying a proper sover-

137. 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*, 26 Eur. H.R. Rep. D5, D10 (1998) (article 50), ¶ 39. Loizidou finally received 457,084.83 CYP in compensation. *Id.* at ¶ 49.

138. 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. *Id.* at ¶ 40. 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) (especially ¶ 77, where the court greatly expands the definition of Turkey's liability stemming from *Loizidou* principles); *Djavit An v. Turkey*, 20652/92 Eur. Ct. H.R. 91, ¶ 23 (2003).

139. *Eugenia Michaelidou Developments Ltd. and Michael Tymvios v. Turkey*, 16163/90 Eur. Ct. H. R. 418, ¶ 14 (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.").

140. See Williams, *supra* note 125, at 446-47.

eign respondent—a predicament that could only be overcome by resorting to private-law analogies.

The second relevant development is exemplified by a line of cases originating in *Filártiga v. Peña-Irala*, recognizing the possibility of tort claims against private, non-state offenders of basic human rights.¹⁴¹ In those cases, classical private-law instruments are visibly brought to bear upon international human rights and open up new important avenues of enforcement. That line of development is clearly horizontal, as State action is unnecessary in alien tort claims. By comparison, the impact of private law upon the *Loizidou* case might seem negligible. Yet, *Loizidou* happens to be more relevant to this Article than the *Filártiga* progeny, because it exemplifies the force of private-law discourse in otherwise vertical and hotly political situations.

B. *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.¹⁴² 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.¹⁴³ 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

141. See Enslin, *supra* note 135, at 696.

142. Mauro Cappelletti, Monica Seccombe & Joseph Weiler, *A General Introduction*, in *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* 3, 15 (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986) (describing the project as aimed at examining “how law can be used to promote . . . economic integration”).

143. See Mauro Cappelletti, *Foreword to the Florence Integration Project Series*, in *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE*, *supra* note 142, at x.

eyes of the people of Europe. The surprising activism of the Community's only judicial body, the European Court of Justice (ECJ), begged for institutional justification. Because the European architecture needed reinforcement to continue to exist and to expand further, a new legal system with strong supranational features had to be built.¹⁴⁴ In non-obvious ways, private law contributed to the supranationalist project as much as public law.

1. *The Public Law Bias of Supranationalism*

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 three of public law's main articulations—international, constitutional, and administrative law. The project of 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 precedent in the history of intergovernmental relations and required new international-law conceptualization.¹⁴⁵ Where international lawyers could not reach, constitutionalists intervened to explain that national constitutions had or could make room for areas of shared or delegated sover-

144. See Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2410 (1991) (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"). On supranationalism and its main traits see Weiler, *supra*, note 16.

145. See Weiler, *Transformation*, *supra* note 144, at 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*, in JUDICIAL DISCRETION IN EUROPEAN PERSPECTIVE 150, 150-163 (Ola Wiklund ed., 2003) (offering a new reading of the doctrine of direct effect and demonstrating its compatibility with most orthodox international law).

eignty.¹⁴⁶ The judicial reviewability of Brussels-made legislation—another fundamental trait of the European legal structure—was based on a French model of administrative law.¹⁴⁷ 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 three volumes, *Integration through Law* paid only tangential attention to civil codes and incipient private-law harmonization.¹⁴⁸

Two decades later, it is instead apparent that 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 EU illustrates, private law achieves both.

146. See, e.g. Paul Kirchof, *The Balance of Powers between National and European Institutions*, 5 EUR. L. J. 225, 227-28 (1999) (discussing interactions between national law and EU law)

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

148. See, e.g. INTEGRATION THROUGH LAW, *supra* note 142, at 35 (discussing the need to approximate private laws of competition and torts); GIORGIO GAJA, PETER HAY, & RONALD ROTUNDA, *Conflict of Law as a Technique for Legal Integration*, in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 113, at 160 (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986) ("There is very little which has been done so far by private institutions in order to achieve greater integration among European States"); PETER HAY, OLE LANDO & RONALD ROTUNDA, *Conflict of Law as a Technique for Legal Integration*, in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 161, at 256 (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986) ("[P]olitical and technical obstacles may make it impossible for the harmonization of substantive law to keep pace with the dismantling of economic frontiers."); LAWRENCE FRIEDMAN & GUNTHER TEUBNER, *Legal Education and Legal Integration: European Hopes and Experiences*, in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 345, at 372-74 (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986) (on the impossibility of reviving doctrinal legal unity in Europe).

2. *Supranationalism Through Private Law: Horizontal Direct Effect, Remedies, and Harmonization*

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 Treaty 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.¹⁴⁹ 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.¹⁵⁰ 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 citizens. Thanks to the private-law axiom of across-the-board consistency, European integration smoothly conquered the land of private contracts. Its entrenchment in member 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.¹⁵¹ 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 pri-

149. Case 43/75, *Defrenne v. SABENA*, 1976 ECR 455, ¶ 39 (“[T]he prohibition on discrimination between men and women . . . also extends . . . to contracts between individuals.”).

150. GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 251 (2d ed. 2002) (1993) (noting that direct effect characterizes not only the prohibition of gender discrimination (now in EC Treaty article 141), but also EC Treaty articles 39 (prohibiting nationality discrimination against workers from other EC states) and 81-82 (prohibiting anticompetitive agreements and abuse of market dominance)).

151. Case 33/76, *Rewe-Zentralfinanz EG v. Landwirtschaftskammer für das Saarland*, Case 33/76, 1976 ECR 1989.

vate 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.¹⁵² Since then, the ECJ has promoted the doctrine of effective compensation for losses suffered by any individual as a result of Community law infringements.¹⁵³ The result applies with equal force in vertical and horizontal relations.¹⁵⁴ 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.¹⁵⁵ Com-

152. This is known as the principle of equivalence. *Id.* at ¶ 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, ¶ 28. Effectiveness may demand that national courts stretch significantly the remedial reach of applicable national provisions. *See, e.g.*, Case C-271/91, *Marshall v. Southampton & Sw. Hampshire Area Health Auth.*, 1993 ECR I-4367.

153. PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS*, 230 (3d ed. 2003) (analyzing the ECJ's struggle to reconcile adequacy and effectiveness of remedies with the countervailing principle of states' autonomy in the design of remedies).

154. 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 3* (Mar. 11, 2005) (Provisional Background Paper, Joint EU Commission/IBA Conference on Antitrust Reform in Europe: a Year in Practice), available at <http://www.ibanet.org/images/downloads/Walter%20Van%20Gerven%20-%20Paper.pdf>.

155. Liability in tort for breach of EC Treaty article 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 EEC Treaty article 86 (now EC Treaty article 82) 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

munity 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*),¹⁵⁶ this is a momentous institutional development for the EU. 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.¹⁵⁷

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.¹⁵⁸ The project of codification, by contrast, is still in its early stages, but it is gaining political momentum.¹⁵⁹ 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.¹⁶⁰ Equally spontaneous may be the grassroots attempts to produce uniform rules meant to govern private transactions across state borders, so as to facilitate trade and promote free

Cottage Foods Ltd v. Milk Marketing Board [1984] A.C. 130 (H.L. 1983). For damages in private disputes relating to contracts entered in breach of EC competition law, see, recently, Case C-453/99, *Crehan v. Courage Ltd.*, 2001 ECR I-6297.

156. (Where there is a right, there is a remedy). See, e.g., Case C-253/00, *Antonio Muñoz y Cia SA v Frumar Ltd*, 2002 E.C.R. I-07289, ¶ 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.”

157. Christoph U. Schmid, *Pattern of Legislative and Adjudicative Integration of Private Law*, 8 COLUM. J. EUR. L. 415, 458 (2002) (“Community law is largely dependent for enforcement on national administrations, and without them could develop no notable effectiveness.”).

158. *Id.* at 418-25.

159. See Christian von Bar, *From Principles to Codification: Prospects for European Private Law*, 8 COLUM. J. EUR. L. 379 (2002). For critical observations See Martijn W. Hesselink, *The Politics of a European Civil Code*, 10 EUR.L.J. 675 (2004).

160. See, e.g., Reinhard Zimmermann, *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 (1994-1995).

movement.¹⁶¹ Jurists involved in the project appear sometimes to proceed in the mode of the historical school of nineteenth-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.¹⁶² It is worth remembering, though, that the German civil code, once adopted, was heralded as a symbol of national unity—a state-making artifact par excellence.¹⁶³

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.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶ The further unifi-

161. See von Bar, *supra* note 159.

162. 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).

163. See Schulze, *supra* note 78, at 465 (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").

164. Peter Christian Müller-Graff, *EC Directives as a means of Private Law Unification*, in *TOWARDS A EUROPEAN CIVIL CODE* 77, 80-82 (Arthur Hartkamp et al. eds., 2004).

165. See Walter Van Gerven, *Harmonization of Private Law: Do We Need It?*, 41 COMMON MKT. L. REV. 505, 530 (2004) (discussing the common assumption that transaction costs considerations militate in favor of private-law harmonization).

166. 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, 14-27 (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, 95-97 (2004).

cation 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.

C. *Private Law and State-Making in Transnational Commerce*

It is now time to switch the focus of these pages away from the relatively homogeneous field of European law. The State-making power of private law can also be deployed in the broader context of transnational commerce. Here, State-making takes the following pattern: the renewed popularity of *lex mercatoria* enhances the perceived legitimacy of private arbitration; arbitral tribunals, in turn, bring the private-law myth of horizontality and neutrality into the otherwise politically sensitive context of foreign investment; lastly, thanks to the legitimizing force of private-law discourse, the institutions of foreign investment become politically less contestable and correspondingly more powerful. What follows is an analysis of this three-part pattern.

1. *The Return of Lex Mercatoria.*

Widely practiced in the Middle Ages, then buried for a long time under a dominant Westphalian logic,¹⁶⁷ *lex mercatoria* is again in vogue.¹⁶⁸ The successful “privatization” of merchants’ disputes 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

167. 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 16th 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 I* (1999).

168. 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).

switch instead to private mechanisms for lawmaking and dispute resolution.¹⁶⁹

The new law merchant consists of rules and principles applied 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.¹⁷⁰ Lex mercatoria is only binding in so 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 the private law of contract.¹⁷¹

Beyond such general remarks, one finds a wide array of opinions on the nature and significance of substantive lex mercatoria.¹⁷² Some authors deem it “an autonomous legal

169. Ignorance of foreign law and distrust of foreign institutions rank amongst the most important reasons for this switch. See William S. Fiske, *Should Small and Medium-Size American Businesses “Going Global” Use International Commercial Arbitration?*, 18 *TRANSNAT’L LAW* 455, 456-57 (2005) (explaining how, when privatized dispute arbitration was not available, US business actors feared foreign courts because of “alien customs, procedures, and laws” as well as “inexperienced and biased judges and juries”).

170. 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.” COVINGTON & BURLING LLP, *PUBLIC INT’L LAW* 3 (2006), available at <http://www.cov.com/download/content/brochures/publicinternationallaw.pdf>.

171. See Teubner, *supra* note 4, at 10, 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 also Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 *IND. L.J.* 425, 433 (1988) (describing arbitration as a “creature of contract”).

172. See CRAIG ET AL., *supra* note 103, at 623. 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).” *Id.*, at 626.

order” based on “definite rules of law.”¹⁷³ 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.¹⁷⁴ 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.”¹⁷⁵ 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. Arbitral awards are portrayed as non-systemic and orthogonal to supranational authority.¹⁷⁶

Interestingly, the more *lex mercatoria* is understood as a peculiarly disassembled and soft version of private law, the more significant its State-making role 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.¹⁷⁷ Arbitration’s legitimacy thrives on the deepening of the private/public divide in transnational legal discourse.¹⁷⁸

173. CLIVE MAXIMILIAN SCHMITTHOFF, *INTERNATIONAL TRADE USAGES* 45, 47 (1987). For a critical discussion of this viewpoint, see CRAIG ET AL., *supra* note 103 at 626-29.

174. Maniruzzaman, *supra* note 168, at 706-08.

175. CRAIG ET AL., *supra* note 103 at 633. Such usages are no more than “a complement to otherwise applicable law.” *Id.* at 623. In the minimalist conception, 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. *Id.* at 635.

176. At least according to the technical taxonomy proposed by Cesare Romano (*Proliferation*, *supra* note 93) 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.

177. See CUTLER, *supra* note 30, 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).

178. See Shalakany, *supra* note 59, 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 con-

2. *Arbitration and Foreign Investment*

Private arbitration by independent tribunals has slowly but surely acquired enough dignity to be considered by many an ideal way to solve not only merchants' disputes, but also serious questions of sovereignty, such as those involved in litigation between private foreign investors and host states. This global trend is represented by over two thousand bilateral investment treaties (BITs) and by several multilateral treaties.¹⁷⁹ 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 government¹⁸⁰ or because of local constitutional protection of proprietary entitlements.¹⁸¹ 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

ception 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.”).

179. Most noticeably NAFTA and the Energy Charter Treaty. See Bernardo M. Cremades & David J.A. Cairns, *Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes*, in *ARBITRATING FOREIGN INVESTMENT DISPUTES*, 325, 325-26 (Norbert Horn & Stefan Kröll eds., 2004).

180. 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.

181. Cremades & Cairns, *supra* note 179.

investment disputes and could only invoke the diplomatic protection of their governments.¹⁸² In that scenario, investor nations, by controlling the arbitral resolution of state-to-state disputes, could obtain a systemic advantage over host countries.¹⁸³ Equally undesirable would be devolving such disputes to the national courts of the host country, 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.¹⁸⁴

To be sure, contrary to the practice of international commercial arbitration, foreign investment tribunals are not officially in the business of applying private law.¹⁸⁵ Scholars painstakingly explain that, even in the presence of “umbrella” clauses,¹⁸⁶ a treaty violation cannot result simply from any breach of contract¹⁸⁷ and that the states’ conduct will have to

182. William W. Park, *Arbitration and the Fisc: NAFTA’s “Tax Veto,”* 2 CHI. J. INT’L L. 231 (2001) (arguing that granting foreign investors a right to settle investment disputes by arbitration allows for “a process more politically and procedurally neutral than either host state courts or foreign gunboats.”).

183. *Id.*

184. Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 369-70 (2003) (“Arbitration [provides] a forum that is more neutral than host country courts, both politically and procedurally. The relative impartiality of international tribunals bolsters investor confidence and inspires greater certainty that the contract will be interpreted in line with the parties’ shared ex ante expectations.”).

185. See Thomas W. Wälde, *The “Umbrella” (or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, TRANSNAT’L DISP. MGMT., Oct. 2004, at 35, n. 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).

186. Many BITs contain so-called “umbrella clauses,” also known as “pacta sunt servanda” clauses. When this is the case, 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 generally *id.*

187. See *Id.* at 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 Société Générale 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 ¶ 127, 48 (in important dictum,

be evaluated by investment arbitrators according to flexible standards (such as fair treatment, non-discrimination, or fair compensation in case of takings).¹⁸⁸ In principle, the system does not envisage any mechanistic enforcement of investors' natural rights.¹⁸⁹ In at least two ways, however, private law lends legitimacy to foreign investment arbitration.

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), this dictum is consistent with "The trend in international investment 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 the courts of the Philippines, and deferred to the will of the parties. *But see* SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, 42 I.L.M. 1290, (Aug. 6, 2003) (where tribunal refused to hold, as a matter of principle, that any simple breach of contract would also be a violation of the Swiss-Pakistani BIT's umbrella clause).

188. Cremades & Cairnes, *supra* note 179, at 339 ("[P]ublic international law has a prominent role in investor-state arbitrations.").

189. 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 (Jun. 2, 2000) (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"), *available at* http://www.worldbank.org/icsid/cases/waste_united_eng.pdf; Azinian v. Mexico, Case No. ARB(AF)/97/2, 20-23 (Nov. 1, 1999), *available at* http://www.worldbank.org/icsid/cases/robert_award.pdf. 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;" and "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*." On the other hand, 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, 42 I.L.M. 85, 111 (ICSID 2003) (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 be-

First, deference to arbitral tribunals stems from governments' express consent at the time in which each investment treaty is signed or, if necessary, at the time of the dispute.¹⁹⁰ Arbitral awards are legitimized by this private, contractual logic.

Secondly, arbitration performs the discursive function of leveling state interests with investors' individual rights along an imaginary horizontal line.¹⁹¹ The intuitive analogy between investment arbitration and law-merchant tribunals, even though incorrect,¹⁹² 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, are treated with the impartiality and indifference to politics typical of commercial arbitration.¹⁹³

3. *Private Law and the Consolidation of Regional Trade Institutions: The Case of NAFTA*

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

cause "normal principles of the Massachusetts law of contracts" happened to excuse the City's breach.)

190. See Wälde, *supra* note 185, at 68; Cheng, *supra* note 187, at 473.

191. 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: IC-SID Arbitration and BITs Challenged by the Argentine Government* (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. Corte Suprema de Justicia [CSJN], 2/11/2004, "Jose Cartellone Construcciones v. Hidroelectrica Norpatagonica S.A," Fallos (2004-XXXVII-87) (Arg.).

192. See Wälde, *supra* note 185, at 35, n. 79 and corresponding text.

193. Cf. Alvarez, *supra* note 96, 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.").

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.¹⁹⁴

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.¹⁹⁵ But NAFTA resorts heavily to a structured arbitration process, not only to resolve disputes between governments in such public-law matters as anti-dumping duties¹⁹⁶ 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.¹⁹⁷ It is generally understood that Chapter 11, relating to the protection of private investments within the borders of any of the three sovereign parties, is where the real bite of NAFTA lies.¹⁹⁸ Chapter 11 sends litigants off into the realm of private arbitration and offers them a choice among already existing arbitral struc-

194. CUTLER, *supra* note 30, at 31.

195. 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, 155 (1992).

196. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992 32 I.L.M. 612, 683 (1993) (Antidumping and Countervailing Duty final determinations).

197. BITs seem to be too many to count. See Antonio Parra, *ICSID and Bilateral Investment Treaties*, 17 ICSID NEWS (2000), <http://www.worldbank.org/icsid/nees/n-17-1-7.htm> (giving an account of the worldwide proliferation of BITs in the past half-century, and outlining their content).

198. The implementation of Chapter 11 over the past few years has upset many. See Jeffrey Atik, *Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques*, 3 ASPER REV. INT'L BUS. & TRADE L. 215, 216 (2003) ("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.").

tures.¹⁹⁹ The dispersion of foreign investment disputes over the most centrifugal form of adjudication—the multitude of arbitral fora—is exactly what turns an otherwise common international agreement into a veritable system with profound constitutional implications.²⁰⁰ Decisionmaking 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.²⁰¹ Rather than simply eroding the sovereignty of the parties, NAFTA re-configures sovereignty at a different, denationalized level.²⁰² The shift is substantive. Heavily tangled bundles of items of governance, not just narrow commercial disputes, are transferred to new adjudicatory bodies.²⁰³ The contribution of private-law

199. These structures include ICSID, ICSID Additional Facility, and UNCITRAL. *Id.*, at 224. Governments have no say on the composition of the arbitral panel or on the law arbitrators will apply. See International Center for Settlement of Investment Disputes, About ICSID, <http://www.worldbank.org/icsid/about/main.htm>.

200. See Afilalo, *supra* note 95. 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).

201. 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* note 198, at 216 n.5 (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”).

202. See Tai-Heng Cheng, *supra* note 187, at 492 (arguing that “The power and authority that international investment law drains from states does not vaporize, and is often transferred to a wide range of decision makers Among these transferees, the greatest beneficiaries are foreign and international tribunals and investors”).

203. 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 govern-

discourse—with its emphasis on de-politicization and triumph of the rule of law over state interests—is once more essential to this development.

IV. GLOBALIZATION AND PRE-POSITIVISM

The illustrations offered in the foregoing pages bear close analogy to famous chapters in the history of private law. This part revisits those illustrations in historical perspective. The goal here is to identify those ancient patterns of private-law evolution which repeat themselves in the age of globalization. The consequences of adopting a private-law mode of discourse in transnational settings become more visible and predictable in light of historical precedents.

This historical overview begins with the idea that globalization reduces the impact of positive state law and therefore paves the way to pre-positive legal arguments. In global private-law discourse, these arguments carry astonishing weight.

A. *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 jurisdiction.

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 al-

ment's pursuit of the common good. *See* Wai, *supra* note 66, at 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 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.”).

ternatively in history or in the allegedly scientific nature of its system.²⁰⁴

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 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 I shall now turn.

B. *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 individuals 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 grassroots norm production as independent from and indifferent to sovereign state powers.²⁰⁵ 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* expressions of state sovereignty in any traditional sense.

This non-systemic, pre-positive strand of private-law discourse finds its origin in seventeenth century natural law.²⁰⁶

204. Joerges, *supra* note 78, at 47.

205. *See* di Robilant, *supra* note 48.

206. 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 second-generation modern jus-naturalist—refined and further

According to this philosophical school, human reason and 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 for, and if necessary in conflict with, the sovereign laws of the time.²⁰⁷

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,²⁰⁸ the kind of private law invoked by transnational 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.²⁰⁹ 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.”²¹⁰

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.²¹¹ This core concept

secularized the rationalism of Grotius’s philosophy. WIEACKER, *supra* note 25, at 213-14.

207. 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).

208. See e.g., ITALIAN CIVIL CODE 832, defining property rights as a set of prerogatives of ownership duly identified and limited by (statutory) law.

209. Daniel J. Meltzer, *Member State Liability in Europe and the United States*, 4 INT’L J. CONST. L. 39 (2006).

210. See Van Gerven, *supra* note 165, at 517-18 (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).

211. See JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 305-07 (Peter Laslett ed., Cambridge Univ. Press 1970) (1690); see also L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U.

must notoriously come to terms with its antithesis, namely Jeremy Bentham's notion of property as a creature of the state.²¹² 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.²¹³

By the same token, in transnational contexts, individual rights are invoked as trump cards²¹⁴ and boosted by sheer jus-natural rhetoric. As the state effaces, natural law triumphs. Private autonomy can express itself without the clutter of state intervention. A prominent arbitration scholar has explained:

[I]n the field of transnational business activities . . . the force of the contractual consensus can flourish and develop its law-making quality, unhampered by consumer protection laws and notions of distributive justice that go beyond the general principle of "good faith and fair dealing in international trade."²¹⁵

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

C. *State-making and state-breaking in "Pacta sunt Servanda."*

The jus-natural maxim *pacta sunt servanda*, featuring prominently to this day in both private and international

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.

212. Ederington, *supra* note 211, at 270-74. 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 inter-state conflicts. When this view prevails, the claims of individual property owners against occupying forces meet with no success whatsoever.

213. *See supra*, Part II.A.2.

214. *Cf.* Joel P. Trachtman & 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).

215. Berger, *supra* note 64, at 11.

law,²¹⁶ 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.²¹⁷ 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.²¹⁸ As observed above, this logic holds sway in contemporary legal discourse. It carries with it profound state-breaking implications, insofar as it shifts the locus of law production away from central authorities and down to the level of consent between equally situated subjects.²¹⁹

Public international law is conventionally based on a just-naturalist faith in private autonomy. Sovereign governments, understood as glorified individuals, can willingly enter treaties and bind themselves to spontaneously undertaken obligations.²²⁰ This basic contractual paradigm operates in a loose,

216. Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT'L L. 421-27 (1994) (explaining 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*.

217. See Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 A.J.I.L. 313, 326 (2001) (explaining that as one of natural law's central tenets, "pacta sunt servanda," could be ascertained simply "by reasoning correctly on the basis of fundamental premises about justice").

218. 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., Hackett Publishing, 2d ed. 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.").

219. See Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFFALO L. REV. 49, 130-31 (1997) (re-marking that "[a]rbitration 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.)).

220. Murphy, Jr. *supra* note 207, 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

disaggregated legal order, with no world legislator or court with real power. The proverbial softness of classical international law is based on the impossibility of enforcing, in any judicial sense, the obligations spelled out in treaties.²²¹ In so far as private law inspires or governs bilateral or multilateral treaties, it 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.²²² 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

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, 28-36 (1999).

221. 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. See *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 by yielding peace, favoring foreign investment, or increasing the chance of obtaining financial or political credit. See Oona A. 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 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.

222. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 115 (2000).

neutral and merely procedural role of channeling and reinforcing the human practice of consensual dealing.

“Pacta sunt servanda” is therefore a maxim with ambivalent meaning. While pointing at dispersion, it may legitimize new centers of power. As observed in the foregoing pages, this ambivalence facilitates institutional developments in the age of globalization.

D. *Centripetal Patterns: From Dispersion to System*

The private law envisaged by the designers of transnational architectures often starts as dispersed and refractory to 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.

But 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.²²³ 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, and transparency, someone will skillfully close up loopholes.

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

223. 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).

drafting of such codes depends on time-honored accretions of practical wisdom and fancy juridical work, 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 grassroots legal work, based on the belief that the spontaneity of human interaction and the wisdom of piecemeal adjudication will lead to both reasonable and efficient sets of rules.²²⁴ 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 model²²⁵ and will at times require adjustments or reformulations of certain rules as developed at the grassroots level.²²⁶ Coherence is a widespread preoccupation among common-law jurists, and despite the demise of classical formalism, the rationality of the system is still of paramount importance.²²⁷

On a global scale, the latter model is clearly in control.²²⁸ 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, and business actors) has produced. Scholars are paying increasing attention to the dynamics of bottom-up norm

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

225. Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979).

226. See e.g., Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995).

227. Within US legal discourse, Professor Feinman 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* (1981); 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." Feinman, *supra* note 19, at 676.

228. See *critically* Mattei, *supra* note 49 at 15.

production, both within national contexts²²⁹ and on a transnational scale.²³⁰ 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.²³¹ International scholars from many different quarters are now pleading for some sort of rationalization of *lex mercatoria*.²³² 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—the argument goes—practitioners regrettably continue to prefer national laws or traditional conflict-of-law rules to *lex mercatoria*.²³³ This problem could be cured by harmonizing arbitration’s

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

230. See, e.g. SCHEPEL, *supra* note 39, at 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.

231. BERGER, *supra* note 167, at 138, 183. “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.

232. See Cremades & Plehn, *supra* note 167.

233. BERGER, *supra* note 167, 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”).

procedural rules.²³⁴ But because “[s]ubstantive law is often born in the womb of procedure,”²³⁵ substantive convergence is bound to follow suit.²³⁶ Ongoing projects of global codification are aimed at bringing transnational law into a system characterized by both coherence and closure.²³⁷

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 argument are “legitimacy, transparency, determinacy, and coherence.”²³⁸ In typical 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.²³⁹

As noted above, the ongoing scholarly elaboration of a European civil code partakes of this systemic logic. In the face

234. William W. Park, *The 2002 Freshfields Lecture—Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, 19 J. INT’L ARB. 279, 282-83 (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”).

235. SCHMITTHOFF, *supra* note 173, at 48.

236. See Sideri, *supra* note 67, at 66 (deriving from contemporary legal philosophy the observation that “procedural law cannot fulfill its promise to provide neutral and objective structures.”)

237. Or at least no less coherence or closure than national private-law systems. For this nuance see BERGER, *supra* note 167, at 89-100; see also Graf-Peter Calliess, *Reflexive Transnational Law. The Privatisation of Civil Law and the Civilisation of Private Law*, 23 ZEITSCHRIFT FÜR RECHTSOZIOLOGIE 185, (2002) (discussing the several techniques employed for the “codification” of *lex mercatoria*).

238. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

239. *Id.* 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* note 327, at 210 (proposing the establishment of a “World Commercial Court” capable of putting forth a pluralist “constitution of international commerce”).

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).²⁴⁰ 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.²⁴¹

E. *The Rhetoric of Neutrality*

The illustrations in Part III 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.²⁴² In its post-national dimension, private law is all too often portrayed

240. 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 25, 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.

241. Through the nineteenth 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* note 69, at 277-80.

242. 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 generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997).

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.”²⁴³ “Linkages” and “openings” disrupt the close, self-referential nature of classical private law.²⁴⁴ This is true not only in national systems but wherever private law attempts to reassert its logic.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷ The ECtHR 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

243. Joerges, *supra* note 162, at 150.

244. *Id.*

245. Wai, *supra* note 66, at 262; *see also* Teubner, *supra* note 4, at 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.”).

246. *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”).

247. *See* Christian Joerges, *The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines - an Analysis of the Directive on Unfair Terms in Consumer Contracts*, 3 EUR. REV. PRIVATE L. 175 (1995).

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.

V. CONCLUDING REMARKS: LOOKING BEYOND DISPERSION AND NEUTRALITY

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 supranational 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 neither an

emerging network of discrete knots²⁴⁸ nor a pond where each stone makes ripples.²⁴⁹ It is also a place where state sovereignty gets reinvented at new levels by means of old 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 the 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, and there is nothing either good or bad in any given language or expressive tool—it all depends on its intended use.²⁵⁰ As a matter of fact, the rhetorical move of switching to private-law categories can offer a refreshing breakthrough 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; it is 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 III above, private-

248. See Wai, *supra* note 68, at 483-84 (noticing that Teubner's "elegant model" over-emphasizes the independence of the nodes in his networks).

249. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARVARD L. REV. 1015, 1057-58 (2004) (noting 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).

250. I 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 30, at 103-04. See Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*, 15 EUR. J. INT'L L. 197, at 208 (2004) (describing this approach a "non-deterministic perception of the law").

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, I 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 obligations²⁵¹ or whether to increase the viability of cross-border class actions to redress mass torts.²⁵² 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.²⁵³ Shifting from a loose level of coordination between regulatory sources to a level of firmly legal hierarchies—"State-making," as I have

251. The ECJ has repeatedly dealt with the question of whether an individual has the right to challenge, before a national court, the incompatibility of Community measures with WTO rules. 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* note 214, and Alan O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005)). See GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003) (explaining that private parties can lobby their governments into initiating WTO disputes on specific trade issues).

252. 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 *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 63, at 172.

253. 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 *TRANSNATIONAL GOVERNANCE*, *supra* note 68, at 257; Francesca Bignami, *Transnational 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).

termed the process —may happen to be, in context, a commendable form of institutional restructuring. But the use of private-law rhetoric to portray State-making as a legal necessity unduly stifles political debate and may mask profound redistributive implications.²⁵⁴ Ultimately, this Article is a plea for more dialogue and political confrontation in and around the institutions of globalization.

254. 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”).