

Unbundling Harmonization: Public versus Private Law Strategies to Globalize Property

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Abstract

The landscape of supranational institutions is highly diverse, defying a single concept of globalization. Some cross-border mechanisms aim at coordination, which would streamline the movement of capital, goods, services, and persons, but could leave intact a substantial layer of local legal ordering. Other supranational instruments aspire to achieve fuller-scale harmonization, placing more pressure on national legal systems to converge. The global web of bilateral investment treaties may be viewed as settling for coordination, the European Union as increasingly seeking harmonization, and the European Convention of Human Rights as currently located in between.

In the context of property law, this Article argues that, somewhat counterintuitively, the true challenge for supranationalism lies in synchronizing private law doctrines rather than public law doctrines. Although countries in their sovereign capacities may at times resist subjecting their local regulatory powers to constitutional-like supranational property norms, they are often able to employ public law strategies that establish credible systems of cross-state commitments, while still enjoying a considerable margin of deference in exercising their sovereign powers. In contrast, moving toward a global system of private law property doctrines may require a deeper commitment to fundamental changes in local ordering, implicating core cultural, social, and economic attributes of national societies.

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The Article identifies the challenges of devising supranational property norms for private law doctrines, such as retention of title or good faith purchase of stolen goods. As a functional matter, because such doctrines may affect an indefinite number of parties, many of whom are not tied by contract and cannot explicitly allocate the risks involved with moving across jurisdictions, the level of uniformity required to avoid frequent legal clashes is much higher than that which typifies public law settings. As a normative matter, any change in private law doctrines must trickle down to social and cultural mechanisms so that heterogeneous crowds within and across national borders would absorb it—a formidable challenge given the slow pace of cultural change.

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I. INTRODUCTION

The prominent account of globalization is one of a largely bottom-up phenomenon that nevertheless follows a clear trajectory: undercutting traditional national borders and exposing the multi-focal, multi-directional spheres within which human interaction takes place. Jürgen Habermas identifies it as

the cumulative processes of a worldwide expansion of trade and production, commodity and financial markets, fashions, the media and computer programs, news and communications networks, transportation systems and flows of migration, the risks generated by large-scale technology, environmental damage and epidemics, as well as organized crime and terrorism.¹

Other fundamentally similar conceptualizations of globalization abound in the academic and popular literature.² This emerging conventional wisdom is by no means naïve or utopic, or even one that necessarily endorses globalization or any of its features (terrorism is but one example). But it does point to globalization's resilience in moving along a certain course and to the challenges this poses for societies' long-standing domestic institutions.

Within this analytical framework, legal systems and national top-down lawmaking institutions are viewed as ones that must catch up with the bottom-up social, economic, and technological forces driving globalization. Ignoring such forces is a luxury that law cannot afford. Responding in an isolated country-specific manner may prove futile or even detrimental to preserving worthwhile aspects of globalization. The dynamics of international politics, along with the willingness and capability of lawmaking institutions to accommodate globalization, will determine whether the gap between the bottom-up forces of globalization and top-down legal systems can be narrowed substantially.³

Under this account, states' fears of potentially undermining their sovereign and local regulatory powers weigh heavily in deciding whether to go global or to

¹ JÜRGEN HABERMAS, *THE DIVIDED WEST* 175 (Ciaran Cronin ed. & trans., 2006).

² For a compilation of some prominent definitions along similar lines, see JUSTIN ERVIN & ZACHARY A. SMITH, *GLOBALIZATION: A REFERENCE HANDBOOK* 2–5 (2008).

³ See Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *STAN. J. INT'L L.* 283, 285 (2004) (arguing that “[s]tates can only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states’ affairs”). This globally oriented alternative to traditional state sovereignty has not gone unchallenged. See, for example, JULIAN KU & JOHN YOO, *TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER* 19–50 (2012) (arguing that whereas the concept of “Westphalian sovereignty”—that is, absolute and exclusive control by the state over the activities within its territory—may become obsolete in the face of globalization, the same does not hold true, as a normative matter, for the concept of “popular sovereignty,” which underlies U.S. constitutionalism and should accordingly constrain international law overreach by the U.S.).

insist on local legal ordering. This is so because, for international conventions, supranational institutions, or other cross-border instruments to be truly effective, states must make credible commitments to yield to the authority of the supranational mechanism, and as rational actors, they would attribute a particularly high cost to rescinding their sovereign powers.⁴

This globalization literature does not assume, however, that the development of legal norms in the global age originates only from states or state-mandated supranational institutions. Gunther Teubner points to the spontaneous, grassroots development of 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.”⁵ Most prominent is the contemporary *lex mercatoria*, the transnational law of economic transactions, alongside other practices of private global norm production including the internal legal regimes of multinational corporations, private lawmaking by labor unions, technical standardization and professional self-regulation, internet arrangements, or international rules on sports.⁶

While the formal status of these privately based global forms of norm-making remains uncertain to national courts, these bottom-up “discourses” attest to the ability of private actors to adjust their rules to social and economic global systems. In this respect, globalization and the innovation of global private lawmaking demonstrate the “power that society, culture and history exert upon law’s empire.”⁷

What picture emerges, explicitly or implicitly, from this account of globalization and law? Bottom-up forces, led by multiple sectors of civil society across borders, constantly push toward globalization and its underlying social and economic system, but states and their top-down institutions may hold back on such a transition and abstain from legally validating such developments whenever they fear losing control over their sovereign powers. The types of lawmaking that do manage to sprout significantly in this state of affairs are ones created by private entities—the new *lex mercatoria* and other forms of private ordering. Accordingly, the corresponding private law fields could more easily

⁴ See, for example, Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 762 (2001) (arguing that “states use international institutions to further their own goals, and they design institutions accordingly,” and that international institutions should be understood as “explicit arrangements, negotiated among international actors, that prescribe, proscribe, and/or authorize behavior”).

⁵ Gunther Teubner, “*Global Bukovina*”: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3, 4 (Gunther Teubner ed., 1997).

⁶ See Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149, 156–59 (1997).

⁷ *Id.* at 165.

move toward harmonization if provided proper support by states and supranational institutions.

This Article sets out to question these assumptions, focusing on property law. Some of the arguments against this conventional wisdom rely on the unique traits of property law, while other insights may have broader applicability in analyzing the globalization of law.

First, this Article shows that the choice between globalization and localism is far from binary, meaning that states, organizations, and individuals may endorse some types of cross-border institutional frameworks for the legal ordering of property while shunning others, and that such choices may have normative merits beyond political strategies. Any attempt to switch from national ordering to supranationalism or to calibrate the specific degree of convergence must rely on some type of cost-benefit analysis. Different property issues may call for different models along a local/global continuum.

Against this binary conception, I emphasize the continuum of supranationalism, which refers not only to the number of participants in a certain cross-border arrangement—with bilateral agreements or regional institutions often proving more effective than attempts at wholesale globalization—but also to the substantive scope of collaboration. Some cross-border mechanisms may be viewed as aiming at *coordination*—attaining a certain threshold of coordinating expectations among countries to streamline the movement of capital, goods, services, and persons, but also leaving intact room for a substantial layer of local legal ordering.⁸ Other supranational instruments aspire for fuller-scale social, economic, or political *harmonization*—cross-border unification of legal norms—placing more pressure on national property systems to converge. The global web of bilateral investment treaties can be seen as settling for coordination in protecting the property rights of investors, and the twenty-eight-member European Union as increasingly seeking harmonization in the various aspects of property law, with the forty-seven-member European

⁸ The term “coordination” is used regularly in the academic literature, bearing somewhat different meanings at times. Game theory is a prominent field coloring this context. See, for example, RANDAL C. PICKER, AN INTRODUCTION TO GAME THEORY AND THE LAW 13 (1994) (defining a “coordination game” as one in which the parties have slightly differentiated preferences but “care most about making the same decision”) (emphasis added). In the context of international legal relations, Richard Buxbaum has referred to “coordination” as including non-hierarchical cooperation among countries manifested in the “adaptation of a state’s laws to those of another formally equal state.” Richard M. Buxbaum, *Comparative Law as a Bridge Between the Nation-State and the Global Economy: An Essay for Herbert Bernstein*, 1 DUKE L. CIRCLES 63, 67–68 (2009). While I share Buxbaum’s view of coordination as a non-hierarchical form of cooperation, my use of the term also delineates the scope of substantive reciprocal adaptation of laws as, in essence, significant but short of full-scale unification.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)⁹ currently located in between.

Second, contrary to the assumption that globalizing private law is generally easier than globalizing public law because private parties across borders derive uniformity largely from private lawmaking and other bottom-up actions, I argue that the true challenge for any major shift beyond mere coordination toward harmonization of property law lies in synchronizing private law doctrines rather than public law doctrines. While it is true that states as sovereigns may at times resist subjecting their local regulatory powers to constitutional-like supranational property norms, they are often able to employ public law strategies that establish credible systems of reciprocal cross-state collaboration while still enjoying a considerable margin of deference in exercising their sovereign powers. In contrast, moving toward a unified system of private law property doctrines to facilitate harmonization requires a deeper commitment to fundamental changes in local ordering, implicating the core cultural, social, and economic attributes of societies—a commitment that nations may find difficult to make.

Third, the Article shows that the challenges of devising supranational norms for private property law doctrines are embedded in both functional and normative considerations that do not apply equally to public law doctrines, even if we otherwise think that the borders between public and private in property are not always clear-cut. As a functional matter, given the *in rem* nature of property rights and the fact that private law doctrines may implicate an indefinite number of private parties—many of whom are not tied by contract and cannot otherwise explicitly allocate the risks involved with moving across jurisdictions—I argue that the level of uniformity of norms required to avoid frequent legal clashes is much higher than that which typifies public law settings, where the dispute typically involves the plaintiff and a distinct domestic government.

As a normative matter, however, any change in a private law property doctrine, which by definition implicates the everyday dealings of ordinary private parties, must trickle down to social and cultural mechanisms. This is required so that the new norm is absorbed and practically exercised by broad-based heterogeneous crowds both within and across national borders, not only as a top-down dictate but also as a social and cultural convention. Obviously, public law concepts such as “public interest,” “expropriation,” “proportionality,” and “fair balance” are deeply embedded in values and normative inclinations, as part of the broader inherent ties between domestic constitutional law and underlying

⁹ Nov. 4, 1950, 213 U.N.T.S. 221, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> [hereinafter European Convention].

national values.¹⁰ But changes to public law concepts to accommodate supranational standards need to be adopted chiefly by the state authorities that implement them and would find the transition smoother if allowed a domestic “margin of appreciation” in doing so.¹¹ Things are different with grassroots observance of norms such as “fair dealing” or “good faith.” Since popular cultural orientations and social beliefs about modes of interpersonal conduct may change relatively slowly over time, domestic private law doctrines may be more resistant to harmonization than typically envisioned by globalization theorists.

The Article is structured as follows. Section II starts by pointing to the complex ways in which states, international organizations, and private entities interact to create a multilayered system of regulation and legal ordering. It introduces current attempts to quantify globalization through measures of cross-border openness and assimilation, while also discussing a different ideal of globalism, one that embraces pluralism and hybridity. This section then identifies the spectrum of supranational collaboration, which is defined at the poles by coordination and harmonization. It considers three prominent supranational mechanisms that implicate property: (1) bilateral investment treaties (BITs), which set substantive and procedural legal norms for the protection of foreign investment; (2) the European Convention, and in particular Article 1 of the First Protocol dealing with the protection of property;¹² and (3) the European Union (EU), which started out as a limited-in-scope common market and evolved toward broader economic and political integration. These mechanisms are located at different points along the coordination-harmonization spectrum, with each such configuration creating, in turn, a distinct set of legal challenges.

Section III studies the unique traits of property as embedded in both public and private law and the implications that this duality has for supranational property mechanisms. Identifying property’s structural traits of in rem applicability and practical constraints on opting out for private ordering, this section discusses how these structural features function differently in private

¹⁰ For a prominent account of the challenges of accommodating domestic constitutional law systems to the age of globalization, in view of the deeply entrenched political and ideological basis of constitutional law, see VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 17–38 (2010).

¹¹ As originally used by the Council of Europe, “[t]he term ‘margin of appreciation’ refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights.” Council of Europe, *The Margin of Appreciation*, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/Paper2_en.asp (last visited Oct. 26, 2014).

¹² European Convention, *supra* note 9, Protocol 1 art. 1.

versus public law. It then returns to the public law context, arguing that countries can coordinate expectations in defining and calibrating key legal concepts while taking upon themselves constitutional-type duties without being committed to full-scale uniformity of laws.

Section IV considers how cross-border property norms evolve, analyzing the quest for harmonization in the private law context. It starts by unfolding the unique challenges—both functional and normative—facing any attempt to converge national private law property doctrines. As a functional matter, the “in rem essentiality” of property rights mandates the establishment of a single ranking of legal powers and priorities with regard to a certain asset, such as land, and thus requires a high degree of cross-border uniformity. From a normative perspective, however, supranational laws that seek to redirect the actions of individuals across borders must recognize, in addition to the formal rules, the grassroots cultural and social attributes that play a key role in practically governing interpersonal dealings. This means that, while the functional features of private property law generally require harmonization for supranational mechanisms to be sustainable, such an ambitious endeavor often faces particularly intricate challenges because of the idiosyncratic normative and cultural attributes of domestic doctrines. Finally, this section reviews the current landscape of cross-border private law property norms. It examines, in turn, the limited success of theme-specific international conventions, the approach taken by the European Court of Human Rights in interpreting the European Convention’s property clause in private disputes, and the strategies employed by the EU to promote integration in private law doctrines through “positive supranationalism”: the enactment of EU regulations, directives, and decisions.

II. GLOBALIZATION: BETWEEN COORDINATION AND HARMONIZATION

A. Turning Socioeconomic Trends into Legal Constructs

Habermas’s conception of globalization, presented in Section I, does not in itself identify the prominent media through which “the cumulative processes of a worldwide expansion”¹³ occur—that is, whether globalization as a social, economic, and technological phenomenon is chiefly the result of top-down initiatives by states and authorized interstate organizations; a bottom-up process initiated by the dispersed actions of individuals, corporations, and nonprofit organizations; or a combination of such forces. Clearly, some of the mechanisms identified with globalization are the result of political negotiations or power

¹³ HABERMAS, *supra* note 1, at 175.

plays among states or other official bodies. The World Trade Organization (WTO) is an example of a “rules-based, member-driven organization”¹⁴ that has expanded well beyond the promotion and enforcement of cross-border state commitments on trade and tariffs to administer the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)—perhaps the most extensive cross-border, state-based collaboration instrument dealing with property law.¹⁵

Other major developments, however, have proceeded from the bottom up. In light of the cumulative globalizing effect of the indefinite number of cross-border transactions in goods, services, capital, and so forth, and the tremendous impact that multinational corporations such as Google, Facebook, and Apple have had on the social, economic, and technological aspects of globalization,¹⁶ certain private organizations have taken on a more robust role as cross-border regulators. This is the case, for example, with the privately based International Chamber of Commerce (CCI, to use the French acronym), which tasks itself with promoting “international trade, services and investment.”¹⁷ More broadly, as Sabino Cassese notes, the approximately 2000 “global regulatory regimes” are run by bodies as diverse as formal international organizations, transnational networks of officials, hybrid intergovernmental-private arrangements, and private institutions.¹⁸ The result is a “marbled” space in which the global, transnational, and national are intermixed.¹⁹

Current attempts to quantitatively analyze globalization also point to both bottom-up and top-down forces as potential facilitators of globalization processes. The Swiss-based KOF Index of Globalization measures the extent of globalization in countries along three dimensions: economic, social, and political.²⁰ The economic aspect refers to both actual capital flows and domestic regulation that may restrict such flows.²¹ The social globalization measure is

¹⁴ World Trade Organization, *About WTO*, http://www.wto.org/english/thewto_e/thewto_e.htm (last visited Oct. 26, 2014).

¹⁵ See *infra* Section IV.B.1 (analyzing TRIPS).

¹⁶ See, for example, Michèle Rioux, *Multinational Corporations in Transnational Networks: Theoretical and Regulatory Challenges in Historical Perspective*, 2014 OPEN J. POL. SCI. 109 (analyzing the complex interplay between such corporations, states, and networks in the globalized economy).

¹⁷ Sabino Cassese, *The Global Polity*, in DEMOKRATIE-PERSPEKTIVEN: FESTSCHRIFT FÜR BRUN-OTTO BRYDE ZUM 70. GEBURTSTAG 511, 514 (Michael Bäuerle et al. eds., 2013) (citing the preamble of the International Chamber of Commerce Constitution).

¹⁸ See *id.* at 512.

¹⁹ See *id.* at 516–19.

²⁰ See Swiss Federal Institute of Technology Zurich, *KOF Index of Globalization*, <http://globalization.kof.ethz.ch> (last visited Oct. 26, 2014).

²¹ Flows are measured by the scope of trade, foreign direct investment, portfolio investment, and income payment to foreign nationals. State measures include import barriers, tariffs, taxes, and

based on data about personal contact, information flows, and cultural proximity.²² The political subindex relies on formal international ties and affiliations of states.²³

These features highlight the complexity and multi-directionality of practices and institutions implicating globalization. Bottom-up attributes, such as cultural orientations and preferences, can foster but also hinder supranationalism, just as top-down political initiatives and subsequent legal instruments can have a significant stimulating effect on globalization trends. Accordingly, it would be wrong to view legal systems as always trailing social, economic, and technological drivers of globalization or as otherwise possessing an inherently conservative or parochial character. It is true that law at times follows grassroots drivers of change. But this is far from identifying a single pattern for law and supranational legal orders in particular. Top-down institutions and legal mechanisms may play a key role in prompting a supranational socioeconomic environment, such as in the context of the EU.²⁴

Moreover, the choice between globalization and localism is far from binary, meaning that states, organizations, corporations, and individuals may endorse some types of cross-border institutional frameworks while shunning others. This continuum refers not only to the number of participants in a certain cross-border arrangement—with bilateral agreements or regional institutions often proving more effective than attempts at wholesale globalization—but also to the substantive scope of collaboration, moving along numerous potential points on the coordination-harmonization axis. As the next section demonstrates, such a choice does not necessarily reflect a compromise or what parties view as a second-best solution to wholesale globalization. An intermediate cross-border regulatory or legal collaboration mechanism, in calibrating the optimal scope of supranational ordering, may, and often does, express both bottom-up and top-down preferences. Such an arrangement may also reflect a nuanced approach toward globalization, one observing the costs and benefits of different degrees of convergence—for instance, putting more weight on harmonization where the

capital account restrictions. See Swiss Federal Institute of Technology Zurich, *2014 KOF Index of Globalization Variables and Weights*, http://globalization.kof.ethz.ch/media/file_public/2014/04/15/variables_2014.pdf (last visited Oct. 26, 2014).

²² These three features include, respectively: telephone traffic, tourism, foreign population, and international letters; internet users, television, and trade in newspapers; and number of McDonald's restaurants, number of Ikea stores, and trade in books. See *id.*

²³ This subindex measures membership in international organizations, participation in UN Security Council missions, the number of embassies within a state, and international treaties. See *id.*

²⁴ See *infra* Section II.B.3.

cross-border functionality of a certain field of property calls for unification but settling for coordination where the costs of differentiation tend to be smaller.²⁵

Such a choice also ties in with broader normative dilemmas about the scope of legal pluralism that a supranational framework could accommodate. It seems obvious that sameness or proximity across borders streamlines supranational institutional frameworks, but the result should not be an all-or-nothing approach by which countries, to collaborate, must seek universal harmonization of their legal systems.

Some authors, such as Paul Schiff Berman, even point to global legal pluralism as a self-standing value, so that supranational institutions may “deliberately seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us.”²⁶ Yet even if one does not adhere to such an idealistic view of pluralism but rather recognizes it as a potential constraint, this does not imply that supranational collaboration can follow only one optimal model—with localism the only alternative. The three mechanisms analyzed in the next section demonstrate how supranationalism should be understood: as comprising various models along a coordination-harmonization continuum.

B. Supranational Institutions along the Coordination-Harmonization Axis

1. BITs as credible coordination.

International investment treaties, prominently taking the form of BITs, represent one of the most remarkable developments in international economic law. BITs currently number over 2900 worldwide, following a dramatic rise in the early 1990s.²⁷ BITs tie together not only developed-developing country dyads, but also pairs of developing or transitional countries as well as developed country dyads. Virtually every country in the world is now party to at least one

²⁵ Cf. Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72 (2005) (pointing to the potential benefits of differentiated state-level property law regimes within the U.S. federal system, including promoting competition among jurisdictions and innovation). The functional debate about the optimal level of convergence in federal systems touches on many other fields, such as environmental regulation. See generally Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996) (offering a new approach to addressing interstate externalities through federal environmental regulation).

²⁶ PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 10 (2012). See also Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L & SOC. SCI. 243 (2009).

²⁷ See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *WORLD INVESTMENT REPORT 2014: INVESTING IN THE SDGs: AN ACTION PLAN* 114, available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf [hereinafter UNCTAD WIR 2014].

BIT. As of 2013, both Germany and China were counterpart to at least 130 BITs.²⁸ Recent developments point to the rise of regionalism in treaty making (in Southeast Asia and Central America, for example) and to the inclusion of investments within broader-based free trade agreements, but BITs remain the most prevalent form of international investment agreements.²⁹

The history and evolution of BITs have been analyzed extensively in the literature, with various theories offered to account for the motivations of states in entering into and implementing such bilateral arrangements.³⁰ Briefly, the first BIT is commonly traced to the agreement signed in 1959 between Germany and Pakistan amid the aftermath of colonialism. During the 1950s, a number of newly independent developing countries embarked on a series of massive expropriations of assets and enterprises that had been funded and owned by foreign investors from Western economies.³¹ Nationalizations and expropriations have been a recurring theme in international investment, reaching another peak during the 1970s³²—and never truly disappearing to this day.³³

This trend seems to have been not merely opportunistic but also based on ideology. Developing and socialist countries explicitly promoted a political platform that would recognize the right to expropriate foreign assets. In two 1974 declaratory statements, the UN General Assembly held that states' sovereignty includes "the right of nationalization or transfer of ownership to its nationals" and, shortly thereafter, the right "[t]o nationalize, expropriate or

²⁸ See *id.* at 223–24.

²⁹ See *id.* at 114; UNCTAD, WORLD INVESTMENT REPORT 2012: TOWARD A NEW GENERATION OF INVESTMENT POLICIES xvi–xvii, available at <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf> [hereinafter UNCTAD WIR 2012].

³⁰ See, for example, Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491, 499–504 (2009); Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 71–79 (2005); PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 628–35 (2d ed. 2007).

³¹ For example, Iran expropriated British petroleum assets in 1951, Libya expropriated joint Libyan-American petroleum assets in 1955, Egypt nationalized the Anglo-French-owned Suez Canal in 1956, and Cuba nationalized an array of foreign assets in 1959. See Amnon Lehavi & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT'L L. 115, 120 (2011).

³² The UN identified 875 distinct governmental takeovers of foreign property in 62 countries during the period between 1960 and 1974. See Don C. Piper, *New Directions in the Protection of American-Owned Property Abroad*, 4 INT'L TRADE L.J. 315, 330 (1979).

³³ For a detailed account of a recent and colossal expropriation by Chad, notwithstanding the involvement of the World Bank, see generally Scott Pegg, *Chronicle of a Death Foretold: The Collapse of the Chad-Cameroon Pipeline Project*, 108 AFR. AFF. 311 (2009).

transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures.”³⁴

Apparent UN policy, then, pushed developed countries to seek alternative mechanisms to protect investments made by their residents abroad. As Kenneth Vandeveld notes, during this era BITs were negotiated principally between a developed and a developing country; often, “the agreement was drafted by the developed country and offered to the developing country for signature, with the final agreement reflecting only minor changes from the original draft. This persistent pattern added an ideological dimension to the agreements.”³⁵

Despite the slow start, the number of BITs grew from a handful to a few dozen each year following a series of key events—notably, the debt crisis of developing countries in the 1980s and the collapse of the Soviet bloc in 1989—and in response to the advancement of a neoliberal policy by the World Bank and the International Monetary Fund (IMF). The World Bank and IMF’s neoliberal policy focused on implementing market-oriented structural reforms within developing countries as a condition for aid, paying particular attention to the protection of property rights. As a corollary, the attitude toward foreign direct investment (FDI) has changed from hostility to hospitality.³⁶ In the 1990s and early 2000s, some leading capital-exporting countries, including the U.S., the U.K., Canada, Germany, and Switzerland, sought to solidify their control over the terms of engagement in FDI by each introducing its own version of a “model BIT.”³⁷

The current scope of BITs extends, however, well beyond the paradigm of a developed, capital-exporting country conditioning the flow of FDI into a capital-dependent developing country on signing a BIT. First, capital is increasingly flowing from East to West and South to North through sovereign wealth funds, government subsidiaries, and corporations based in China, Brazil, Russia, and the Persian Gulf countries.³⁸ This means that many BITs now

³⁴ Vandeveld, *supra* note 30, at 167–68 (internal citations omitted).

³⁵ *Id.* at 170–71.

³⁶ See Lorraine Eden et al., *From the Obsolescing Bargain to the Political Bargaining Model*, in INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY 251 (Robert Grosse ed., 2005); see also Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT’L ORG. 811, 833 (2006) (suggesting that entering BITs is often at least implicitly expected of developing economies in order to receive IMF funding).

³⁷ For analyses of model BIT provisions, see generally OECD, INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS (2008).

³⁸ See Steven Weisman, *A Fear of Foreign Investments*, N.Y. TIMES, Aug. 21, 2007, available at <http://www.nytimes.com/2007/08/21/business/worldbusiness/21wealth.html?pagewanted=all> (describing growing fears in the U.S. over multi-billion dollar foreign investments from sovereign wealth funds in China, Russia, and Persian Gulf countries, and quoting American officials’ concerns that these funds are politically influenced and have opaque investment policies).

possess a more reciprocal nature not only formally but also practically. Second, China and other emerging economies are investing massively in Africa and Latin America, to the point that the U.S. has warned African countries of the perils of “new colonialism,”³⁹ and Brazil—itsself investing heavily in other developing countries—has tried to narrow the impact of Chinese investment within its own territory.⁴⁰ Finally, as noted above, developed countries, and especially neighboring countries, are now signing BITs between themselves, as is also the case among dyads of developing economies.⁴¹

But while it may seem that all countries are simply riding the wave of BITs, it should be clear that, because BITs involve a credible set of commitments that may impinge on parties’ sovereignty—as I will now show—countries who join BITs carefully weigh the potential implications of such treaties. Consider China and Brazil again: China has used BITs extensively both to improve its reputation among Western investors and to protect its own investors abroad, whereas Brazil has generally declined to sign new BITs out of concerns about sovereignty and remaining attractive to FDI.⁴²

What are the mechanisms that turn BITs into a system of credible commitments? BITs typically implement three credibility-related measures: (1) a commitment by host countries to a certain set of substantive standards of treatment for foreign investment; (2) a direct right of action for investors against host countries for an alleged breach of these commitments; and (3) resolution of disputes by international arbitration, most often in the International Centre for Settlement of Investment Disputes (ICSID).⁴³

The substantive commitments states undertake in BITs typically include the duties of national treatment, most-favored-nation treatment, fair and equitable treatment, and guarantees of compensation with respect to expropriation (direct or indirect), alongside other commitments such as freedom of capital movements and prohibitions against imposing certain requirements on

³⁹ *Clinton Warns Against “New Colonialism” in Africa*, REUTERS (June 11, 2011, 1:09 PM), <http://www.reuters.com/article/2011/06/11/us-clinton-africa-idUSTRE75A0RI20110611> (last visited Nov. 4, 2014).

⁴⁰ See Alexei Barrionuevo, *China’s Interest in Farmland Makes Brazil Uneasy*, N.Y. TIMES, May 27, 2011, available at <http://www.nytimes.com/2011/05/27/world/americas/27brazil.html?pagewanted=all>.

⁴¹ See *supra* text accompanying notes 27–29.

⁴² See Dan Wei, *Bilateral Investment Treaties: An Empirical Analysis of the Practices of Brazil and China*, 33 EUR. J. L. & ECON. 663, 684–87 (2012).

⁴³ ICSID is by far the most popular arbitration framework for BIT disputes. A distant second is the arbitration framework developed by UNCITRAL, the United Nations Commission on International Trade Law. See Rafael Leal-Arcas, *Towards the Multilateralization of International Investment Law*, 10 J. WORLD INVESTMENT & TRADE 865, 875–77 (2009).

foreign investors.⁴⁴ The term “investment” is typically defined as comprising a list of rights in the following assets: immovable, movable, and intangible property; intellectual property; shares, stocks, options, and other derivatives; licenses and permits; related property rights such as leases, mortgages, liens, and pledges; and, in some cases, even claims to debts.⁴⁵ Consequently, BIT jurisprudence has gradually shifted toward a “property discourse,” focusing on investors’ property rights as the subject of legal protection and balancing them against states’ legislative and regulatory powers, while also borrowing from the property jurisprudence of the European Convention, the U.S. Constitution, and other legal instruments.⁴⁶

As for the direct right of action and international arbitration, recent years have seen a dramatic growth in the number of cases brought before ICSID and other tribunals. By the end of 2012, the total number of known treaty-based cases stood at 518, with a record sixty-two new disputes filed during 2012. Ninety-five countries have been sued at least once in such proceedings. Four Latin American states lead the list (Argentina, Venezuela, Ecuador, Mexico), followed by the Czech Republic and Canada. Recent data points also to investors’ significant success rates in litigating these disputes. In 2012, seventy percent of publicly available decisions addressing the merits of the disputes accepted investors’ claims at least in part, with that year seeing also the highest compensation award in the history of BITs: a \$1.77 billion judgment against Ecuador following its unilateral termination of an oil contract.⁴⁷

BITs, therefore, may carry substantial implications for states, impinging on their sovereignty in designing domestic legislative and regulatory policy and potentially resulting in major financial awards for breaches of obligations toward investors. Although during earlier periods of foreign investment and under earlier BITs, several scholars embraced the “obsolescing bargaining theory”—by which developing countries initially accept terms required by foreign multinational corporations as a condition for investment only with the purpose of “obsolescing” the bargain once it has been struck and investments sunk⁴⁸—it

⁴⁴ See UNCTAD WIR 2012, *supra* note 29, at 109.

⁴⁵ See, for example, Agreement between the People’s Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments 2–3, Dec. 1, 2003, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/736>.

⁴⁶ See Amnon Lehari, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 447–51 (2010); Lehari & Licht, *supra* note 31, at 128–32.

⁴⁷ See UNCTAD, *Latest Developments in Investor-State Dispute Settlement (ISDS)*, May 2013, at 19, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf [hereinafter UNCTAD ISDS].

⁴⁸ See RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 47–53 (1971); see also THEODORE H. MORAN, MULTINATIONAL CORPORATIONS AND

seems less likely that states would be able to rely on such a strategy with the current explosion of BIT disputes and arbitral awards. While states may attempt to avoid liability by identifying the legal thresholds that allow them to reshape the regulatory framework applying to the investment, it is clear by now that BITs do subject states to a set of credible commitments.⁴⁹

Despite the growing pressures that BITs exert on local sovereignty, states have generally refrained from unilaterally rescinding specific BITs or entirely opting out of the system.⁵⁰ In a considerable number of instances, however, states have renegotiated BITs, especially when convinced that an over-expansive interpretation of treaty terms may be undercutting domestic legislative and regulatory powers.⁵¹ In 2001, in light of their concern over tribunals' interpretations of the standards of treatment and expropriation in particular, the trade ministers of the U.S., Canada, and Mexico offered a joint interpretation to key provisions in Chapter 11 of the North American Free Trade Agreement (NAFTA), which concerns the protection of investments.⁵²

Moreover, while the structure of international investment arbitration tribunals, including ICSID, is ad hoc—without a formal principle of precedent⁵³—these tribunals have increasingly referred to previous investment arbitration cases in order to consolidate the interpretation of typical procedural and substantive provisions in BITs.⁵⁴ This emerging body of law has thus gone

THE POLITICS OF DEPENDENCE: COPPER IN CHILE 9 (1974); Stephen J. Kobrin, *Expropriation as an Attempt to Control Foreign Firms in LDCs: Trends from 1960 to 1979*, 28 INT'L STUD. Q. 329, 342 (1984).

⁴⁹ On the centrality of institutions as commitment mechanisms, see Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 808 (1989). On institutional commitment mechanisms in international investment, see generally Witold J. Henisz, *The Institutional Environment for Multinational Investment*, 16 J.L. ECON. & ORG. 334 (2000); Witold J. Henisz & Oliver E. Williamson, *Comparative Economic Organization—Within and Between Countries*, 1 BUS. & POL. 261 (1999).

⁵⁰ Ecuador has been a notable exception, rescinding nine BITs (mainly with Latin American counterparts). See UNCTAD, *Recent Developments in International Investment Agreements (2008–June 2009)*, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/8 (2009), at 6, available at http://unctad.org/en/Docs/webdiacia20098_en.pdf [hereinafter UNCTAD *Recent Developments 2009*]; UNCTAD, *WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT* 108, available at http://www.unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

⁵¹ See UNCTAD *Recent Developments 2009*, *supra* note 50, at 5–6.

⁵² See NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx>.

⁵³ See Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 603, 642–44 (2012).

⁵⁴ See SANTIAGO MONTT, *STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION* 106–07 (2009). For a

well beyond customary international law to create a system of supranational norms concerning the proper balance between protection of investors' property rights and preservation of domestic sovereign powers, one that is increasingly referred to as establishing supranational or even global constitutional law with regard to international investments.⁵⁵

I would suggest, however, that even under this broader view of BIT jurisprudence, it would be wrong to conclude that states have explicitly or implicitly embraced an idea of harmonization of their public or constitutional laws on property. As I will show in more detail in Section III by focusing on two BIT provisions that have played a prominent role in the development of BIT jurisprudence—expropriation (direct or indirect) and fair and equitable treatment—the overarching legal regime that seems to have developed is one of coordination. This means that states gradually embrace a common threshold with respect to core cases of infringement of property rights and procedures affecting legislative and regulatory changes, but they otherwise maintain significant leeway in designing their domestic policies. In this respect, the coordination embedded in BIT jurisprudence should be understood as creating a legal environment that seeks to align the reasonable expectations of investors and states, while remaining clear that foreign investors are otherwise subjected to the legal regime of the host state.

Moreover, a key aspect of property law that is entirely left out of BIT jurisprudence is that of private law doctrines. The commitments entailed in BITs, at least as interpreted by arbitral tribunals as of now, concern only duties of states in exercising legislative and regulatory powers in their own relations vis-à-vis individuals. These provisions do not refer to legal relations among private persons in regard to property rights, meaning that the foreign investor remains subject to domestic lawmaking on private law matters. As I suggest in the following sections, in view of the complex public-private interplay in property, significant implications for the congruence of property's public aspects follow from private law jurisprudence remaining entirely outside the scope of BITs. States thus do not undertake a commitment to uniformity by exercising their sovereign powers in either private or public aspects of property, although they may certainly be held accountable—through the payment of monetary awards—

discussion of the fair and equitable standard in current arbitral awards, featuring references to earlier cases but also a certain measure of diversity, see UNCTAD *ISDS*, *supra* note 47, at 12–14. This example is discussed further *infra* Section III.B.1.

⁵⁵ See, for example, MONTI, *supra* note 54, at 12–17; Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 899–902 (2011); see also Peter Behrens, *Towards the Constitutionalization of International Investment Protection*, 45 ARCHIV DES VÖLKERRECHTS 153 (2007).

for breaching their BIT commitments to investors in coordinating certain standards of public conduct.

2. The European Convention of Human Rights as common ground.

The evolution of the European Convention and the European Court of Human Rights (ECHR) is often depicted as one of the most incredible phenomena in the history of international law.⁵⁶ The discussion of the European Convention throughout this Article will focus on the right to property as articulated in Article 1 of the First Protocol, and will generally refrain from overarching arguments about the scope of coverage and level of state commitment with regard to the entire array of human rights protected in the Convention.

The chief argument I make in this context is that the Convention, as interpreted by the ECHR, constructs an intermediate level of commitment by states to subject their domestic property lawmaking to supranational principles that focus on assuring “fair balance” and “proportionality” in the deprivation or regulation of property—while entrusting states with a broad margin of appreciation in setting forth both ends and means. Also, although the ECHR has taken on cases that were essentially private law disputes, it has expressed a particularly deferential approach toward the state-based ordering of such private legal relations.

In the aftermath of the Second World War, the initial ambition of the European Convention’s proponents was to institute a scheme that would act as a type of alarm for democratic European countries seeking to protect themselves against the rise of totalitarian regimes and attendant large-scale violations of human rights.⁵⁷ At first, the Convention’s clauses recognizing court jurisdiction and the individual right to petition were only optional for signatory states. The common justification for this was that the Convention’s ratification was merely “an act of pan-European solidarity” by members of the Council of Europe (established in 1949), as the members’ national courts already had been fulfilling the task of protecting human rights.⁵⁸ Thus, when the court was set up in 1959, it had jurisdiction over only a few states and handled a limited number of cases.⁵⁹

⁵⁶ See, for example, Michael O’Boyle, *On Reforming the Operation of the European Court of Human Rights*, 1 EUR. HUM. RTS. L. REV. 1, 1 (2008).

⁵⁷ See ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* 5–8 (2010).

⁵⁸ Luzius Wildhaber, *Changing Ideas about the Tasks of the European Court of Human Rights*, in *THE EUROPEAN COURT OF HUMAN RIGHTS 1998–2006: HISTORY, ACHIEVEMENTS, REFORM* 138 (2006).

⁵⁹ See BATES, *supra* note 57, at 11.

The 1970s marked a turning point for the Convention, with the European Commission of Human Rights—a quasi-judicial body tasked with receiving and sorting all petitions submitted under the Convention—approving more cases for court hearings; in addition, the ECHR issued a number of key decisions on the right of access to the court and outlined principles for the application and interpretation of the Convention.⁶⁰ It was then that the Convention’s paradigm changed. No longer concerned with large-scale, flagrant violations of human rights, the ECHR began to develop a “European Bill of Rights” with regard to the types of civil liberty issues regularly adjudicated by national constitutional supreme courts, and many states amended their domestic laws in response to the ECHR pronouncements. Thus was a European standard of human rights protection added to the states’ domestic systems of law, providing a mechanism for individuals to challenge and potentially change domestic law.⁶¹

Not surprisingly, what followed was a dramatic growth in the number of cases brought before the ECHR. To handle the growing volume and streamline the judicial process, Protocol 11 of the Convention, which entered into force in 1998, dissolved the Commission and established a new, permanent ECHR with jurisdiction and the right of individual petition mandatory for all member states.⁶² Further, during that time, the Convention was signed and ratified by Eastern European countries; at present, the Convention applies to practically the entire continent.⁶³ The current volume of ECHR activity is truly remarkable: as of the end of 2012, the Court had delivered over 16,000 judgments, finding at least one violation of the Convention in 83 percent of the decisions.⁶⁴ Article 1 of the First Protocol is the subject matter concerning which the Court has found the second-most violations.⁶⁵

The property jurisprudence of ECHR initially opted for a relatively narrow review of the deprivation or regulation of property, focusing on a lawfulness or “quality of law” principle under which states only had to demonstrate that they complied with the formal requirements of their respective legal systems and that such rules were sufficiently “accessible, precise and foreseeable.”⁶⁶ This early approach has thus served as something of a procedural check, focusing on

⁶⁰ For a review of some of these decisions, see *id.* at 14–18.

⁶¹ See *id.* at 14–23.

⁶² See *id.* at 24–25.

⁶³ The sole exceptions are the Vatican and Belarus. See *id.* at 22.

⁶⁴ ECHR, OVERVIEW 1959–2012 3 (2013), available at http://www.echr.coe.int/Documents/Overview_19592012_ENG.pdf.

⁶⁵ See *id.* at 5.

⁶⁶ Tom Allen, *Compensation for Property Under the European Convention on Human Rights*, 28 MICH. J. INT’L L. 287, 292–94 (2007).

formalities and due process rather than constructing an independent set of supranational substantive concepts of property rights and remedies.

This approach changed in the 1982 *Sporrong and Lönnroth v. Sweden*⁶⁷ and 1986 *James v. United Kingdom*⁶⁸ cases, in which the ECHR developed standalone criteria for reviewing domestic legislation or regulation. The Court now considers, first, whether a “fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights,”⁶⁹ and then ties this substantive criterion of protection to the general framework of proportionality when considering the alleged violation of the right to property and the appropriate remedy.⁷⁰

This supranational set of standards, however, is far from creating a uniform blueprint for the domestic ordering of property law. As is the case throughout ECHR jurisprudence, review of national law is subject to the margin-of-appreciation principle. Briefly summarized, this doctrine goes beyond the general deference courts award to legislative or administrative bodies in reviewing their actions, tying it rather to the Convention’s central subsidiarity principle that divides powers among supranational and national institutions.⁷¹ In the 1976 *Handyside v. United Kingdom*⁷² case, the ECHR considered to what extent protecting morals justifies limiting free expression. It observed that “it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals” and that their policy may vary “from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject.”⁷³ This principle has been extended to all the other provisions of the European Convention and, as Section III will show, is applied in a particularly broad manner in the public law property context.

Importantly, the margin of appreciation grants states latitude in setting forth both ends and means for implementing their policies. In the public security

⁶⁷ *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75 & 7152/75 (Eur. Ct. H.R. 1982), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580>. Note that all citations to ECHR cases are keyed to the paragraph numbering of the official online versions rather than the page numbering in physical reporters.

⁶⁸ *James et al. v. United Kingdom*, App. No. 8793/79 (Eur. Ct. H.R. 1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57507>.

⁶⁹ *Sporrong Judgment*, *supra* note 67, ¶ 69.

⁷⁰ *See James Judgment*, *supra* note 68, ¶¶ 50–51.

⁷¹ *See* JAMES A. SWEENEY, *THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST-COLD WAR ERA: UNIVERSALITY IN TRANSITION* 32–36 (2013).

⁷² *Handyside v. United Kingdom*, App. No. 5493/72 (Eur. Ct. H.R. 1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>.

⁷³ *Id.* ¶ 48.

context, for example, the doctrine was invoked to allow national authorities a wide margin in deciding “both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it,”⁷⁴ with a similar rationale employed over time in other Convention settings. In the property context, the argument for the margin of appreciation has relied on the need to defer to the “more democratically accountable national legislature in pursuing social, economic, and fiscal policies,” assuming that “domestic authorities are better placed to evaluate the complex and technical nature of such policies and their specific implementing measures.”⁷⁵

Obviously, the broader the margin of appreciation is, the less intense the standard of proportionality becomes, thus directly impacting the level of state commitment to supranational ordering. The European Convention’s balancing act has been a source of much debate, especially to the extent that the margin of appreciation allows for moral or cultural relativism in the protection of human rights.⁷⁶

3. The European Union’s quest for internal market harmonization.

The evolution of the EU cannot be comprehensively recounted here. This subsection points briefly to three themes that will set the ground for a more detailed discussion of EU-level jurisprudence on the public aspects of property in Section III and on property’s private law aspects in Section IV. I address here, first, the gradual move of the EU from a limited economic community toward a more comprehensive institutional and legal framework—though stopping short, as of yet, of full-scale harmonization. Second, I introduce the concept of exclusive versus shared competences in the structure of the EU and explore how this implicates lawmaking in the field of property. Third, I discuss the ways in which attempts at harmonization are currently broken down in the literature to “negative” and “positive” components: the former relating mostly to treaty- or court-based restrictions on domestic lawmaking viewed as hindering the functioning of the internal market, and the latter referring to EU-level regulations and directives that explicitly seek to create a uniform body of law across various property doctrines.

To start with, while the development of the EU has been gradual, laden with obstacles and setbacks, its supranational aspirations have been substantial

⁷⁴ Ireland v. United Kingdom, App. No. 5310/71, ¶207 (Eur. Ct. H.R. 1978), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506>.

⁷⁵ YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 164 (2002).

⁷⁶ Recently, Eastern European states have specifically invoked this principle for latitude in making the gradual transition from totalitarian to democratic societies. See SWEENEY, *supra* note 71, at 35–36.

from its inception. Even the initial step of establishing the six-member European Coal and Steel Community in 1951 envisaged surpassing the type of cooperative intergovernmental organization manifested by the Council of Europe.⁷⁷ The institutional, thematic, and geographical expansion of the community-turned-union over the decades has been persistent—even if the underlying debate between those aspiring for full-scale integration and others content with an expanded version of an intergovernmental European organization has not yet been clearly settled.⁷⁸ The festive declarations by EU officials, following the 2007 signing of the Lisbon Treaty, that the treaty would improve “the Union’s capacity to pursue one of its central tasks: to shape globalization,”⁷⁹ are thus grounded in years of progress toward supranationalism, although the EU is still marred by elements of incompleteness and is far from a stable integrative framework.⁸⁰

The EU, presently comprising twenty-eight member states and featuring seven EU institutions,⁸¹ is the most extensive supranational framework in the world,⁸² with the new Treaty on European Union (TEU),⁸³ Treaty on the Functioning of the European Union (TFEU),⁸⁴ and Charter of the Fundamental Rights of the European Union (EU Charter)⁸⁵ covering more thematic ground than ever before. At the same time, however, the EU still falls short of being a

⁷⁷ See ALLAN ROSAS & LORNA ARMATI, *EU CONSTITUTIONAL LAW: AN INTRODUCTION* 9–10 (2d ed. 2012).

⁷⁸ See, for example, JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 46–48 (2010).

⁷⁹ Diamond Ashiagbor et al., *Introduction*, in *THE EUROPEAN UNION AFTER THE TREATY OF LISBON* 1 (Diamond Ashiagbor et al. eds., 2012) (quoting the speech of European Commission President José Manuel Barroso at the 4th Joint Parliamentary Meeting on the Future of Europe, Dec. 4, 2007).

⁸⁰ See *id.* at 5.

⁸¹ The seven EU institutions are the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the EU, the European Central Bank, and the European Court of Auditors.

⁸² For a study of these post-Lisbon institutions, see, for example, Laurent Pech, *The Institutional Development of the EU Post-Lisbon: A Case of Plus Ça Change...?*, in *THE EUROPEAN UNION AFTER THE TREATY OF LISBON* 7, 22–32 (Diamond Ashiagbor et al. eds., 2012).

⁸³ Consolidated Version of the Treaty on European Union, Feb. 7, 1992, 2012 O.J. (C 326) 13, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN> [hereinafter TEU].

⁸⁴ Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47 (entered into force Dec. 1, 2009), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN> [hereinafter TFEU].

⁸⁵ Charter of the Fundamental Rights of the European Union, Dec. 12, 2007, 2012 O.J. (C 326) 391, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN> [hereinafter EU Charter].

full-fledged federal entity. As Allan Rosas and Lorna Armati show, the EU has some state-like features, such as an autonomous legal order; rules addressed directly to member states and their governmental branches; power to legislate (exclusive in some areas, shared in others); a system of democratic governance; judicial controls; a concept of citizenship; economic and monetary union; and a framework for external relations.⁸⁶ But it also has some significant non-state features, such as reliance for most of its primary law on treaties signed between the member states; reservation of core elements of national sovereignty in matters such as security and defense, taxation, immigration, and criminal law; and the lack of concepts such as territory and population.⁸⁷

Accordingly, a key unsettled theme is whether the EU can be viewed as governed by some type of constitutional order. As Joseph Weiler aptly notes, the concept of constitutionalism in the supranational context often remains unclear, with much of the discourse about “global constitutionalism” and “constitutional pluralism” featuring both descriptive and normative concerns⁸⁸ that obviously cannot be resolved here. On a more pragmatic note, the explicit move toward an EU constitution undoubtedly failed when the 2004 Constitutional Treaty was rejected in referenda held in France and the Netherlands; similarly, the progress toward the 2007 Lisbon Treaty was made possible largely because of the decisions to amend existing treaties without replacing them and to omit explicit references to “constitutionalism” and other terms associated with EU statehood.⁸⁹ At the same time, to the extent that constitutionalism refers to a normative hierarchy in those fields in which EU-level institutions are authorized to act (meaning that states relinquish a significant level of their domestic sovereignty in such matters in favor of EU institutions), then constitutionalism is at least partially adequate in describing the current legal structure of the EU.⁹⁰ It is this sense of constitutionalism to which I refer in the EU context.

The focus on this aspect of constitutionalism mandates a brief review of the competences of EU institutions and the way that these define the scope of supranational lawmaking in general and the prospects of harmonization in property law in particular.

Article 2 of the TFEU identifies three distinct categories of EU competence: exclusive, supporting, and shared.⁹¹ *Exclusive* competence entrusts

⁸⁶ See ROSAS & ARMATI, *supra* note 77, at 15–17.

⁸⁷ See *id.* at 17–19.

⁸⁸ See J.H.H. Weiler, *Prologue: Global and Pluralist Constitutionalism – Some Doubts*, in THE WORLDS OF EUROPEAN CONSTITUTIONALISM 8, 14–15, 17–18 (Gráinne de Búrca & J.H.H. Weiler eds., 2012).

⁸⁹ See, for example, PIRIS, *supra* note 78, at 23–35.

⁹⁰ See ROSAS & ARMATI, *supra* note 77, at 52–65.

⁹¹ See TFEU, *supra* note 84, art. 2.

legislative power only to the EU, unless members are empowered to act by the EU or work to implement the acts of the Union. Its scope is defined in Article 3(1) of the TFEU, which refers to customs union, competition rules, Euro monetary policy, marine conservation, common commercial policy, and some aspects of external relations addressed in Article 3(2).⁹² *Supporting* competence enables the EU to act to support, coordinate, and supplement the actions of member states without superseding their actions in these areas or otherwise entailing harmonization of national laws. This competence applies to matters such as protection and improvement of human health, industry, culture, tourism, and education.⁹³

The most intricate type of competence, which is also understood to serve as a residual category, is that of *shared* competence. Article 2(2) of the TFEU provides that member states “shall exercise their competence to the extent that the Union has not exercised its competence” or “has decided to cease exercising its competence.”⁹⁴ The principal (though unclosed) list of areas of shared competences in Article 4(2) of the TFEU includes eleven items, the most notable of which for this Article’s purposes is “internal market.”⁹⁵ The concept of internal market, which has been a mainstay of the European economic community from the EU’s inception and still serves as its major pillar today, is articulated in Article 26(2) of the TFEU: “[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.”⁹⁶

What then are the general implications of the various types of competences articulated in the TFEU for the creation of supranational property doctrines, and what is the particular role played by the shared competences of the EU in the context of the internal market? To ascertain the scope of such competences, it should be noted, first, that all types of EU powers are subject to principles of conferral, subsidiarity, and proportionality.⁹⁷ While the conferral principle was initially understood as an attribution of powers to the EU with a corollary residual competence of the member states, the current text of Article 4(1) and 5(2) of the TEU stresses that competences not conferred to the Union remain

⁹² See *id.* art. 3.

⁹³ See *id.* art. 6.

⁹⁴ *Id.* art. 2(2).

⁹⁵ See *id.* art. 4(2).

⁹⁶ *Id.* art. 26(2).

⁹⁷ See Takis Tridimas, *Competence after Lisbon: The Elusive Search for Bright Lines*, in *THE EUROPEAN UNION AFTER THE TREATY OF LISBON* 47, 49–55 (Diamond Ashiagbor et al. eds., 2012).

with the member states.⁹⁸ Moreover, the subsidiarity and proportionality doctrines have worked to limit the EU's lawmaking powers.⁹⁹ These doctrines have also implicated the interpretation of Article 114 of the TFEU, which provides that the treaty's provisions will apply "for the achievement of the objectives set out in Article 26" in regard to the internal market "save where otherwise provided in the Treaties," and that the EU institutions shall "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."¹⁰⁰

While Article 114 could have been construed as granting EU institutions an open-ended mandate to legislate, the European Court of Justice (ECJ) held in *Germany v. Parliament and Council*¹⁰¹ (the *Tobacco Advertising* case) that the EU legislature does not have a "general power to regulate the internal market" and that a "mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition" forms an insufficient basis to establish EU competence to act.¹⁰² The ECJ thus made clear that there is no general competence of the EU to unify or harmonize law simply by identifying disparity in national laws, and that the scope of the EU's competences in the context of the internal market must be functional, exercised only after it has been well established that a certain disparity between national laws would undermine the functioning of the market.¹⁰³ However, later ECJ cases seem to have opted for a less stringent approach,¹⁰⁴ approving in one case the use of "minimum harmonization" EU contract legislation adopted under the former version of Article 114 of the TFEU.¹⁰⁵

In the context of property law, another potential challenge to the EU's competence to create supranational norms is found in Article 345 of the TFEU,

⁹⁸ See TEU, *supra* note 83, arts. 4(1), 5(2) (noting, in both Articles, that "competences not conferred upon the [EU] in the Treaties remain with the Member States" and, in Article 5(2), that "[u]nder the principle of conferral, the [EU] shall act only within the limits of the competences upon it by the Members States in the Treaties").

⁹⁹ See Tridimas, *supra* note 97, at 49–55.

¹⁰⁰ TFEU, *supra* note 84, art. 114(1).

¹⁰¹ Case C-376/98, *Germany v. Parliament and Council*, 2000 E.C.R. I-8419.

¹⁰² *Id.* ¶¶ 83–84.

¹⁰³ See CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL PROPERTY LAW 1029–30 (Sjef van Erp & Bram Akkermans eds., 2012) [hereinafter CASES ON PROPERTY LAW].

¹⁰⁴ See Lucinda Miller, *European Contract Law After Lisbon*, in THE EUROPEAN UNION AFTER THE TREATY OF LISBON 227, 247–49 (Diamond Ashiagbor et al. eds., 2012).

¹⁰⁵ See Case C-205/07, *Lodewijk Gysbrechts & Santurel Inter BVBA*, 2008 E.C.R. I-9947.

by which “[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.”¹⁰⁶ A literal interpretation of this provision would suggest that property law lies outside the competence of EU institutions, but the ECJ rejected this approach in *Commission v. Belgium*¹⁰⁷ (the *Golden Share* case). It held that Article 345 “does not have the effect of exempting the Member States’ systems of property ownership from the fundamental rules of the Treaty.”¹⁰⁸ In effect, the court held that domestic legislation conditioning privatization of a company on the allocation of a golden share to the state and the sale of shares only to persons residing in EU member states, must be measured by its potential hindrance to the free movement of capital and cannot avoid such review simply by its doctrinal location in property law.¹⁰⁹

Finally, the move toward supranational norms has been depicted in the literature as comprising “negative” and “positive” components.¹¹⁰ The negative feature relates mostly to the protection of principles set forth in EU treaties, such as those relating to the freedom of movement in Article 26 of the TFEU and now also to the protection of the fundamental individual rights included in the EU Charter. It appears prominently in ECJ case law and addresses mostly domestic legislation and regulation, which typically concerns public law doctrines (discussed in Section III). The “positive” component relates to EU legislation by regulations, directives, and other legislative acts, subject to the competence limits discussed above. At least in the property context, positive supranationalism deals mainly with the ordering of private law relations (discussed in Section IV). As such, it concerns the more challenging aspect of creating supranational norms, one that is nevertheless essential in moving toward fuller-scale property harmonization.

III. PROPERTY LAW: BETWEEN PUBLIC AND PRIVATE

Having identified in Section II the basic features of cross-border mechanisms operating along the coordination-harmonization continuum and their general role in creating a supranational layer of property norms, I set out in this section to analyze the disparate implications such supranationalism has for

¹⁰⁶ TFEU, *supra* note 84, art. 345.

¹⁰⁷ Case C-503/99, *Comm’n v. Belgium*, 2002 E.C.R. I-4809.

¹⁰⁸ *Id.* ¶ 44.

¹⁰⁹ See CASES ON PROPERTY LAW, *supra* note 103, at 1033–35.

¹¹⁰ As a point of clarification, note that this literature regularly employs the terms “negative harmonization” and “positive harmonization.” *Id.* at 1024–25. To avoid confusion with the use of the term “harmonization” in the context of this Article, I resort here instead to the term “supranationalism.”

the public and private law aspects of property. While the division between public and private in property is far from clear-cut, I argue that it makes sense to speak about the ways in which the structural and normative features of property may play out differently for core concepts and doctrines in these two realms. These differences may prove to be particularly dominant in any attempt to switch from local to supranational property ordering.

This section begins by identifying the general structural features of property law and their potential implications for supranational ordering. Examining BITs, the European Convention, and the EU, it then shows that supranational public law mechanisms have been able to emerge across such institutions via varying degrees of coordination that create significant common ground but keep intact substantial local ordering. This state of affairs will be contrasted in Section IV with the private law setting, in which core doctrines cannot settle functionally for cross-state coordination if they are to be effective, whereas normatively, such doctrines may be less likely candidates for supranationalism because of their unique embeddedness in local history, culture, and social norms.

A. The Structure of Property Rights

This section addresses three structural traits of property. I have addressed these features in more detail elsewhere,¹¹¹ and my goal here is to concisely portray the core of these attributes so as to set the ground for an analysis of the challenges in switching from a largely domestic construct of property to a supranational legal concept, while remaining particularly mindful of the uneasy distinction between public and private law.

1. Third party applicability.

I use the term “third party applicability” interchangeably with the more familiar term “in rem.” This concept refers to the ways in which legal interests typically enumerated as property rights—such as ownership, lease, security interest, or servitude—possess a qualitative trait of general applicability toward a broad class of persons in establishing the set of legal powers and priorities over assets. Although property relations may be combined with contract- or tort-based relations, property rights in the broader sense do not merely break down into bilateral legal relations among specifically defined parties. This is particularly so because of the way in which legal powers and priorities regarding both specific assets and categories of resources (land, chattels, intangibles, intellectual

¹¹¹ See AMNON LEHAVI, *THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES* 13–58 (2013).

property) regularly implicate numerous parties with diverging features and legal interests.

Unlike pure contractual relations, parties affected by property's legal powers and priorities may not be in privity or have prior explicit legal relations and are often "strangers" that find themselves ex post facto entangled in a clash over competing claims to an asset. Consider, for example, the legal setting in which a tract of land is owned by one person, leased by another, mortgaged in favor of a third party, and subject to an easement in favor of a neighboring landowner. Property rights reveal their true complexity when actors affected by the property regime diverge in the particular set of powers and priorities they hold with respect to the resource.

Moreover, property reveals its complex nature in scenarios involving a good faith purchaser of voidable or void title, conflicting transactions, and other types of "legal triangles" where parties who are not in contractual privity find themselves asserting simultaneous claims to the asset, and property law is required to prioritize the claims.¹¹² Bankruptcy and similar scenarios also vividly exemplify the distinctiveness of property rights. In such settings, property rights (typically, secured interests) have categorical priority over contractual or obligatory rights, with a further internal ranking occurring within each of the different categories of rights.

Beyond the fact that parties to property conflicts may not be known to one another in advance, they often turn out to be more heterogeneous in their epistemological, cultural, and social attributes than their typical contractual counterparts. One can think here of the potential tensions between owners of patented or copyrighted materials (such as pharmaceutical or software products, respectively) and different groups of potential users, from competitors to rank-and-file end users; or of the ways in which business corporations implicate not only various groups of shareholders (controlling shareholders, institutional investors, and minority shareholders from the general public) but also creditors, suppliers, workers, or the personal creditors of each of the shareholders.¹¹³

These disparities create a challenge not only for ordering property relations within a certain country, but even more so for any attempt to establish supranational property regimes to accommodate globalization.¹¹⁴ For property to

¹¹² See generally Menachem Mautner, "The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties, 90 MICH. L. REV. 95 (1991).

¹¹³ See generally Amnon Lehavi, *The Corporation as a Nexus of Property* (Radzyner Sch. L., Working Paper 2013), available at <http://ssrn.com/abstract=2239619>.

¹¹⁴ Cf. Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 9 (2012) (noting that delineations of property tend to be more resistant to change in property law than in contract law and that in rem aspects of property remain particularly stable).

function well in creating, allocating, and enforcing in rem rights across borders, the legal framework must establish a broad-based understanding among otherwise diverse audiences across borders about how legal interests in property are structured and prioritized in cases of conflict. (I will explore this point in further detail in Section IV in the context of private law doctrines.)

2. Constraints on opting out.

A second qualitative difference between property and other fields that regulate legal relations among persons concerns the parties' ability to opt out in favor of private ordering. Contractual parties displeased with the general laws of contracts can relatively easily opt out of the contract law regime by resorting to private ordering mechanisms. These private mechanisms may deviate from both substantive and procedural default rules. Contract law traditionally includes few restrictions on the power of the parties to do so. Moreover, to coordinate legal expectations given potential differences among national contract laws, international transactions typically include specific provisions about the forum for dispute resolution, choice of law, evidence, and the like, which often deviate explicitly from the default conflict-of-laws rules in international law.¹¹⁵

Property is different. To the extent that the law sets up certain requirements for a party to qualify as a good faith purchaser (meaning that she will have the upper hand in a legal contest with the original owner unduly stripped of the asset) or to bind third parties (including creditors of the mortgagor) by registering a security interest, legal actors are much more constrained in their ability to privately circumvent property law norms. This is in fact one of the oft-made justifications for the *numerus clausus* principle, according to which only limited types of property rights are recognized as such by the legal system.¹¹⁶ This structural principle practically prevents parties from exercising their nearly unbounded transactional freedom to shape their legal relationships if they wish their rights to have a binding effect on third parties. Needless to say, this principle plays out significantly in the legal structuring of property rights across borders.

The traditional rule in private international law for property conflicts is that of *lex rei sitae*: to apply the rules of the legal system of the nation in whose

¹¹⁵ On the prevalence of such provisions and their nexus with the prospect of creating a self-standing new *lex mercatoria*, see generally Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 COLUM. J. TRANSNAT'L L. 369 (2014).

¹¹⁶ See, for example, Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); BRAM AKKERMANS, THE PRINCIPLE OF NUMERUS CLAUSUS IN EUROPEAN PROPERTY LAW (2008).

territory the object is located.¹¹⁷ While at first glance such a rule seems to provide certainty and predictability, it fails to account for many contingencies that typify property relations in contemporary supranational settings. Thus, for example, a security right created in one national jurisdiction (such as a certain type of lien resulting from the extension of credit) may not be recognized in the same manner under the laws of a different jurisdiction to which the goods purchased have been transferred. Such a conflict is particularly acute in scenarios of conflicting security interests and bankruptcy.

Generally speaking, parties transacting over an asset that may later trigger a wider-scale property conflict implicating third parties across borders are unable to bind such third parties by opting for private ordering, though such an arrangement may be applicable in their bilateral legal relations. The gap between private ordering and the *in rem* effect of property can be somewhat mitigated to the extent that highly sophisticated professional international merchants and financial institutions devise innovative transnational mechanisms for allocating financial gains and risks from commercial flows, while still detaching such financial bulks from specific assets.¹¹⁸ But the focus on this distinct subset of transnational actors should not distract from the current challenges of property law and the various ways in which globalized markets broadly implicate indefinite, heterogeneous actors who are unable to allocate risks in advance and depend on the legal allocation of priorities to assets among distant parties.

Aware of the impediments to cross-border markets that may result from this state of affairs, some national courts have tried to offer a more nuanced approach to mitigate the consequences of legal fragmentation.¹¹⁹ Thus, for example, the Dutch Supreme Court held, in the context of the then-in-force 1980 Rome Convention on the Law Applicable to Contractual Obligations,¹²⁰ that when parties agree on the law to govern the assignment of claims, it also applies to the proprietary aspects of the assignment.¹²¹ In that case, the assignment of future claims was crafted as part of a retention-of-title clause,

¹¹⁷ See JAN SMITS, *THE MAKING OF EUROPEAN PRIVATE LAW: TOWARD A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM* 245 (Nicole Kornet trans., 2002).

¹¹⁸ See 2 DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW 547–49 (5th ed. 2013) (arguing that current harmonization efforts in the EU, such as that of the Draft Common Frame of Reference, fail to distinguish between the needs of professionals and consumers and that the focus of current transnational property law should lie in promoting flexibility and party autonomy for professionals).

¹¹⁹ See CASES ON PROPERTY LAW, *supra* note 103, at 1020–22.

¹²⁰ Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1605 U.N.T.S. 80.

¹²¹ See HR 16 mei 1997, NJ 1998, 585 (*Brandsma qq/Hansa Chemie AG*) (*Neth.*). For a detailed review, see generally Teun H.D. Struycken, *The Proprietary Aspects of International Assignment of Debts and the Rome Convention, Article 12*, 1998 LLOYD'S MAR. & COM. L.Q. 345.

protecting a German seller of chemical products against a Dutch buyer while assigning to the seller the right to future claims of the buyer vis-à-vis subsequent purchasers. The Dutch buyer went bankrupt prior to paying the German seller, but only after receiving payment from a subsequent buyer of the products, creating a conflict between the German seller and the Dutch trustee in the insolvency proceedings. While German law—which governed the original contract of sale including the assignment provision—allows for transfer of claims for security purposes, Dutch law generally restricts it. The court’s decision to apply German law to the proprietary aspects of the assignment, in view of the fact that the parties to the original contract agreed to apply it, determined priority in favor of the German seller, although such an interest was not otherwise recognized in Dutch law.¹²²

As Sjef van Erp and Bram Akkermans note, the willingness of the Dutch court to give a proprietary status to the original parties’ private ordering on the choice of law stemmed, first, from a desire to avoid the adverse consequences for trade that would have resulted from invalidating this type of German-law security interest under Dutch substantive law, and, second, from the court’s inability to otherwise find an equivalent property right under Dutch law.¹²³

It should be clear, however, that the advantage of allowing parties to the original transaction to allocate the property risks involved with a cross-border transition of assets may be more than offset by the uncertainty and unpredictability incurred by third parties.¹²⁴ The problem of recognizing private ordering schemes in cross-border settings goes well beyond the general problem of publicity (or notice) that is often discussed under conventional national laws.¹²⁵ It inflicts on third parties across borders the burden of being subjected to types of property interests that are unknown or even explicitly forbidden under the domestic law they deem to be applicable in the regular course of events.

This tension thus touches directly on one of the key points this Article makes: private law doctrines that implicate the property rights of various (often indefinite) parties across borders require a comprehensive top-down mechanism

¹²² See HR 16 mei 1997, NJ 1998, 585 (*Brandsma qq/Hansa Chemie AG*) (*Neth.*).

¹²³ See CASES ON PROPERTY LAW, *supra* note 103, at 1020–21.

¹²⁴ See, for example, Eric Dirix, *Effects of Security Rights vis-à-vis Third Persons*, in DIVERGENCES OF PROPERTY LAW, AN OBSTACLE TO THE INTERNAL MARKET? 69 (Ulrich Drobnig et al. eds., 2006).

¹²⁵ Compare Merrill & Smith, *supra* note 116 (arguing that information costs and the need for publicity of property rights justify the *numerus clausus* principle), with Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373 (2002) (offering a more nuanced approach by which law’s limitations on property rights serve not to standardize but to facilitate verification of ownership of rights offered for conveyance).

of supranational ordering that facilitates a more predictable and definite allocation of risks involved in moving assets, tangible or intangible, across borders. Such mechanisms often cannot settle for mere coordination and leave intact a substantial amount of local lawmaking. In order to facilitate the identification and validation of a single ranking of priorities to an asset, supranational property norms must seek a more comprehensive harmonization scheme.

3. The public/private interface.

A third distinctive structural facet of property—one which occupies a key role in this Article—concerns the complex public/private interface. The general challenge faced by legal systems in designing property law is how to delineate the borders of permissible government interference with property, while simultaneously defining the scope and nature of property rights vis-à-vis the entire spectrum of private third parties.

Although the task of drawing the lines between public/constitutional legal norms and those controlling private conduct is familiar in many other fields of law, property does seem to introduce a special challenge. That the very same term, “property,” is used in both the private law field that orders legal relations among persons with regard to assets and the public/constitutional realm, is not merely a matter of historical accident or conceptual confusion. While the standard, mostly liberal arguments in favor of some differentiation between government conduct and private conduct may apply to property, any attempt to hermetically separate the two realms of property law would be both impractical and normatively awkward. The result is one of constant tension between public and private. Whereas different legal systems may reach different results in attempting to draw the lines between public and private, the normative debate is not free of constraints and is implicated by how the structure of property rights encompasses both realms.¹²⁶

I suggest, however, that in the supranational context one can make an intelligible—even if not hermetic—distinction between public and private property law, at least for the purposes of identifying and delineating the challenges of shifting to a cross-border property regime.

In the context of public law doctrines, such as those dealing with direct expropriation or regulation that may amount to indirect expropriation (or, in contrast, those addressing governmental benefits such as up-zoning of land, licenses, or transfer payments), sovereign power is regularly not dispersed, even in the global era, among numerous countries. This is so although exceptions may

¹²⁶ See LEHAVI, *supra* note 111, at 43–45.

exist, such as taxation or securities regulation of multinational corporations.¹²⁷ While parties implicated by such governmental acts may be residents of different countries—that is, local residents alongside foreign investors—the locus of the act of expropriation or regulation can still be typically attributed to a particular government, one that is not inevitably related to the actions of other domestic governments. Accordingly, I argue below that, at least as a structural and functional matter, public law doctrines can often settle for cross-border coordination rather than aspiring for full-scale harmonization. This means supranational mechanisms can quite feasibly create a certain common denominator that would hold countries accountable for substandard expropriatory or regulatory actions while preserving significant leeway in establishing domestic policy ends and means.

In contrast, private law doctrines that may implicate numerous, indefinite parties are placed under particular structural, functional, and normative pressure in supranational contexts. As Section IV will show, the multiplicity of domestic legal sources that may implicate the ordering of powers and priorities of assets poses a particular challenge for the functioning of property rights, thus creating a more pressing demand for harmonization. Unlike domestic governments, private parties do not have the capacity to fully control the applicable legal regime and are thus particularly sensitive to scenarios of legal fragmentation that may undermine the *in rem* essentiality of property interests.

B. Why Cross-Border Public Law Doctrines Can Settle for Coordination

By settling for coordination rather than aspiring for harmonization, the supranational institutions analyzed in this Article have been able to create frameworks involving cross-state commitments for protecting property from states' vertical exercise of their legislative and regulatory powers.

This is not to say, however, that such coordination, relying at least on identifying a common denominator in conceptualizing property and ensuring due process for its protection, is a trivial matter for sovereign countries. Thus, in its nonbinding 1948 Universal Declaration of Human Rights, the UN General Assembly included the right to property,¹²⁸ but later attempts to incorporate such a right into binding UN instruments have failed, though not due to neglect.

¹²⁷ See, for example, STEPHEN D. COHEN, *MULTINATIONAL CORPORATIONS AND FOREIGN DIRECT INVESTMENT: AVOIDING SIMPLICITY, EMBRACING COMPLEXITY* 252–81 (2007).

¹²⁸ See Universal Declaration of Human Rights art. 17, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (holding that (1) “[e]veryone has the right to own property alone as well as in association with others,” and (2) “[n]o one shall be arbitrarily deprived of his property”).

Intense negotiations failed on this point during the 1950s and 1960s largely because of the reluctance of the USSR and newly independent African countries to subject their domestic lawmaking to international scrutiny.¹²⁹ A more recent effort conducted shortly after the fall of the Soviet bloc also came up short, with the reporter for the UN Commission on Human Rights noting that “it is extremely difficult to establish a universal human right to individual private property in terms that one can substantiate as requiring incorporation in the national law of all States and capable of being given the same weight to [sic] in domestic courts.”¹³⁰

This means that current cross-border mechanisms that subject local lawmaking to supranational procedural or substantive norms entail a significant commitment on the part of countries. At the same time, however, such undertakings prove more practicable when they focus on the public aspect of property law and locate the threshold of coordination at a point that allows states sufficient leeway in promoting domestic ends and means.

1. BITs and investment treaty jurisprudence.

Recall the prevailing conceptualization of BIT jurisprudence as moving beyond commercial arbitration to establish a system of supranational public/constitutional norms that balances the protection of investors’ property rights against domestic legislative and regulatory powers. Accepting this view of cross-border investment law, however, does not necessarily countenance harmonization of national property systems. BIT jurisprudence should be more accurately defined as a coordination mechanism that seeks to establish certain thresholds of treatment standards while maintaining a significant layer of local diversity. This subsection seeks to demonstrate some of the ways in which this emerging body of law attains such coordination by focusing on two of its standards that have proven dominant: expropriation (direct or indirect) and fair and equitable treatment.

Let us first examine the concept of expropriation. As the United Nations Conference on Trade and Development (UNCTAD) notes, “[t]he first stage of international investment rule-making was shaped by sharp disagreement within the international community concerning the extent to which customary international law protects foreign investment against adverse treatment by the

¹²⁹ See John G. Sprankling, *The Emergence of International Property Law*, 90 N.C. L. REV. 461, 466–68 (2012).

¹³⁰ Indep. Expert to U.N. Comm’n on Hum. Rts., *The Right of Everyone to Own Property Alone as Well as in Association with Others*, ¶ 475, U.N. Doc. E/CN.4/1994/19 (Nov. 25, 1993) (by Luis Valencia Rodriguez).

host state.”¹³¹ A wave of massive direct expropriations of foreign investors’ assets sparked the emergence of BITs, and expropriations continue to preoccupy states, investors, and arbitration tribunals when managing and interpreting existing treaties.¹³² Accordingly, every BIT includes provisions that refer to and seek to govern the use and consequences of expropriations or other similar measures.¹³³

Direct expropriations of investments are still prevalent and have been the subject of numerous arbitral awards. The tests for establishing direct expropriation have been relatively solidified in BIT jurisprudence. In the 2012 *Burlington v. Ecuador* case,¹³⁴ the tribunal interpreted direct expropriation as amounting to an act of dispossession that permanently deprives the investor of its investment and that cannot otherwise be justified under the police power doctrine.¹³⁵ The requirement of dispossession or a formal taking of title in the asset as a condition for establishing direct expropriation, allows for relative clarity in identifying the scope of such expropriations.¹³⁶

This does not necessarily mean, however, that the law of direct expropriations is already harmonized or will necessarily become so. One source of disparity may arise from the current incongruence between different practices of direct expropriations and the remedies awarded. Jan Dalhuisen and Andrew Guzman seek to identify different categories of “takings” by mapping them onto expropriatory and non-expropriatory takings, and for each such category,

¹³¹ UNCTAD, International Investment Rule-Making: Stocktaking, Challenges and the Way Forward 10 (2008), available at http://unctad.org/en/Docs/iteit20073_en.pdf.

¹³² See *supra* text accompanying notes 31–34.

¹³³ For example, Article 13 of the 2004 Canadian model BIT provides: “Neither Party shall nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation . . . except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation. . . . Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.” Canada Model Foreign Investment Protection Agreement art. 13, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> [hereinafter Canadian Model BIT].

¹³⁴ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012) [hereinafter *Burlington*].

¹³⁵ See *id.* ¶ 506. According to the police power doctrine, “a State may justify deprivations of private property on the basis of its police powers in order to promote the general welfare and enforce its laws on its territory.” *Id.* ¶ 471. The tribunal found no such justification in this case. See *id.* ¶ 529.

¹³⁶ See, for example, A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY LAW 336–39 (3d ed. 2011) (noting that the acquisition of property is said to distinguish direct expropriations from “deprivations,” but also suggesting that this feature should serve as only one element in conceptualizing expropriations in a broader sense).

whether such a taking is lawful or unlawful.¹³⁷ But as they observe, the current state of affairs in international investment law is such that all types of compensable takings are typically subject to the same kind of remedy: fair market value compensation. This is so because arbitral tribunals are reluctant to grant other remedies, such as specific performance, reinstatement, or restitution, which are at times awarded by national courts.¹³⁸ What this means, at least as of now, is that some states may practically engage in discriminatory direct expropriations—ones in which there is no demonstrable public purpose or those lacking due process—without having to incur a compensation premium. While countries may face some reputational costs, they are not subjected to super-sanctions for sticking to such direct expropriation practices. In this sense, BIT jurisprudence does not itself work to harmonize national laws and practices even with respect to direct expropriations.

A more complicated task is that of devising a legal concept of indirect expropriation, particularly one that would allow for a significant level of coordination among states and vis-à-vis investors, even if it would not result in harmonization of national regimes on the matter.

The problem of indirect expropriations (or “regulatory takings,” as they are known in the U.S.) is one of the most intricate topics in property law in just about every legal system.¹³⁹ Indirect expropriations pose additional problems in the context of international investment jurisprudence because of the tension between constructing a set of supranational norms on protecting foreign investment and preserving the ability of states to set forth public policy, promote societal values, and respond to changes.¹⁴⁰

Although a full-scale analysis of the evolution of this doctrine in BIT jurisprudence is outside the scope of this Article,¹⁴¹ it is interesting to note that

¹³⁷ See Jan H. Dalhuisen & Andrew T. Guzman, *Expropriatory and Non-Expropriatory Takings Under International Investment Law* (UC Berkeley Public Law & Legal Theory Research Paper Series, Paper No. 2137107, 2012), available at <http://ssrn.com/abstract=2137107>. Dalhuisen and Guzman suggest that a taking would be generally considered non-expropriatory if it promotes a “super’ public purpose” or is “incidental to a legitimate, ordinary government action.” *Id.* at 5. Yet even a non-expropriatory taking could be unlawful and justify compensation if, for example, it violates a particular undertaking or other assurance provided by the host government. *See id.* at 13.

¹³⁸ *See id.* at 14–17.

¹³⁹ See generally William P. Barr et al., *The Guild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429 (2005); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

¹⁴⁰ See MONTI, *supra* note 54, at 231–36 (defining the “complicated enterprise” of finding this equilibrium).

¹⁴¹ For a detailed analysis, see *id.* at 231–91.

the Canadian model BIT¹⁴² (and less surprisingly, the U.S. one¹⁴³) embraces the U.S. Supreme Court's three-prong test for identifying regulatory takings developed in *Penn Central Transportation Co. v. City of New York*.¹⁴⁴ Arbitration tribunals have sought, however, to develop independent standards or to refer to other prominent supranational instruments, such as the European Convention.¹⁴⁵

Recent cases concerning indirect expropriations emphasize a number of elements. First, tribunals study the magnitude of the adverse effects of the indirect expropriation on the “the investment as a whole”¹⁴⁶ and whether the expropriation substantially “deprive[s] the investor of the economic value, use or enjoyment of its investment.”¹⁴⁷ Second, some tribunals have also looked at the reasonableness and proportionality of the expropriatory measure.¹⁴⁸ Third, recent cases have debated whether proving indirect expropriation requires a showing of a “loss of control” over the investment, beyond “mere loss of value,” coming at times to different conclusions.¹⁴⁹ Fourth, several tribunals have taken into consideration the “investor’s reasonable expectations.” This parameter has received various interpretations, with some tribunals examining more generally whether a domestic policy in effect at the time an investment was made creates some sort of a vested interest,¹⁵⁰ and others focusing on specific

¹⁴² Canadian Model BIT, *supra* note 133, Annex B.13(1).

¹⁴³ 2012 U.S. Model Bilateral Investment Treaty, Annex B, *available at* <http://www.state.gov/documents/organization/188371.pdf> [hereinafter U.S. Model BIT].

¹⁴⁴ 438 U.S. 104 (1978). The *Penn Central* test, essentially copied by these model BITs, looks at: (1) “[t]he economic impact of the regulation”; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the governmental action.” *Id.* at 124.

¹⁴⁵ *See, for example*, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003), 43 I.L.M. 133, 164 (2004) (discussing the “proportionality” test and referring to the use of this doctrine in a number of cases decided by the ECHR).

¹⁴⁶ *Burlington*, ICSID Case No. ARB/08/5, ¶ 404.

¹⁴⁷ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶ 328 (Dec. 7, 2011).

¹⁴⁸ *See, for example*, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 196–97 (Dec. 21, 2010).

¹⁴⁹ *Compare* *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶¶ 245, 249 (Oct. 31, 2011) (holding that “the decisive element in an indirect expropriation is the ‘loss of control’ of a foreign investment” and that “a mere loss in value of the investment, even if important, is not an indirect expropriation”) (emphasis in original), *with* *Burlington*, ICSID Case No. ARB/08/5, ¶ 397 (holding that “[t]he loss of viability does not necessarily imply a loss of management or control” and “[w]hat matters is the capacity to earn a commercial return”).

¹⁵⁰ *See, for example*, *Grand River Enterprises Six Nations Ltd. v. United States*, Award (ICSID Jan. 12, 2011), *available at* <http://www.state.gov/documents/organization/156820.pdf>.

circumstances, such as whether the host state made any representations to the investor.¹⁵¹

What lessons can be drawn from the multitude of tests in BIT jurisprudence about the scope of coordination among nations with regard to the laws of indirect expropriations? Can we identify a single set of legal norms applying to all states so that the same type of factual conduct will receive the same legal treatment by arbitral tribunals regardless of the background legal rules in domestic systems? Is BIT jurisprudence pushing states to harmonize or standardize their laws on this point?

I suggest that this is not the case and that BIT jurisprudence can be said to create a significant threshold of coordination but not uniformity. Although BIT jurisprudence seems to have established a certain set of criteria for identifying indirect expropriations, these criteria are designed as “legal standards” rather than as hard-edged rules.¹⁵² This means that their application by various arbitration tribunals may diverge across cases, especially because of the lack of a strict principle of *stare decisis*;¹⁵³ moreover, standards entail at least some degree of deference to states in lawmaking or regulation. Although the issue of deference on a national level revolves around the allocation of powers between a legislative or administrative body and the court, on the supranational level it entails the additional component of allowing for a certain scope of diversity among national legal systems. Such diversity may even go beyond the latitude that the European Convention grants under the “margin of appreciation” doctrine (discussed in the next subsection).

The issue of deference in international investment law and its implications for the establishment of coordination is further demonstrated in the case of the fair and equitable treatment (FET) standard that typifies BITs.¹⁵⁴ Contemporary BIT jurisprudence points to the complexity and often ambiguity of this concept.

¹⁵¹ See, for example, *Olguín v. Republic of Paraguay*, ICSID Case. No. ARB/98/5, Award (July 26, 2001).

¹⁵² See generally Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L.J. 81 (2010).

¹⁵³ See MONTI, *supra* note 54, at 288–91.

¹⁵⁴ According to several commentators, this standard traces its roots to Article 11(2) of the 1948 Havana Charter for an International Trade Organization, which contemplated that foreign investments should be assured “just and equitable treatment.” See, for example, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INVESTMENT & TRADE 357, 357 (2005). Theodore Kill, however, has argued that this concept dates further back to the 1919 Covenant of the League of Nations. See Theodore Kill, Note, *Don’t Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106 MICH. L. REV. 853, 870 (2008) (noting that Article 23(e) of the Covenant calls on its members “to secure and maintain . . . equitable treatment for the commerce of all Members of the League”).

In the oft-cited *Metalclad v. Mexico* arbitration,¹⁵⁵ the ICSID tribunal found a violation of the FET standard in Mexico's failure to ensure a "transparent and predictable framework for Metalclad's business planning and investment" in view, inter alia, of the "absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling [municipal construction permit] applications."¹⁵⁶ The focus, therefore, is on transparency and due process, not on a substantive template for regulation under the FET provision.

Subsequent cases have identified several parameters circumscribing the FET standard. In the 2012 *Deutsche Bank v. Sri Lanka*¹⁵⁷ case, the tribunal referred to (1) "protection of legitimate and reasonable expectations which have been relied upon by the investor to make the investment"; (2) "good faith conduct[,] although bad faith on the part of the State is not required for its violation"; (3) "conduct that is transparent, consistent and not discriminatory"; and (4) "conduct that does not offend judicial propriety, that complies with due process and the right to be heard."¹⁵⁸ In *Swisslion v. Macedonia*,¹⁵⁹ the tribunal noted that the FET standard "basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances,"¹⁶⁰ while the *Electrabel v. Hungary*¹⁶¹ tribunal emphasized that the "requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably."¹⁶² Some tribunals also have incorporated the obligation of proportionality into the FET standard.¹⁶³

What emerges from this body of cases on the FET standard? According to UNCTAD, recent decisions "highlight the potential unpredictability of the standard as tribunals continue[] to emphasize its flexible nature and coverage of

¹⁵⁵ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

¹⁵⁶ *Id.* ¶¶ 88, 99.

¹⁵⁷ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (Oct. 31, 2012).

¹⁵⁸ *Id.* ¶ 420.

¹⁵⁹ *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award (July 6, 2012).

¹⁶⁰ *Id.* ¶ 273.

¹⁶¹ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012).

¹⁶² *Id.* ¶ 7.77.

¹⁶³ *See, for example, Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012).

a number of elements.”¹⁶⁴ Even if we avoid the skeptical view that FET is inherently embedded in excessive ad hoc jurisprudence, what seems to emerge is an attempt to coordinate a certain threshold of treatment, one that focuses not so much on substantive outcomes but the procedures of decision-making. While the coordination of procedures in regard to the public law aspects of property is far from trivial, it nevertheless leaves significant room for differentiation. As noted, in the supranational setting, deference to national-level lawmakers translates into tolerance of at least some degree of localism in lawmaking and an unwillingness to attempt harmonization of the regulation of investments and protection of property.

Such an approach is welcomed by authors who argue that, while the “BIT generation must define minimum thresholds that determine what is expected from a reasonably well-behaved regulatory state,” state liability in the FET context should be imposed only when the state “fail[s] to maintain the usual order which . . . is the duty of every state to maintain within its territory.”¹⁶⁵ If this is the case, then the creation of supranational public law norms for the protection of property rights indeed constitutes a coordination mechanism that fosters investments without entirely undermining domestic policymaking.

2. Property constitutionalism and the margin of appreciation.

As explained in Section II, the European Convention and the EU Charter are now commonly understood as comprising a supranational bill of rights for the member states of the Council of Europe and the European Union, respectively. However, the extent to which constitutional or constitutional-like property provisions, namely Article 1 of the First Protocol of the European Convention and Article 17 of the EU Charter, preempt the local ordering of property depends on the tradeoff between the scope of supranational principles such as proportionality or fair balance and the breadth of the margin of appreciation given to states’ design and implementation of local policies.

Consider, first, the European Convention. The general approach of the ECHR is to review economic matters such as property under a relatively lax standard, granting states a wide margin of appreciation. Moreover, since the Convention, unlike the EU instruments, does not regulate markets but solely protects human rights, property has not been ranked as a particularly vulnerable

¹⁶⁴ UNCTAD, *Latest Developments in Investor-State Dispute Settlement (ISDS)*, Apr. 2012, at 7, available at http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.

¹⁶⁵ MONTI, *supra* note 54, at 367.

human right and has not otherwise been tied to overarching treaty goals (such as ensuring market access).¹⁶⁶

There is, however, a difference between the scope of the margin granted in cases said to implicate the “deprivation” of property under the first paragraph of Article 1 of the First Protocol and in those dealing with regulation that works to “control the use of property” under Article 1’s second paragraph.¹⁶⁷ The first type of case is usually subject to a higher level of scrutiny and stricter application of supranational standards such as fair balance and proportionality (in defining cases of deprivation and assessing due compensation).¹⁶⁸ This may be due to the fact that, compared to a regulation “controlling” the use of property, a deprivation—that is, permanent dispossession or compulsory transfer of title—is easier to identify, typically considered a more serious injury to property, and may be easier to quantify for purposes of the fair market value standard.¹⁶⁹

On the other hand, when evaluating a regulation that controls the use of property without expropriating it *de facto* or *de jure*, the ECHR has granted states a particularly wide margin of appreciation to design an underlying policy, choose the most appropriate means to achieve such legitimate social ends, and evaluate the effects that such means have on property interests.¹⁷⁰ Moreover, when applying the various prongs of the proportionality test, the ECHR has not required states to choose the least restrictive means as long as the chosen local measure remains “within the bounds of its margin of appreciation.”¹⁷¹ This lenient approach has been criticized as reducing the proportionality assessment

¹⁶⁶ See ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* 164–67 (2012).

¹⁶⁷ The first paragraph reads: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. 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 second paragraph states: “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.” European Convention, *supra* note 9, Protocol 1, art. 1.

¹⁶⁸ See ARAI-TAKAHASHI, *supra* note 75, at 149–50.

¹⁶⁹ See Allen, *supra* note 66, at 298–300, 313–15 (noting, however, that fair market value generally ignores the overall impact on the victim’s economic security).

¹⁷⁰ See, for example, AGOSI v. U.K., App. No. 9118/80, ¶ 52 (Eur. Ct. H.R. 1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57418> (“[T]he State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”).

¹⁷¹ Mellacher et al. v. Austria, App. Nos. 10522/83, 11011/84 & 11070/84, ¶ 53 (Eur. Ct. H.R. 1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57616>.

to a minimum level.¹⁷² The normative debate notwithstanding, as a positive matter this approach can be said to place the cross-state commitment embedded in the property clause of the European Convention closer to the “coordination” model, which grants states significant leeway in embracing domestic policy and exposes them, at worst, to the payment of fair market value when the domestic regulation is considered excessive.

It also should be noted that the ECHR does not grant special consideration to cross-border investments or property interests, but treats them in the same manner that it deals with a petition submitted by a plaintiff against its home state.¹⁷³ This is because the European Convention is neither specifically oriented toward protecting foreign investment nor entrusted, as the EU is, with the task of facilitating an internal market among its member states. This means that the same standard of review would apply to domestic and foreign plaintiffs, and the effect of ECHR jurisprudence on cross-border coordination of property protection would derive from the general balance that the court strikes between supranational and national norms.¹⁷⁴ At times, the court has even hinted that holders of property interests should be aware of the regulatory risks involved with moving across national borders.¹⁷⁵

Moving to the EU context, it should be noted at the outset that the ECJ’s review of national lawmaking that arguably contradicts EU law, referred to in Section II as aimed at negative supranationalism,¹⁷⁶ is premised on various provisions in the EU’s treaties, directives, and regulations: some concern the freedom of movement across the EU’s internal market, while others deal more specifically with the right to property.

¹⁷² See, for example, ARAI-TAKAHASHI, *supra* note 75, at 156–57.

¹⁷³ One exception concerns the provision regarding the “general principles of international law” in the first paragraph of Article 1 of the First Protocol, which the ECHR has interpreted not to apply to a “taking by a State of the property of its own nationals.” James Judgment, *supra* note 68, ¶¶ 58–66.

¹⁷⁴ See Christian Tomeuschat, *The European Court of Human Rights and Investment Protection*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOR OF CHRISTOPH SCHREUER 636, 642–46 (Christina Binder et al. eds., 2009).

¹⁷⁵ See, for example, *Gasus Dosier-und Fördertechnik GmbH v. Netherlands*, App. No. 15375/89, ¶¶ 66–70 (Eur. Ct. H.R. 1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57918> (holding that the ranking of security interests under Dutch law, according to which the rights of a German creditor holding a retention-of-title interest in a concrete mixer located in the Netherlands was inferior to a statutory lien of the Dutch national tax collector over the mixer, does not amount to disproportional interference, because “Gasus [the creditor] could therefore not have expected otherwise than that the effectiveness of their retention of title in the face of the seizure depends on Netherlands law” and that it “could have eliminated their risk altogether by declining to extend credit to Atlas [the debtor]”).

¹⁷⁶ See *supra* text accompanying notes 109–110.

One prominent mode of review focuses on the protection of free movement in the internal market, with property-related disputes addressing mostly the movement of capital and goods and inquiring whether a certain domestic legislation or regulation, by limiting free movement, unduly hinders the functioning of the internal market. The second and more recent front follows from the formal adoption of the EU Charter, which includes the protection of the right to property in Article 17 and serves as a potential limit on domestic lawmaking—one that goes beyond freedom of movement issues.

Consider first the free movement of capital, guaranteed, *inter alia*, in Article 26 of the TFEU.¹⁷⁷ The ECJ has invoked these guarantees to constrain national property legislation limiting the acquisition of land. In *Konle v. Austria*,¹⁷⁸ the ECJ invalidated an Austrian legislative provision by which foreigners wishing to purchase land in the Tyrol region had first to obtain administrative authorization. Konle, a German citizen, was denied such authorization by the Austrian court under a policy limiting the purchase of second homes in order to preserve the Alpine environment.¹⁷⁹ The ECJ ruled that restrictions on cross-border land acquisition generally amount to restraints on the free movement of capital.¹⁸⁰

In a subsequent case, *Reisch v. Mayor of Salzburg*,¹⁸¹ the ECJ reviewed a local law that, for certain types of transactions, required potential acquirers of land in Salzburg to declare, first, that they are nationals of Austria or another EU member state, and second, that the land will be used as a principal residence or will meet a commercial need. Based on such a declaration, the local Austrian land commission would then issue a confirmation of the transaction but could refuse to do so if it had reason to suspect either that the land would not be used for the declared goal or that the transaction was otherwise inconsistent with the local law.¹⁸² The ECJ held that the applicant's status as an Austrian national did not make interpretation of EU law unnecessary, given the potential application of the local law to residents of other member states. The ECJ went further and invalidated the local ordinance, holding that the specific statutory scheme was

¹⁷⁷ In addition, the free movement of capital is guaranteed in Article 63 of the TFEU and Directive 88/361/EEC. *See* TFEU, *supra* note 84, art. 63(1); Council Directive 88/361, 1988 *O.J. (L 178)* 5 (EEC).

¹⁷⁸ Case C-302/97, *Konle v. Austria*, 1999 E.C.R. I-3099.

¹⁷⁹ *See id.* ¶¶ 1–7.

¹⁸⁰ *See id.* ¶¶ 21–22.

¹⁸¹ Joined Cases C-515, C-519–C-524 & C-526–C-540/99, *Reisch v. Bürgermeister der Landeshauptstadt Salzburg*, 2002 E.C.R. I-2157.

¹⁸² *See id.* ¶¶ 5–8.

cumbersome and not “strictly indispensable” to achieve the admittedly legitimate goal of preventing tourist colonies.¹⁸³

A somewhat different line of reasoning has typified the ECJ’s approach to cases involving the guarantees of the freedom of movement of goods found in Articles 26 and 34 of the TFEU, which prohibit “[q]uantitative restrictions on imports and all measures having equivalent effect.”¹⁸⁴ Although initial cases dealt with more explicit forms of local restrictions on trade—the seminal 1979 *Cassis de Dijon* decision¹⁸⁵ sets the tone for such case law—current ECJ cases and scholarly contributions have discussed the potential expansion of Article 34 and the pressure that this could put on national legal systems and property law rules in particular.

According to several commentators, differences among national property systems can lead, under certain circumstances, to hindering the free movement of goods between countries and should be considered as “having equivalent effect” to the quantitative restrictions prohibited by the TFEU.¹⁸⁶ This is especially so, under this view, when a certain type of property right recognized in one member state is not recognized in the legal system of another, affecting cross-border traders and hindering intra-EU trade contrary to Article 34.¹⁸⁷

The most notable ECJ case dealing with the potential implications of divergent national property laws regulating the free movement of goods is the pre-EU 1990 *Krantz* case.¹⁸⁸ *Krantz*, a German company, sold and delivered machines to a Dutch company subject to a reservation-of-title clause. Because the machines were installed in the Dutch company’s facilities without full payment of consideration, the Dutch tax collector seized the machines on the basis of a Dutch law authorizing it to seize debtor property—even if owned by a third party—to secure the payment of taxes. Rejecting *Krantz*’s petition, the ECJ reasoned that this seizure right under Dutch law, which effectively trumped the reservation-of-title clause, could not be viewed as hindering trade between member states.¹⁸⁹

¹⁸³ See *id.* ¶ 38.

¹⁸⁴ This language is taken from Article 34 of the TFEU, *supra* note 84.

¹⁸⁵ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649.

¹⁸⁶ See, for example, Eva-Maria Kieninger, *Securities in Movable Property Within the Common Market*, 4 EUR. REV. PRIVATE L. 41 (1996).

¹⁸⁷ See Bram Akkermans, *Property Law and the Internal Market*, in *THE FUTURE OF EUROPEAN PROPERTY LAW* 199, 204–10 (Sjef van Erp et al. eds., 2012).

¹⁸⁸ Case C-69/88, *H. Krantz GmbH v. Ontvanger der Directe Belastingen*, 1990 E.C.R. I-583.

¹⁸⁹ See *id.* ¶¶ 11–12.

The *Krantz* decision has been criticized.¹⁹⁰ But by rejecting the notion that a mere difference between national property systems would categorically amount to violation of EU law, and in light of the prevailing conception that Article 34 lacks “horizontal direct effect,”¹⁹¹ the ECJ placed the protection of the freedom of movement in the TFEU well within a constitutional-like framework that explicitly stops short of seeking full-scale harmonization of property law. Domestic property lawmaking contested as violating the EU treaties’ protection of free movement of goods is thus evaluated under the general tests that the ECJ has developed for the compatibility of national lawmaking with EU norms. This means that, in reviewing a potential violation of the internal market’s four freedoms, the ECJ, on one hand, requires member states to demonstrate a legitimate national goal and proportionality of the local measures to the aim pursued, but, on the other, it grants states a considerable margin of appreciation in defining both ends and means and adheres to the broader notion of subsidiarity.

Accordingly, to the extent that a property system in one country refuses to recognize types of property interests prevalent in other national systems or otherwise prioritizes property interests so as to undermine the ranking of property rights that typify the law of another member state—as was the case in *Krantz*—the deviating state would have to point to a legitimate goal (such as protecting third parties, including other creditors, that rely on the domestic system of property rights) and proportionate measures. Yet it would not be otherwise hard-pressed to move toward harmonization of its property law with that of other states.¹⁹²

The other major setting in which the concept of supranational constitutionalism plays out in the ECJ’s review of domestic lawmaking on property rights is in the context of the EU Charter, which formally went into force in 2009 alongside the Lisbon Treaty and protects the right to property in Article 17.¹⁹³

The EU Charter is presently considered to apply only vertically—that is, to EU institutions or national lawmakers, but not to private actors. At the same

¹⁹⁰ See, for example, Akkermans, *supra* note 187, at 218–22.

¹⁹¹ See *id.* at 219–20.

¹⁹² See *id.* at 210–17.

¹⁹³ See generally EU Charter, *supra* note 85. The concept of fundamental rights was not entirely outside the scope of the EU before adoption of the Charter. Various treaties contained scattered provisions dealing with issues such as non-discrimination on the ground of nationality or gender equality, and pre-Charter cases indicated that fundamental rights formed an integral part of community law. But this was a long way from any type of bill of rights. See P.P. Craig, *The Charter, the ECJ and National Courts*, in *THE EUROPEAN UNION AFTER THE TREATY OF LISBON* 78, 79–81 (Diamond Ashiagbor et al. eds., 2012).

time, the application of the EU Charter to member states is construed in a relatively broad manner. This means that the Charter would apply not only when states specifically act as agents of the Union in applying EU law, but also when the substance of the domestic law falls within the general scope of EU norms embodied in treaties, directives, and regulations.¹⁹⁴

A key feature of the definition of rights included in the Charter is expounded in Article 52(3):

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.¹⁹⁵

Moreover, the Explanatory Memorandum accompanying the Charter has identified the rights, including the right to enjoyment of property, that “correspond” to those included in the European Convention.¹⁹⁶

The result of the foregoing, quite simply, is that the ECHR’s current jurisprudence serves as the baseline for assessing both the right to property in the Charter and the potential supranational effect of judicial review carried out by the ECJ or national courts. However, the ECJ’s case law may diverge from that of the ECHR over time because of the aforementioned provision in Article 52(3) of the Charter, which allows EU law to expand the scope of protection beyond that provided by the European Convention. More generally, the two bodies of case law may diverge simply because these two distinct institutions of judicial review operate simultaneously and without clear institutional hierarchy.¹⁹⁷

The ECJ’s post-Charter property jurisprudence has focused not so much on instances of state lawmaking as to subject matter within the general scope of EU law, but rather on EU-level legislation contested as unduly violating the right to property. Most notable is a series of cases dealing with decisions by EU institutions to freeze the funds of persons affiliated with certain foreign regimes and organizations. In its 2013 *Trabelsi v. Council* decision,¹⁹⁸ the ECJ invalidated the Council of the EU’s decision to freeze the assets of one of the petitioners, finding it violative of his right to property. Holding that a limitation on the exercise of the right of property must (1) “have a legal basis,” (2) “refer to an objective of public interest, recognized as such by the EU,” and (3) “not be

¹⁹⁴ See Craig, *supra* note 193, at 87–91.

¹⁹⁵ EU Charter, *supra* note 85, art. 52(3).

¹⁹⁶ See Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303) 17.

¹⁹⁷ See Craig, *supra* note 193, at 101–04.

¹⁹⁸ Case T-187/11, *Trabelsi v. Council* (2013), available at <http://curia.europa.eu/juris/document/document.jsf?docid=137742&doclang=EN>.

excessive”—meaning that it “must be necessary and proportional to the aim sought” without impairing the “essential content” of the right—the Court held that the Council failed to meet this test in the specific circumstances of the first applicant.¹⁹⁹

It remains to be seen, therefore, how the ECJ will develop its case law on the right to property in the context of state lawmaking and the potential negative supranationalizing effect embedded in the Charter’s Article 17. As noted, while Article 52(3) of the Charter seeks generally to tie together ECJ and ECHR jurisprudence, divergence may still reign as states grapple with the tradeoff between hewing to supranational property-right standards at the expense of state sovereignty and invoking the margin of appreciation to legitimize local constitutionalism. On one hand, ECHR jurisprudence on property is not restricted to goals such as facilitating the internal market; being party to the European Convention entails a more general normative commitment by members to subject their sovereignty, at least partially, to supranational standards for the protection of human rights. As such, the development of supranational property norms guiding state conduct relies directly on the constitutional-like status the European Convention has achieved. On the other hand, the fact that the EU Charter is embedded in a broader supranational structure that includes affirmative EU-level legislation may foster a different kind of push toward strengthening the common body of property law dealing with property. But at least as of now, neither venue aspires for full-scale negative supranationalization of property norms governing state conduct. The margin of appreciation in ECHR jurisprudence and the corresponding concept of subsidiarity in the EU context maintain the states’ commitment to supranationalism at an intermediate level in regard to public law property doctrines.

The big difference that does exist, however, between the European Convention and the EU lies in the institutional and legal framework for positive supranationalism in the EU. Accordingly, to the extent that the EU increasingly aspires to harmonize and not merely coordinate property law among member states, it would be up to the EU’s legislative institutions, subject to the limits on their competences addressed in Section II, to create a uniform body of law that would apply to both the private and public aspects of property.

¹⁹⁹ See *id.* ¶¶ 74–117.

IV. PRIVATE LAW PROPERTY DOCTRINES: IN SEARCH OF HARMONIZATION

This section analyzes the path of supranationalism in the private law context. Subsection A unfolds the unique challenges involved in any attempt to converge national private law property doctrines by pointing to both functional and normative considerations. It argues that, while a functional approach necessitates a more ambitious attempt at supranational harmonization that transcends mere coordination, deeply rooted normative considerations underlying private law doctrines may make the task of convergence particularly difficult. Subsection B then reviews the currently limited scope of actual harmonization schemes in property law.

A. The Private Law Challenge

There are two particular challenges frustrating the creation of supranational norms governing the private law aspects of property. First, the *in rem* nature of property rights requires that any supranational ordering facilitate a single ranking of legal powers and priorities with regard to a certain asset, meaning that mere coordination that leaves intact domestic-level differentiation might not function well. Second, there is normative complexity in harmonizing national arrangements of private law property relations that have been traditionally embedded in local values and culture.

1. The functional dimension: *in rem* essentiality.

As the structural analysis in Section III demonstrated, property disputes may implicate indefinite numbers of private parties who have no contractual privity or other preexisting legal relations yet assert simultaneous or otherwise conflicting claims to a specific asset. To function properly, a legal system must identify and prioritize the various kinds of property interests with broad *in rem* applicability to all parties concerned. To facilitate such a ranking of powers and priorities among otherwise distant parties, national property law systems regularly establish certain formal requirements (such as registration or other types of publicity), decide whether to grant statutory priority to some property interests over others, and further constrain the ability of actors to circumvent property law privately if they wish their rights to prevail against third parties.²⁰⁰ This *in rem* essentiality of property rights is the principal functional challenge in moving to a supranational system of property.

²⁰⁰ See generally SMITS, *supra* note 117.

Consider the issue of security interests in movable goods. As the *Krantz* decision demonstrates,²⁰¹ the fact that two national systems generally recognize the concept of a reservation-of-title clause has only limited effect in ensuring cross-border in rem applicability, at least if the two systems diverge on whether and how they allow a tax lien to rearrange the ranking of priorities to the asset. Cross-border coordination—that is, a common recognition of the legal concept of reservation of title that is nonetheless subject to domestic leeway in defining the scope of protection, requirements for publicity, or priority vis-à-vis other types of security interests—may simply not be enough to protect parties' expectations and reliance interests. The in rem essentiality of property suggests that a cross-border regime should aspire for harmonization.

National legal systems, even among EU member states, continue to feature marked differences in the various components of property interests such as reservation of title.²⁰² Such divergence exists in relation to the underlying conceptualization of the property interest (for example, whether a reservation of title is merely a security interest or genuinely preserves the seller's ownership); the existence of formal requirements to grant an in rem effect to the right (for example, whether there is a filing or other publicity requirement); how a certain type of interest ranks in relation to other types of property interests (for example, prioritizing contract-created security interests, tax liens, possessory retention, and the like.); and other features that may have a substantive impact.

Although this problem has been widely recognized, even the EU's relatively tight form of institutional supranationalism has so far failed to come up with a harmonized legal order. Thus, for example, the 2000 Directive on later payments in commercial transactions treats reservation of title in isolation,²⁰³ as does the 2000 Regulation on cross-border insolvency proceedings.²⁰⁴ No comprehensive scheme has been devised as of yet to create a uniform body of law.

²⁰¹ See discussion *supra* Section III.B.2.

²⁰² See Anna Veneziano, *The DCFR Book on Secured Transactions: Some Policy Choices Made by the Working Group*, in *THE FUTURE OF EUROPEAN PROPERTY LAW* 123, 125 (Sjef van Erp et al. eds., 2012).

²⁰³ See Council Directive 2000/35, 2000 O.J. (L 200) 35 (EC). A prior draft of the Directive that sought to more comprehensively harmonize the law on reservation of title was rejected due to a disagreement about the competence of the EU to act in the matter. Moreover, not all member states accommodated retention of title in their domestic legal order even after the Directive was introduced. See Bram Akkermans, *The European Union Development of European Property Law 3–4* (Maastricht European Private Law Institute, Working Paper No. 2011/30, July 2011), available at <http://ssrn.com/abstract=1888294>.

²⁰⁴ See Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC). While most of the Regulation deals with procedural aspects, it does provide a number of harmonized substantive rules regarding the validity of retention-of-title provisions (in cases where, at the time of the opening of a *national* insolvency proceeding, the asset is located in the territory of another member state). See *id.* art. 7.

It should be noted that the 2009 Draft Common Frame of Reference (DCFR), which focuses mostly on contract law, deals in Book IX with personal property security rights.²⁰⁵ It aims at offering a unitary conceptual approach for different types of security interests and at introducing a common set of rules for giving an in rem effect to such rights vis-à-vis third parties without entirely undermining national legal order.²⁰⁶ It remains to be seen whether these recommended provisions will become law in the EU.

This initiative sharpens a more general discourse about introducing broader-based harmonized property mechanisms, such as the proposals for a European Security Right (ESR) in movables²⁰⁷ or a “Eurohypothec” for real estate security interests.²⁰⁸ Without dealing here with other potential benefits of creating a single system of security rights, such as increasing competition in the credit market, it is clear that any move toward such an integrated system would better address the in rem applicability of security rights.

The need for harmonization instead of mere coordination to address the in rem essentiality of property rights is also apparent in areas of property law other than security interests. Such is the case with the doctrine of the good faith purchase of a movable good—stolen or otherwise unlawfully taken from the owner—that changes hands until it ends up with a buyer who pays consideration and arguably acts in good faith. The in rem essentiality underlying this garden variety situation points to one subset of good faith purchases that has been dealt with quite extensively in the supranational arena: “cultural objects” (which typically carry a particularly high value for the history or culture of a specific nation). In addition to rules constructed in national systems, cultural objects have been the subject of a number of international conventions, including the 1954 Hague Convention,²⁰⁹ the 1970 UNESCO Convention,²¹⁰ a 1993 EU

²⁰⁵ See PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), OUTLINE EDITION 447–499 (Christian von Bar et al. eds., 2009), available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

²⁰⁶ See Bram Akkermans, *The Role of the (D)CFR in the Making of European Property Law* 12–13 (Maastricht European Private Law Institute, Working Paper No. 2011/29, July 2011), available at <http://ssrn.com/abstract=1888244>.

²⁰⁷ See Henk J. Snijders, *Access to Civil Securities and Free Competition in the EU, A Plea for One European Security Right in Movables*, in DIVERGENCES OF PROPERTY LAW, AN OBSTACLE TO THE INTERNAL MARKET? 153, 159–64 (Ulrich Drobnig et al. eds., 2006).

²⁰⁸ See Otmar Stöcker, *The Eurohypothec*, in THE FUTURE OF EUROPEAN PROPERTY LAW 65 (Sjef van Erp et al. eds., 2012).

²⁰⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

²¹⁰ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

Directive,²¹¹ and a 1995 UNIDROIT Convention.²¹² Generally speaking, the international conventions seek to protect cultural objects by subjecting the ability to trade or otherwise transfer them to the granting of prior authorization by the national authority. If the object has already been unlawfully alienated, including when the final buyer is a good faith purchaser, the various supranational instruments set up rules that typically provide for the restitution of the object to the home country, subject to some measure of compensation to the good faith buyer. While the level of international collaboration in the context of cultural objects is quite substantial, it falls short of full-scale harmonization, implicating potential conflicts between interpretations of the various conventions and vis-à-vis applicable national systems.²¹³

But beyond the distinct category of cultural objects—for example, in standard conflicts between the original owner and a purchaser of a stolen good that crossed national borders sometime in the process—the property regime would still be marred by the divergent interpretations of the good faith purchaser doctrine across national systems. As Giuseppe Dari-Mattiacci and Carmine Guerriero show in a recent study of this doctrine across 126 countries, national legal systems show substantial differences: twenty-nine percent of the surveyed jurisdictions fully protect the original owner, thirteen percent fully protect the bona fide purchaser, and fifty-eight percent afford the owner an intermediate level of protection, typically by restricting the owner’s right to reclaim the stolen good to a term of years (ranging from one to thirty years across various countries).²¹⁴

Obviously, to the extent that a cross-border property conflict implicates two legal systems that embrace opposite positions—with one affording full protection to the owner and the other categorically favoring the buyer—it stands in the way of creating a supranational set of private law norms. But even in more moderate cases of cross-country divergence, such as a private conflict implicating one legal system that subjects the owner’s priority to a one-year limit in reclaiming the property and a second to a five-year limit, the otherwise distant parties to the conflict are still faced with the same type of uncertainty. To the extent that the current supranational regime is one that can be depicted as settling for “coordination”—meaning that the relevant legal systems share an

²¹¹ Council Directive 93/7, 1993 O.J. (L 74) 74 (EEC).

²¹² UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330.

²¹³ See CASES ON PROPERTY LAW, *supra* note 103, at 1118–29.

²¹⁴ Giuseppe Dari-Mattiacci & Carmine Guerriero, *Law and Culture: A Theory of Comparative Variation*, 34 OXFORD J. LEG. STUD. (forthcoming 2015) (manuscript at 4), available at www.iuscommune.eu/html/activities/2013/2013-11-28/workshop3_Dari-Mattiacci.pdf.

underlying concept of preferring the original owner subject to a period of limitation, but at the same time, each domestic system sets its own time limit or individually articulates specific features of the good faith requirement—this may not suffice to facilitate cross-border trade in goods while adequately protecting property rights of otherwise distant parties. Where the friction caused by legal diversity is substantial as a matter of practice, the in rem essentiality of property requires a more ambitious move toward harmonization.

2. The normative dimension: law, values, and culture.

Beyond the functional challenges involved with moving to a supranational property regime in the private law context, any systematic restructuring of this field must also address broader-based normative dilemmas. One such concern is political and moral (that is, value-based) legitimacy. Whereas any switch to a supranational legal order may implicate such concerns, I suggest that property, and its private law doctrines in particular, pose a distinct set of legitimacy issues. A second aspect of the normative challenge derives from the fact that national private law property doctrines are deeply entrenched in longstanding social and cultural orientations, so that any attempt to create a harmonized regime must trickle down to these local grassroots institutions for absorption by the various heterogeneous crowds to be guided by such new norms. Again, although this type of challenge may inhere in all types of supranational legal regimes, it is particularly acute in the context of private law property doctrines, which guide private conduct by constraining the ability to opt out for private ordering and requiring a high degree of norm convergence across borders.

In his 1979 book *Parliament for Europe*, David Marquand coined the term “democratic deficit” to mark the apparent gap between the general commitment to democratic principles among the then-European Community member states and the lack of democratically accountable institutions at the European Community level.²¹⁵ The issue of whether there is indeed a democratic or legitimacy deficit in EU lawmaking has since been broadly debated.²¹⁶

Private law matters are far from immune to these afflictions, and in some ways may even more profoundly implicate them, at least from the citizens’ viewpoint. To the extent, for example, that the EU Charter provides an

²¹⁵ See DAVID MARQUAND, *PARLIAMENT FOR EUROPE* 64–66 (1979).

²¹⁶ For a discussion of this term in the EU context, see generally Christophe Crombez, *The Democratic Deficit in the European Union: Much Ado About Nothing?*, 4 *EUR. UNION POL.* 101 (2003); Andreas Føllesdal, *Survey Article: The Legitimacy Deficits of the European Union*, 14 *J. POL. PHIL.* 441 (2006). In the U.S. context, see generally Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 *DRAKE L. REV.* 859 (2007). In the global governance context, see, for example, Steven Wheatley, *A Democratic Rule of International Law*, 22 *EUR. J. INT’L L.* 525, 527–30 (2011).

additional layer of human rights protection to member states' residents (including public law property doctrines) or that BIT commitments may raise the threshold of legal protection for foreign investment (and, indirectly, domestic investment), citizens may be less adversely affected by lawmaking through non-domestic institutions. In contrast, the establishment of supranational private law norms affects private actors directly, with the potential incremental benefit to one group of private actors (for example, sellers protected by a retention-of-title rule) necessarily adversely impacting another (such as other creditors of the buyer-debtor, particularly upon insolvency). Property legal norms, the in rem character of which generally constrains opting out, would thus cabin private conduct.

The basis of private law norms is not merely formal, but also deeply embedded in normative considerations as to the underlying choice of values and social goals. Far from being merely technical or instrumental, private law plays a key role both in identifying and validating moral values and in constructing societal and even political institutions. As Martijn Hesselink notes, the making of private law is one context in which “people may seek their values and ideals to obtain some legal expression.”²¹⁷

Accordingly, the ECJ's identification of several “general principles of civil law”—including the binding force of contract, good faith, and unjust enrichment—must be studied in the broader context of a search for “post-national principles of private law.”²¹⁸ Beyond the issue of formal competences, questions arise as to whether EU lawmaking institutions should design general principles of private law rather than promoting ideas of private law pluralism or political liberalism, especially because the EU may otherwise lack democratic accountability.²¹⁹ Must supranational institutions adhere to autonomy as the inherent essence of private law, such that any other set of values promoted at the supranational level runs the risk of being considered illegitimate?²²⁰ Is the field of property a particular source of legitimacy concerns because supranational private law norms, unlike default rules in contract law, do not allow for effective opting out?

The ties between private law values and sociopolitical construction, and the resulting normative legitimacy issues, have further dimensions. As Daniela

²¹⁷ Martijn W. Hesselink, *Private Law Principles, Pluralism and Perfectionism*, in *GENERAL PRINCIPLES OF EU LAW AND EUROPEAN PRIVATE LAW* 21, 22 (Ulf Bernitz et al. eds., 2013).

²¹⁸ *Id.* at 2.

²¹⁹ *See id.* at 4–16.

²²⁰ *See* Dorota Leczykiewicz & Stephen Weatherill, *Private Law Relationship and EU Law*, in *THE INVOLVEMENT OF EU LAW IN PRIVATE LAW RELATIONSHIPS* 1, 3–5 (Dorota Leczykiewicz & Stephen Weatherill eds., 2013).

Caruso notes, private law played a key role in state-making in continental Europe during the eighteenth and nineteenth centuries, particularly in Napoleonic France.²²¹ The emphasis on private law codification explicitly sought not only to protect individual freedom and private property, but also to establish legislative and administrative superiority over courts and other institutions. More recently, the state-making function of private law has been similarly evident in post-Soviet countries.²²² It also features implicitly in globalization whenever post-national institutions, under the guise of neutrality and indifference to power, seek to gain currency through private law discourses. Somewhat paradoxically, argues Caruso, the powerful rhetoric of neutrality characterizing private law discourse may accelerate the formulation of highly political global institutions.²²³ And while private parties can empower these institutions when, for example, they explicitly agree to extraterritorial arbitration in a commercial contract, they may not have similar power to either decrease or increase the impact of supranational norms in the property context.

These dilemmas may thus account for the hesitancy of member states to grant supranational institutions general private lawmaking powers, despite increasingly yielding to a constitutional-like regime in the public law context. The ways in which private law may serve as a powerful mechanism for nurturing and consolidating identity, while enjoying apparent neutrality and lacking accountability mechanisms present in the public law context, could explain the careful approach of both member states and their constituents to yielding to an comprehensive harmonization of private law.²²⁴

Current comparative empirical literature supports this analysis of private law, and the way it accounts for differences among national legal systems—as deriving from deeply embedded normative considerations—is supported by current comparative empirical literature. Scholars focus largely on private and commercial law and explore how national legal systems differ, for example, in protecting minority shareholders and creditors in business corporations,²²⁵ judicially enforcing debt contracts,²²⁶ and constraining landlords' ability to evict defaulting tenants.²²⁷ The differences observed among national legal systems are

²²¹ See Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 NYU J. INT'L L. & POL. 1, 24–26 (2006).

²²² See *id.* at 26.

²²³ See *id.* at 29–33.

²²⁴ See Miller, *supra* note 104, at 237.

²²⁵ See, for example, Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Simeon Djankov et al., *Private Credit in 129 Countries*, 84 J. FIN. ECON. 299 (2007).

²²⁶ See, for example, Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445 (2004).

²²⁷ See, for example, Simeon Djankov et al., *Courts*, 118 Q.J. ECON. 453 (2003).

substantial and cannot be explained merely by juxtaposing developed economies with developing or transitional societies.

Rafael La Porta, Florencio López-de-Silanes, and Andrei Shleifer offer a consolidating theory as to the interrelations between social and political institutions, legal rules, and financial and economic outcomes of countries.²²⁸ They argue that what explains differences in private and commercial laws—which in turn account for disparities in economic and financial outcomes—are “legal origins” (applying not only to origin countries but also to former colonies and other countries following these systems), with the English common law, French civil law, and German civil law constituting the chief “origins.”²²⁹

More precisely, the term “legal origins” refers to the ways in which countries “have developed very different styles of social control of business, and institutions supporting these styles.”²³⁰ Regardless of whether they can be traced back to medieval or even earlier revolutionary periods, these styles have since proven quite persistent even in the face of regulatory or legal changes. The English common law system is said to advocate a general hands-off approach with only specific interventions by the state. In contrast, the German and French civil law systems give the state a key role in ordering social and legal relations and in providing top-down solutions to economic challenges.²³¹

Other writers in this field have focused on even more fundamental and slow-moving institutions, such as culture.²³² Amir Licht, Chanan Goldschmidt, and Shalom Schwartz offer a classification of culture based on three axes of value orientations: embeddedness vs. autonomy, hierarchy vs. egalitarianism, and mastery vs. harmony.²³³ They study the ways in which these value emphases interact with key social institutions regulating governance and power: rule of law, control of corruption, and democratic accountability. They argue that “[s]ocial norms of governance correlate strongly and systematically with cultural value dimensions,”²³⁴ such that countries with high scores for rule of law, non-corruption, and accountability also score highly on autonomy and egalitarianism.

²²⁸ See generally, Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

²²⁹ *Id.* at 287–91.

²³⁰ *Id.* at 307.

²³¹ See *id.* at 309–10.

²³² For this conceptualization of culture and similar institutions, see generally Gérard Roland, *Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions*, 38 STUD. COMP. INT’L DEV. 109 (2004).

²³³ See Amir N. Licht et al., *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECON. 659, 662–63 (2007).

²³⁴ *Id.* at 669.

Further, such cultural orientations can be seen as the *cause* of many features of social institutions.²³⁵

In a work coauthored with Licht,²³⁶ I empirically examined the relationship between the degree of cultural embeddedness/autonomy and property rights, using a comparative dataset on property rights protection compiled by the Property Rights Alliance.²³⁷ Our analysis found a clear association between the two variables: the more a country's culture emphasizes embeddedness and de-emphasizes autonomy, the less likely it is to protect physical, and especially intellectual, property rights (in the way the latter are captured by the indices). To address the issue of causality among the variables, we ran a regression analysis in which cultural embeddedness emerged as a clear negative explanatory variable for property rights protection.²³⁸

Dari-Mattiacci and Guerriero further explore the dependency of private law property doctrines on cultural attributes in their study of the good faith purchaser doctrine.²³⁹ They attribute the significant differences among the 126 surveyed countries to a cultural notion of self-reliance, defining it along two dimensions: regard for hierarchy and emphasis on the individual.²⁴⁰ They view self-reliant cultures as being characterized by egalitarianism (or a low regard for hierarchy) and individualism, and find that the corresponding legal systems exhibit strong owner protection, meaning in this case that the purchaser never acquires ownership of a stolen good. Consequently, countries with cultures characterized by low self-reliance strongly protect the buyer, meaning that the bona fide purchaser of a stolen good immediately acquires ownership. Cultures with an intermediate level of self-reliance are reported to provide an intermediate level of protection to the buyer, meaning that the good faith purchaser acquires ownership only upon the passage of a number of years.²⁴¹

²³⁵ See *id.* at 669, 672–79.

²³⁶ Lehavi & Licht, *supra* note 31.

²³⁷ The property rights data comes from the International Property Rights Index (IPRI) 2009 Report. PROPERTY RIGHTS ALLIANCE, INTERNATIONAL PROPERTY RIGHTS INDEX (IPRI) 2009 REPORT, available at <http://www.internationalpropertyrightsindex.org>. The IPRI is a cross-country, comparative, and composite index comprising three subindices, each of which is also composite. These subindices cover the following subjects: legal and political environment (LP), physical property rights (PPR), and intellectual property rights (IPR). It is a long-term project that seeks to improve property rights systems around the world by showing the relationship between a strong property rights system and a country's economic well-being.

²³⁸ See Lehavi & Licht, *supra* note 31, at 139–48.

²³⁹ See generally Dari-Mattiacci & Guerriero, *supra* note 214.

²⁴⁰ See *id.* at 5–6.

²⁴¹ See *id.* at 15–18.

While the methodology of these empirical cross-country studies has been debated,²⁴² it seems safe to conclude that the way in which a certain national legal system designs its private law property doctrines is neither a technical matter nor merely the result of different analytical approaches by jurists. To a considerable degree, these doctrines are embedded in long-lasting cultural orientations, social perceptions, and political structures. Any significant change in such doctrines must be initiated, or at the least supported, by the same basic societal institutions that crafted existing legal norms.²⁴³ Accordingly, a comprehensive attempt at harmonizing private law doctrines must confront how some underlying national institutions may be less apt for change than others.

Moreover, the underlying local culture and set of values may impact not only the willingness of domestic institutions to introduce a change in private law doctrines from the top down, but also the de facto effectiveness of a prospective legal reform. A number of recent studies point to culture and deeply entrenched values as crucial factors in the success or failure of private law reforms, particularly in property law. For example, scholars have attributed the mixed results and often outright failure of property-related reforms in Russia (in contexts such as commercial law or condominium governance) to longstanding cultural features such as lack of interpersonal trust and apathy toward civic engagement,²⁴⁴ or even to centuries-old theological, social, and aesthetic convictions.²⁴⁵ Such potential hindrances to legal reforms, especially to changes driven by a supranational agenda and embedded in values that may be foreign to the local populace, pose yet another challenge to the harmonization of property law.²⁴⁶

²⁴² See, for example, Holger Spamann, *Large Sample, Quantitative Research Designs for Comparative Law?*, 57 AM. J. COMP. L. 797 (2009).

²⁴³ See Roland, *supra* note 232, at 125–28.

²⁴⁴ See, for example, Ekaterina Borisova et al., *Collective Management of Residential Housing in Russia: The Importance of Being Social* 29–37 (January 19, 2012) (unpublished working paper), available at <http://ssrn.com/abstract=2295974> (identifying social capital—particularly, “technical civic competence” or the willingness and social capability of tenants in homeowners associations to exercise effective control over their governing bodies—as a key determinant in the performance of such associations).

²⁴⁵ See URIEL PROCACCIA, *RUSSIAN CULTURE, PROPERTY RIGHTS, AND THE MARKET ECONOMY* 7 (2007) (tying suspicion toward Western-style concepts of contract and property to (1) longstanding religious and cultural disregard for individualism, humanism, and reason, and (2) submission to central authority).

²⁴⁶ See Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 101–03 (2002) (pointing to the challenge of establishing uniform norms as legal standards that would be received and adopted not only by governments but also by private actors in different countries); see generally Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 REV. L. & ECON. 715 (2008) (arguing that the rule of law is a social norm that interfaces the formal institutions of society with the informal ones).

B. The Current State of Cross-Border Convergence

The above analysis serves to frame the following concise study of the current status of supranational instruments dealing with private law aspects of property: theme-specific international conventions, ECHR rulings in essentially private law matters, and EU legislative attempts at “positive supranationalism.” The private law challenge, although circumscribed by the inherent limits of harmonization efforts, points to the conclusion that supranational private law coordination may require an approach different from that of its public law counterpart.

1. Theme-specific international conventions.

As Section II demonstrated, attempts to create a generally applicable binding international convention dealing with the right to property have failed so far, leaving the floor to the development of theme-specific international conventions.²⁴⁷ Few such conventions or other multi-state instruments have been adopted, with most concerning only highly distinct types of assets, such as the 1954 Hague Convention on cultural property (discussed above).²⁴⁸ Another is the 2001 UNIDROIT Convention on Interests in Mobile Equipment,²⁴⁹ which applies to a limited number of means of transportation such as aircraft and railroad equipment and establishes an international registry of security interests—with general applicability across all member states—aimed at facilitating asset-based financing of such mobile equipment.²⁵⁰

A notable series of international conventions deals with the creation of global standards with respect to trusts, estates, wills, and marital property of persons who cross national boundaries during their lifetime due to work, retirement, immigration, or other reasons.²⁵¹ Thus, the 1973 Convention Providing a Uniform Law on the Form of an International Will requires signatory states to enact into their domestic laws a set of minimal standards enabling wills drafted and signed in one country to be enforced in other states.²⁵²

Probably the most significant international convention dealing with property is the Agreement on Trade-Related Aspects of Intellectual Property

²⁴⁷ See *supra* text accompanying notes 128–130.

²⁴⁸ See 1954 Hague Convention, *supra* note 209, and *supra* text accompanying notes 209–213.

²⁴⁹ UNIDROIT Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 342.

²⁵⁰ See Sprankling, *supra* note 129, at 479–80.

²⁵¹ See *id.* at 483–84.

²⁵² See *generally* Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, 12 I.L.M. 1302.

Rights (TRIPS).²⁵³ The evolution and content of TRIPS obviously cannot be surveyed here, but two points are of particular relevance. First, as a matter of political feasibility and institutional organization, it seems clear that TRIPS would not have been signed and ratified by 158 countries had the intellectual property commitments not been inherently tied to the establishment of the World Trade Organization (WTO) and the requirement that all states who wish to join the WTO sign the TRIPS agreement as well as submit to the WTO's dispute resolution mechanisms.²⁵⁴ TRIPS is thus highly exceptional in its ability to create a comprehensive supranational framework in a private law field (intellectual property) by relying on the establishment of reciprocal public law commitments in the fields of trade regulation and tariffs.²⁵⁵

Second, there is disagreement as to whether TRIPS essentially created a single supranational code that brings about harmonization of intellectual property law, or whether it should be viewed rather as having created a less stringent framework, one located between coordination and harmonization. Graeme Dinwoodie and Rochelle Dreyfuss, who subscribe to the latter viewpoint, portray TRIPS as having created a neofederalist structure that “gives states substantial latitude to tailor their law to the circumstances of their creative sectors, to deal with local distributive concerns, and to further policy preferences orthogonal to the intellectual property system.”²⁵⁶ Without resolving this controversy here, I should note that, to the extent TRIPS allows for substantive local flexibility in going beyond mere implementation measures, such latitude would undermine the feasibility of a system in which creators of innovative information, market competitors, and end-users across borders would be governed by a single set of norms, ranking powers, and priorities to intellectual products.

The Supreme Court of India's 2013 decision in *Novartis v. Union of India*²⁵⁷ offers key insights about the limited scope of such harmonization in the post-TRIPS era. India's 1970 Patents Act originally excluded the possibility of patenting “substances intended for use . . . as food or as medicine or drug.”²⁵⁸ To conform to TRIPS, India amended its Patents Act effective as of 2005 to

²⁵³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

²⁵⁴ For a discussion of different narratives regarding the formation of TRIPS—including a “coercion narrative”—see GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME 32–39 (2012).

²⁵⁵ See *id.* at 144–45.

²⁵⁶ *Id.* at 143–44.

²⁵⁷ *Novartis AG v. Union of India*, (2013) 6 S.C.C. 1 (India).

²⁵⁸ The Patents Act, No. 39 of 1970, § 5, INDIA CODE (1970).

delete this section. At the same time, the amended Act limited patentability only to drugs created after 1995 and subject to additional constraints, particularly those enumerated in Sections 2(ja) and 3(d) of the Act, which condition the patentability of a “new product” on “technical advance as compared to . . . existing knowledge” and on “enhancement of the known efficacy.”²⁵⁹ Gleevec, Novartis’s original drug for leukemia treatment, was developed in the early 1990s and was thus not patentable in India. In 1998, Novartis filed an application for a beta version of the drug, arguing it was a “new” and “superior” version, entitled to be registered as a patent.²⁶⁰

Recounting the Act’s evolution, the Court reasoned that the underlying rationale of the 1970 Act was one that viewed English colonial patent laws as doing “little good to the people of the country” and serving mostly the interests of foreigners, especially in the context of food and medicine that are “vital to the health of the community” and “must be available at reasonable prices.”²⁶¹ Analyzing the Act and the subsequent development of the pharmaceutical industry in India, the Court expounded the position of India and other developing countries during and following the negotiations on TRIPS, including those leading to the 2001 Doha Declaration.²⁶² It identified concern that overbroad patent protection might “put[] life-saving medicines beyond the reach of a very large section of people.”²⁶³ The Indian legislature, “while harmonizing the patent law in the country with the provisions of the TRIPS Agreement, strove to balance its obligations under the international treaty and its commitment to protect and promote public health considerations.”²⁶⁴ Finally, the Court held that Novartis did not convincingly demonstrate the required “enhanced efficacy.”²⁶⁵

The *Novartis* decision thus demonstrates how underlying moral and social perceptions are bound to impact private law doctrines over time, even in the case of a relatively thick supranational framework such as TRIPS, and how domestic societal values (to the extent that they are adequately identified and represented by lawmakers) pose normative challenges to globalization. The explanation for these disparities cannot be reduced only to opportunism or power plays among national governments in their sovereign capacity. Whether

²⁵⁹ The Patents (Amendment) Act, No. 15 of 2005, §§ 2(ja), 3(d), INDIA CODE (2005).

²⁶⁰ *See* *Novartis*, (2013) 6 S.C.C. 1, ¶ 8.

²⁶¹ *Id.* ¶¶ 31, 42.

²⁶² World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

²⁶³ *Novartis*, (2013) 6 S.C.C. 1, ¶ 66.

²⁶⁴ *Id.*

²⁶⁵ *Id.* ¶¶ 173, 184.

such normative gaps can be narrowed over time so as to facilitate true legal harmonization is a puzzle, but distinct from the mere existence of global technology or markets.

2. The European Convention of Human Rights and private disputes.

How has the ECHR responded to petitions alleging a breach of Article 1 of the First Protocol of the Convention in essentially private law disputes? In such settings, the plaintiff challenges the underlying legislative or judicial legal regime regulating private relations as a disproportionate violation of its property rights. As this subsection shows, the ECHR's overall approach has been to apply the general tests of proportionality and fair balance and highlight the need for procedural adequacy, while at the same time opting for a particularly broad margin of appreciation and refraining from pushing toward substantive uniformity in the private law of property.

One such example is the 2007 *Anheuser-Busch Inc. v. Portugal* case.²⁶⁶ The petitioner, a U.S. corporation, sought to have its trademark “Budweiser” registered in Portugal’s registry of industrial property. Its application was initially approved for registration but later denied following an objection by a Czech brewery, Budvar, which argued that it was exclusively entitled to make use of Budweiser’s commercial name. Portugal’s Supreme Court had held in favor of Budvar, in light also of the provisions of a 1986 BIT between Portugal and then-Czechoslovakia.²⁶⁷ The ECHR determined that Article 1 of the First Protocol applied to intellectual property and that the petitioner could be viewed as owning a set of property rights linked to its application for registration, especially because the original application had been submitted in 1981 but the BIT signed only in 1986.²⁶⁸

The Court observed that “even in cases involving litigation between individuals and companies, the obligations of the State under Article 1 of Protocol No. 1 entail the taking of measures necessary to protect the right of property” and that “the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in light of the applicable law.”²⁶⁹ At the same time, it stressed that “its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and that is not [the Court’s] function to take the place of the

²⁶⁶ *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01 (Eur. Ct. H.R. 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78981>.

²⁶⁷ *See id.* ¶¶ 12–24.

²⁶⁸ *See id.* ¶¶ 66–78.

²⁶⁹ *Id.* ¶ 83.

national courts, its role being rather to ensure that the decisions of these courts are not flawed by arbitrariness or otherwise manifestly unreasonable.”²⁷⁰ Accordingly, the Court held that the national court’s decision could not be viewed as arbitrary or unreasonable: “[c]onfronted with the conflicting arguments of two private parties concerning the right to use the name ‘Budweiser’ . . . the Supreme Court reached its decision on the basis of the material it considered relevant and sufficient for the resolution of the dispute, after hearing representations from the interested parties.”²⁷¹

Probably the most prominent ECHR case to date on an essentially private law property dispute is *J.A. Pye (Oxford) Ltd v. United Kingdom*.²⁷² Concisely stated, the case dealt with adverse possession of registered private land. The applicants, the land’s former owners who had lost their case before the national courts, argued that the then-in-force English adverse possession law, the Land Registration Act of 1925,²⁷³ violated Article 1 of the First Protocol.²⁷⁴ The ECHR’s Section 4 Chamber ruled that the case did implicate the first paragraph of Article 1 and that, although English adverse possession law may be deemed as serving a genuine public interest, the interference with the registered owners’ rights was disproportionate and thus in violation of Article 1.²⁷⁵

The Grand Chamber reversed. While resorting to the general tests of fair balance and proportionality, it noted that “the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one” and that this deferential approach is “particularly true in cases such as the present one where what is at stake is a long-standing and complex area of law which regulates private-law matters between individuals.”²⁷⁶ Moreover, the Grand Chamber held that “[i]t is a characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local conception of the importance and role of property.”²⁷⁷

²⁷⁰ *Id.*

²⁷¹ *Id.* ¶ 86.

²⁷² *J.A. Pye (Oxford) Ltd. v. United Kingdom*, App. No. 44302/02 (Eur. Ct. H.R. 2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71034> [hereinafter *J.A. Pye I*]; *J.A. Pye (Oxford) Ltd. v. United Kingdom*, App. No. 44302/02 (Eur. Ct. H.R. 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82172> [hereinafter *J.A. Pye II*].

²⁷³ Land Registration Act, 1925, 15 Geo. 5, ch. 21, § 75 (Eng. & Wales).

²⁷⁴ See *J.A. Pye II* ¶ 3.

²⁷⁵ See *J.A. Pye I* ¶¶ 49–76.

²⁷⁶ *J.A. Pye II* ¶ 71.

²⁷⁷ *Id.* ¶ 74.

In the 2009 *Zehentner v. Austria*²⁷⁸ case, the ECHR focused on the general obligation of the state to “afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees,” holding that an Austrian law’s procedures for the judicial sale of the applicant’s home did not sufficiently account for her illness and lack of legal capacity.²⁷⁹

Finally, in the 2012 *Lindheim v. Norway*²⁸⁰ decision, the Court reviewed a 2004 amendment to the Ground Lease Act of 1975 that subjected the leasing of lands for permanent homes or holiday homes to special statutory regulation, entitling lessees to demand an unlimited extension of the contracts on the same conditions as applied previously upon the expiration of the lease’s agreed term.²⁸¹ The ECHR reiterated its previous case law, by which “the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one” such that the Court will respect the domestic legislative judgment as to what is in the public or general interest “unless that judgment is manifestly without reasonable foundation.”²⁸² It held, however, that the statutory intervention in lease contracts, even if looking to address the growing pressure on real estate prices in Norway, placed its social and financial burden solely on the applicant lessors, thus not striking a “fair balance between the general interest of the community and the property rights of the applicants.”²⁸³

As these cases indicate, the ECHR has been particularly careful when interfacing with private law doctrines, instead granting domestic legislatures and courts a wide margin of appreciation in defining both the ends and the means that have been set forth against the background of the local conception of the role of property. The Court thus places particular weight on the idea of subsidiarity and avoids attempts at converging substantive national property doctrines. By contrast, it finds more room to intervene through its general doctrines of fair balance and proportionality in matters relating to the procedural adequacy of legislative or judicial actions. It has also generally intensified its supranational standards of property protection in reviewing legislative reforms driven by social justice or other redistributive considerations, such as in *James v.*

²⁷⁸ *Zehentner v. Austria*, App. No. 20082/02 (Eur. Ct. H.R. 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93594>.

²⁷⁹ *Id.* ¶¶ 75–79.

²⁸⁰ *Lindheim et al. v. Norway*, App. Nos. 13321/08 & 2139/10 (Eur. Ct. H.R. 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111420>.

²⁸¹ *See id.* ¶ 11.

²⁸² *Id.* ¶ 96 (quoting *Hutten-Czapska v. Poland*, App. No. 35014/97, ¶ 166 (Eur. Ct. H.R. 2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75882>).

²⁸³ *Id.* ¶ 134.

*United Kingdom*²⁸⁴ or the *Lindheim* case. This intensification is especially evident when the ECHR examines whether the burdens entailed by the means chosen fall solely or inordinately on one of the parties—perhaps viewing such reform schemes as closer to the public law end of property. But as far as quintessential private law disputes are concerned, the Court is far from trying to introduce a harmonized system of property law through the Convention’s property clause.

3. The European Union and the limits of positive supranationalism.

As Section II argued, although the EU is evidently the most comprehensive supranational framework in existence today, the “positive supranationalism” of private law is far from wide-ranging. A few fields, such as consumer law, are seeing mixed results, with some theme-specific provisions (such as distance contracts) legislated at the EU level attaining at least a certain degree of convergence, but most other topics are still dominated by national lawmaking.²⁸⁵ Private law aspects of property have been dealt with even more rarely in EU regulations, directives, and decisions. This is so not only in light of general questions of EU lawmaking competence discussed in Section II, but also because of practical difficulties in devising a harmonized set of in rem property norms.

Current property-related EU legislation includes: the directive on cultural property;²⁸⁶ a directive on late payments addressing the issue of retention of title but allowing for national divergence by not setting EU standards; and regulations on insolvency proceedings that provide only few substantive rules on

²⁸⁴ This landmark case, discussed briefly *supra* text accompanying note 68, offered an intriguing mix of public and private. The U.K. Leasehold Reform Act of 1967 confers on tenants residing in houses on long leases (over 21 years) at “low rents,” as defined in the Act, the right to purchase compulsorily the freehold of the property on prescribed terms and subject to certain conditions, with the compensation schemes usually falling below the full market value of the freehold estate. The plaintiffs petitioned the court following a series of transactions under the Act, arguing that the statutory rates inflicted considerable losses compared to open-market conditions. In holding that the Act does not violate Article 1 of the First Protocol, the ECHR reasoned that “the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.” James Judgment, *supra* note 68, ¶ 40. According to the Court, Article 1 does not guarantee a right to full compensation in all circumstances, as “legitimate objectives of ‘public interest,’ such as measures . . . designed to achieve greater social justice, may call for less than reimbursement of the full market value.” *Id.* ¶ 54.

²⁸⁵ See, for example, Vanessa Mak, *The “Average Consumer” of EU Law in Domestic and European Litigation*, in *THE INVOLVEMENT OF EU LAW IN PRIVATE LAW RELATIONSHIPS* 333 (Dorota Leczykiewicz & Stephen Weatherill eds., 2013).

²⁸⁶ See *supra* text accompanying notes 209–213.

priority.²⁸⁷ As pointed out in Section IV, more ambitious efforts to design an EU-level single system of security rights, such as a European Security Right in movables or a Eurohypothec for real estate,²⁸⁸ have so far not come to fruition. The very essentiality of a single set of property norms and a supporting integrated mechanism for publicizing and affecting such rights is also the source of the challenge. To be effective, a system governing one or more of the private law aspects of property must often aspire to substantive and institutional harmonization. A fragmented system of coordination may not suffice even within the EU.

This rationale seems to have guided the EU Parliament's December 2012 decision to approve the "EU patent package" of a unitary patent, language, and court regime. The unitary patent system seeks to create a genuine harmonization scheme, one that not only provides a single set of substantive legal provisions and patent registration mechanisms, but also establishes a single court that will have sole jurisdiction in deciding patent disputes.

As a final note, the formal harmonization efforts of property law within the EU should be evaluated against the massive investment by EU academic and professional institutions to create a common ground for EU private law. The 2009 DCFR, sponsored by the Joint Network of European Private Law,²⁸⁹ serves not only as an intellectual endeavor. Alongside its potential to set up principles and model provisions for future EU legislation, DCFR and similar initiatives seem to aim at a much more ambitious goal: creating a common framework that could over time trickle down to the underlying societal institutions and cultural values of the member states. Time will tell whether this ambitious goal will be achieved.

V. CONCLUSION

The globalization of property poses a series of challenges that cannot be attributed merely to an inadequate or conservative legal response to bottom-up social and economic forces. While the cross-border nature of markets for capital, goods, services, and labor creates pressure for a supranational institutional platform, slow-changing domestic societal institutions that play a key role in shaping interpersonal legal relations must follow their own course in moving from a local to a global system of governance. At times, top-down frameworks

²⁸⁷ For a survey of these two latter instruments, see *CASES ON PROPERTY LAW*, *supra* note 103, at 1036–42.

²⁸⁸ See *supra* text accompanying notes 207–208.

²⁸⁹ See generally *JOINT NETWORK OF EUROPEAN PRIVATE LAW (CoPECL)*, <http://www.copecl.org> (last visited Oct. 28, 2014).

such as BITs or the EU may work to facilitate such a grassroots shift, but its results—especially in private law—may be more complex than anticipated.

As a field of law, property has a complex and unique structure that may also be instrumental in illuminating the broader prospects of legal globalization. The fact that public law and private law doctrines may allow for different strategies and diverging levels of supranational ordering along the coordination/harmonization continuum vividly illustrates that globalization is not likely to follow a single course. In particular, attempts at globalizing the private law aspects of property face functional and normative challenges that may take much time and effort to overcome. The essentiality of grassroots processes of cultural and social change, advocated and often idealized by many proponents of globalization, mandates caution in assessing the future trajectory of strong-form supranationalism in property law.