CAMBRIDGE STUDIES IN INTERNATIONAL RELATIONS

90 *A. Claire Cutler*
Private power and global authority
Transnational merchant law in the global political economy

89 *Patrick M. Morgan*
Deterrence now

88 *Susan Sell*
Private power, public law
The globalization of intellectual property rights

87 *Nina Tannenwald*
The nuclear taboo
The United States and the non-use of nuclear weapons since 1945

86 *Linda Weiss*
States in the global economy
Bringing domestic institutions back in

85 *Rodney Bruce Hall and Thomas J. Biersteker (eds.)*
The emergence of private authority in global governance

84 *Heather Rae*
State identities and the homogenisation of peoples

83 *Maja Zehfuss*
Constructivism in international relations
The politics of reality

82 *Paul K. Huth and Todd Allee*
The democratic peace and territorial conflict in the twentieth century

81 *Neta C. Crawford*
Argument and change in world politics
Ethics, decolonization and humanitarian intervention

80 *Douglas Lemke*
Regions of war and peace

Series list continues after index.

Private Power and Global Authority

Transnational Merchant Law in the Global Political Economy

A. Claire Cutler
University of Victoria, British Columbia

CAMBRIDGE
UNIVERSITY PRESS

Contents

Acknowledgments

A number of people have assisted in the development of the analysis presented here, to whom the author is most grateful. The greatest thanks, however, must go to a few people whose assistance has been crucial. The author owes fond thanks to Mark W. Zacher, whose insistence on developing international relations theory on firm analytical and empirical foundations and whose faith during the author's early years as a scholar continue to provide direction and inspiration. Appreciation must also go to Stephen Gill and to the late Susan Strange for their intellectual guidance and enthusiasm and to the Social Sciences and Humanities Research Council of Canada for its generous research funding. Perhaps the deepest gratitude is deserved by the author's family, Roger, Dylan, and Chelsea, for steadfast support and good cheer, notwithstanding an often distracted partner and mother!

The author would also like to thank the following for granting permission to reproduce parts of previously published material in an expanded and significantly revised form:

Blackwell Publishing for material from "Locating 'Authority' in the Global Political Economy," *International Studies Quarterly* 43 (1999): 59–81, reprinted in part with permission and adapted for use in Chapter 3.

Cambridge University Press for material from "Critical Historical Materialism and International Law: Imagining International Law as Praxis," in Stephen Hobden and John Hobson (eds.) (2002), *Historical Sociology of International Relations*, pp. 181–99, reprinted in part with permission and adapted for use in Chapter 2.

IMO	International Maritime Organization
IOs	International Organizations
LNTS	League of Nations Treaty Series
MAI	Multilateral Agreement on Investment
MITI	Ministry of International Trade and Industry (Japan)
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
TNC	Transnational Corporation
TRIMs	Trade-Related Investment Measures
TRIPs	Trade-Related Intellectual Property Rights
UCC	Uniform Commercial Code (USA)
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNFAO	United National Food and Agriculture Organization
UNIDO	United Nations Industrial Development Organization
UNIDROIT	International Institute for the Unification of Private Law
UNTS	United Nations Treaty Series
WIPO	World Intellectual Property Organization
WOMP	World Order Models Project
WTO	World Trade Organization

1 Introduction

This book explores the historical and contemporary influence of private power in the global political economy. Private commercial actors have over time exercised varying degrees of authority in the generation and enforcement of the laws governing international commercial relations. Today, forces of globalization and privatization are relocating the boundary between private and public authority in international commercial relations and creating new opportunities for private, corporate actors to exercise power and influence. Indeed, this book argues that fundamental transformations in global power and authority are enhancing the significance of the private sphere in both the creation and enforcement of international commercial law. State-based, positivist international law and "public" notions of authority are being combined with or, in some cases, superseded by nonstate law, informal normative structures, and "private" economic power and authority as a new transnational legal order takes shape. Transnational commercial law or the new law merchant is an integral component of this emerging transnational legal order. The new law merchant is variously referred to as transnational economic law (Horn and Schmitthoff, 1982), the law of private international trade (Schmitthoff, 1964a), and international business law (Schmitthoff, 1961). It is regarded by some as a system of "protolaw" that forms the foundation for an emerging transnational lawmaking community (Teubner, 1997 b) and as part of the "transnationalization of the legal field" which is "a constitutive element of the process of globalization" (Santos, 1995: 268). The analytical and theoretical challenges posed by this emergent order resonate powerfully in its description as a "twilight zone" of international law (Bowett, 1986).

The new legal order is working significant transformations in governance arrangements, both locally and globally, suggesting that the

distinction between the public and the private realms is becoming increasingly difficult to sustain. Transnational merchant law is implicated in three major trends in governance. These trends are in turn linked to deeper transformations in local and global political economies and are challenging conventional understandings of world order. The first trend is the *juridification* of political, social, and economic life as law is utilized to legitimate increasingly more varied claims to authority. The second is the increasing heterogeneity of, and *pluralism* in, forms of regulation and governance, while the third is the enhanced significance of *privatized* governance arrangements.[1] While more will be said of these trends and their underlying causes in the next chapter, the important point here is that a new transnational legal order is globalizing a corpus of commercial law and practice that derives from increasingly diverse and multiple local, regional, and global locations involving both state and nonstate authorities and state and nonstate law. This order governs a proliferating number and variety of commercial activities and involves increasingly heterogeneous subjects or actors, such as transnational corporations and private business associations, as participants in lawmaking and dispute resolution. We are also experiencing the development and application of novel legal forms and new sources of law that contribute markedly to pluralistic and privatized governance arrangements and which are tailored specifically to meet the demands of business under conditions of late capitalism. These developments are expanding privatized lawmaking and dispute resolution, thereby transforming relations of power and authority in the global political economy.

However, conventional theories of international relations and international law are incapable of capturing these developments. This is due in part to their analytical, theoretical, and ideological orientations that render private and nonstate authority a *non sequitur*. Liberal theories of international relations and international law and state-centric, realist analysis in both fields render the activities of private actors and institutions politically "invisible" as transnational corporations and their law are regarded as part of the realm of "apolitical" and neutral, private economic activity.[2] Notions of liberal, democratic, and

[1] See Chapter 2.

[2] For analysis of this situation in the context of the governance of maritime transport and for a more general statement of the invisibility of transnational corporations under international law, see Cutler (1999 c).

representative lawmaking and enforcement, and the monopoly held by the state over such processes under both domestic and international law, do not sit well with private lawmaking and private interest governance.

The incapacity of conventional theories to provide a compelling analysis of these fundamental transformations in world order is also due to the more profound inability of the disciplines of both law and politics to adequately account for the role of law in the constitution of local and global political economies. This incapacity, curiously, extends to critical or Marxist-inspired theory as well. Both conventional and unconventional theories in law and politics adopt formalistic conceptions of law which block analyzing and theorizing about the role of law in the constitution of economic, social, and political practices.[3] Formalism treats the law as an external, autonomous, self-sustaining, and independent order, neutralized of the conflict associated with politics, morality, and religion through the liberal separations between public and private authority, economic and political activity, and the state and civil society. As a consequence, neither law nor politics produces meaningful understandings of how law empowers actors as legal subjects or identifies legitimate sources and voices of the law or confers the authority and legitimacy to resolve disputes and determine outcomes or "who gets what" in Harold Lasswell's famous phrase. Conversely, neither law nor politics enables inquiry into the manner in which law disempowers, delegitimizes, and disenfranchises subjects and sources of law. Moreover, in analyzing and theorizing law as an autonomous and self-referential system, legal formalism tends toward a form of historicism that empties the law of a past and a future. Law simply exists "there" (Shklar, 1964: 33) as a body of rules created and applied neutrally by authoritative sources and forming a self-contained, objective, rational order, exhibiting continuity and universalism through time. In a word, neither discipline admits the historical effectivity of the law as a force in the constitution and reconstitution of social, political, and economic practices. Neither captures law as "a constituent of the way in which social relations are lived and experienced" (Hunt, 1993: 121). As a consequence, both disciplines regard law as an inherently conservative force and preclude the possibility of human intervention or agency

[3] Conventional and unconventional theories of international relations and international law are addressed in Chapter 3.

to challenge and change the existing or emerging order, which simply exists out "there."[4]

This book examines the historical evolution of the law merchant over roughly a millennium with a view to illustrating its centrality to the constitution of the global political economy. The law merchant has changed and adapted to transformations in global power and authority, from medieval to modern and postmodern societies and from feudal to capitalist to late capitalist political economies. The analysis illustrates the problematic nature of locating and conceptualizing "authority" in the global political economy and the analytical, theoretical, and normative inadequacies of liberal-inspired theories of international political economy and international law and state-centric theories of international relations that focus on the "public" nature of authority.[5] It is argued that these theories are faced with a legitimacy crisis for they are unable to theorize their subject-matter in any but the most formalistic way, thus obscuring the fundamental transformations in world order that are occurring. Moreover, this crisis is part of a more general crisis experienced by late capitalist societies which involves fundamental transformations in political economies including the movement from the "welfare" to the "competition" state, the advent of flexible patterns of accumulation, the transnationalization of capitalism and the resulting "primacy" of the private sphere.[6]

Transnational merchant law, which is generally and mistakenly regarded in purely technical, functional, and "apolitical" terms, is argued to be a central and crucial mediator of domestic and global political/legal orders in that it enables the extraterritorial application of national laws as well as the domestic application of transnational commercial law. The law merchant provides the basic norms governing property, contract, and dispute resolution, functioning very much in distributional terms as the juridical foundations for global capitalism. Moreover, it provides norms, practices, and a common language that bind and unify a global corporate elite, the "mercatocracy." Derived from the medieval reference to the law merchant, *lex mercatoria*, the mercatocracy is comprised of transnational merchants, private international

[4] This matter will be developed further in pages to come. However, for a slightly different tack on the conservative nature of conventional theory in international relations and law, see Cutler (1991).
[5] See Chapter 3.
[6] These processes are discussed in the next chapter. However, for excellent accounts see Jameson (1991); Cox (1996 a); Gill (1995 a); and Cerny (1990).

lawyers and other professionals and their associations, government officials, and representatives of international organizations. The mercatocracy operates globally and locally to develop new merchant laws governing international commerce and the settlement of international commercial disputes and to universalize the laws through the unification and harmonization of national commercial legal orders. As a complex mix of public and private authority, the mercatocracy blurs the distinction between public and private commercial actors, activities, and law.[7] It exercises near hegemonic influence through its material links to transnational capital and through its monopoly of expert knowledge, thought, and institutional structures. Indeed, the mercatocracy and its law are deeply implicated in the ordering of state–society relations because they operate to recast "public" concerns as "private" and thus are not subject to democratic methods of scrutiny and review. However, this role is obscure and little understood by students of international relations. Prevailing ontological, epistemological, and ideological orientations in the study of international relations and international law obscure the "political" nature of private authority, such as that of the law merchant. The authority of corporate law and transnational corporations, the major agents of corporate power, are minimized by statist political theories that discount the political significance of such corporations and by legal theories that do not regard them as legitimate "subjects" or "sources" of law. These theories thus limit our understanding of the nature of the global political economy by obscuring the nature and significance of private, corporate power and authority. Moreover, the technical and complex nature of merchant law renders its distributional implications intelligible to only highly trained legal specialists. Significantly, these specialists are schooled in a legal science that perpetuates the mythology of the law merchant and the private ordering of international commerce as neutral, apolitical, consensual, and ultimately the most efficient method for regulating international commercial relations (Cutler, 1995). They support the intellectual and ideological hegemony of the mercatocracy and thus are central participants in the juridification, pluralization, and privatization of authority relations. They are also key architects of the legitimacy crisis facing states as the dominant modes of theorizing about political/legal authority are unable to capture the increasing authority of private power in the global political economy.

[7] The historical, material, and ideological dimensions of the mercatocracy are discussed in Chapter 6.

Following on the insight of Robert Cox that "all theories are *for* someone and *for* some purpose" (1996 a: 87), this book aims to displace the dominant theories that view the law merchant as a technical, functional, and apolitical body of law, operating neutrally amongst market participants which are deemed generally to be of equal bargaining power. This is disputed by showing that the law merchant operated historically to serve first private merchant communities and later nation-states in the processes of capital accumulation and state-building. In so doing, it privileged corporate interests. Today, merchant law is integral to the restructuring of the global political economy taking place through deeper transformations in local and global political and economic relations. Transnational merchant law advances what Stephen Gill calls "disciplinary neoliberalism" and a "new constitutionalism" which "confer privileged rights of citizenship and representation on corporate capital, while constraining the democratisation process that has involved struggles for representation for hundreds of years" (1995 a: 413). The book aims to make the central role played by merchant law in the construction and reconstruction of global political and economic authority more visible and hence to displace its characterization as a private, "apolitical" and, thus, politically unimportant domain. It shows how private power has historically been politically determinative and is increasingly significant today with the expansion of corporate power resulting from juridification, pluralization, and privatization. This study is thus concerned with the analytical, theoretical, and normative dimensions of private authority.[8] But it also seeks to clarify the nature of the relationships between international law, international relations, and international political economy. The focus on the historic and contemporary role of transnational merchant law in structuring global material, ideological, and institutional conditions over time it is hoped will illustrate that the law is not an objective force that exists out "there," impacting neutrally on society, economy, and polity, but is in "here," both constituting and constituted by social, economic, and political forces. The law is thus constitutive of capitalist social relations in a most elemental and foundational way.

In exposing the inability of existing theories to account for the nature and scope of private, corporate authority, the book also makes the

[8] There is a burgeoning literature on global governance and private authority. See Cutler, Haufler, and Porter (1999 a); Ronit and Schneider (2000); Hall and Biersteker (2002). For bibliographical references and critical reviews of the literature on global governance, see Cutler (2002 b and forthcoming).

case for developing a new theory of international law. This theory must be capable of analyzing and explaining the role of law in the constitution of the global order. It must be a dynamic theory that comprehends the historical effectivity and inherent normativity of the law: a theory that restores both the theoretical and practical potentialities for human agency to effect change in the law.

Chapter 2 sets the conceptual stage for the analysis of the law merchant by reviewing the three significant trends in local and global governance in which it is implicated. The juridification, pluralization, and privatization of governance arrangements involve both public and private international law, which operate locally, nationally, internationally, and transnationally. However, the significance of private legal ordering in this patchwork of criss-crossing and pluralistic regulation is argued to be obscured by the complex nature of the relationship between private and public international law and the contested status of the law merchant in relation to both bodies of law. These matters are considered in the context of the legal and political distinctions between the private and public spheres, the nature and operation of private international trade law, and the history of the private/public distinction in international law. The chapter argues that four liberal myths provide the ideological and material support for the continuing influence of the conceptual distinction between private and public international law, notwithstanding its declining empirical significance.

Chapter 3 reviews theoretical obstacles to recognizing the historical significance of the law merchant in the constitution of the global political economy. It opens with the more general problems that dominant approaches to international relations and law have in "locating" private authority. Public definitions of authority, state-centric and territorial theories of rule, and positivistic legal ontologies and epistemologies are argued to block recognition of the significance of private law. Conventional and unconventional theories of international relations and law alike obscure the political significance of private authority. Both reproduce problematic distinctions between economics and politics and between domestic and international law and relations and are incapable of theorizing the historical effectivity and inherent normativity of law. Their tendency to analyze law in formalistic and fetishized terms places severe limitations on their theorization of the transformative capacities of the law. In fact, the incapacity of these theories to adequately theorize the juridification, pluralization, and privatization of authority and to account for the enhanced significance of privatized law are linked to

a more general incapacity of the broader fields of law and politics to develop a critical understanding of law. The tendency of both fields to analyze law in formalistic and fetishized terms places severe limitations on the transformative capacities of the law. As a consequence, neither discipline is able to engage constructively with the law as a powerful emancipatory force.

A brief overview of the three phases in the historical evolution of the law merchant order, from the medieval, to the modern and then the postmodern law merchant, provides the outline for subsequent chapters. The following chapters illustrate the historical and contemporary significance of the private law merchant order in the constitution and reconstitution of both capitalism and the state, thus challenging conventional understandings of authority. Moreover, the significance of private law in the constitution of the global political economy suggests the need for a new theory of international law. This theory must be able to capture the historical effectivity and normativity of the law and its role in the juridification, pluralization, and privatization of local and global governance over time. A modified form of historical materialism is proposed as the most suitable analytical and theoretical framework for understanding the law merchant order. This modified form recognizes the historical, material, and ideological effectivity of the law and broadens the ambit of historical materialism to embrace nonclass-based claims to identity and inclusion as subjects and sources of law. Most importantly, historical materialism, as here conceived, recognizes the revolutionary potential for a law informed by the reunification of legal theory and practice in emancipatory praxis.[9]

Chapter 4 analyzes the first phase in the development of modern private international trade law and provides an overview of the scope and nature of international commerce from the eleventh to the sixteenth centuries. It reveals that the medieval law merchant operated to support a predominantly private commercial order, generating merchant laws and institutions that operated outside the local political economy of the period. While local transactions were heavily regulated by political authorities, long-distance trade was largely immune to the application of local laws and was governed by the law merchant. The imprecision in the location of authority evident in this dualistic regulatory order reflected ambiguity in the social and political foundations of the period. This is associated more generally with the feudal political economy and

[9] These matters are discussed in Chapters 3 and 7.

the parcelization of sovereignty "in a vertical allocation downwards, at each level of which political and economic relations were . . . integrated," although neither territorially centralized nor fixed (Anderson, 1974 a: 148; 1974 b). Additionally, the predominantly customary nature of the law merchant order reflected the highly personalized nature of feudal authority relations.

The chapter identifies the agents responsible for creating the medieval law merchant. It also describes the merchant court system used to settle commercial disputes and to enforce agreements. What is distinctive about this phase is the essentially self-disciplinary nature of the merchant community in both law-creation and dispute resolution. While there was no distinction yet between private and public international law, the merchant community provides an early hint of what was to become the private realm later with the development of capitalism. Indeed, the absence of a distinction between private and public realms reflects the conditions of the feudal, precapitalist world. Most commercial transactions were local in nature and heavily regulated by local political and religious authorities. Prices were regulated by custom, which involved agreement amongst vendors informed by a notion of the "just price." Quality controls and the prohibition of interest charges were also strictly enforced. Local market activity thus operated within strict guidelines and standards. In contrast, merchants engaged in long-distance trade were not subject to the same kind of discipline, but operated under delocalized customs and practices. However, the freedoms enjoyed by medieval long-distance traders cannot be assimilated to that of later times. It took the emergence of capitalism and the disembedded market and the articulation of liberal political economy to constitute the modern merchant class. These developments served to legitimize commerce and the merchant class by creating a special protected space for international commercial activities.

The chapter shows how merchant laws evolved and achieved considerable universality throughout the European trading world. Their authority is associated with the commercial ascendance of different regions and cities, but their impact was diffuse and universalized throughout the European trading world by consuls who traveled along with merchants to assist in the settlement of their disputes. The first maritime law codes were developed and applied by the Mediterranean trading cities, but as commercial supremacy passed to the Atlantic and northern trading ports and cities, so too did the source of law-creation and enforcement. Many of the laws established in the medieval phase drew

upon earlier Phoenician and Roman customs and once received into European law became the foundation for future Anglo-American commercial law. However, what is notable about this phase is the largely autonomous nature of the merchant class and the merchant courts. This was to change as political authorities engaged in processes of state-building came to absorb commercial law-creation and dispute resolution into their local systems of law. The various laws governing sales, insurance, transportation, finance, and dispute resolution were incorporated into domestic commercial laws in the second phase in the development of the law merchant.

Chapter 5 covers the second phase in the evolution of the law merchant order. It reviews the processes by which the merchant class largely disappeared as an autonomous and self-disciplinary order when the law merchant and its courts were nationalized and localized by authorities engaged in state-building projects and in the establishment of nationally-based capital accumulation. The juridification of commercial relations occurred at different times from the seventeenth to nineteenth centuries in Europe and resulted in considerable variation in the degree to which merchant autonomy was displaced by state regulatory controls. The erosion of merchant autonomy was particularly acute for common law jurisdictions, such as the United Kingdom and United States. European, civil law states retained more scope for merchant autonomy. However, in all systems, international commercial law came to be regarded as a matter under domestic governmental authority and positive national legal regulation through increasingly rationalized and systematized legislation. The delocalized, customary order was displaced by localized and nationally-based statutory orders that regulated all commercial transactions through positive law. The important and enduring links between positive local law, capitalism, and rationalized domination were thus established through the increasing juridification of legal commercial disciplines.

Authority structures were reconfigured, territorially, when national legislatures came to displace merchant custom as a source of law and national courts came to replace merchant courts in dispute settlement and enforcement. Moreover, with the articulation of national commercial legal rules and codes, the enforcement of commercial law came to be more generally associated with national public policy processes. Initially mercantilist in orientation, with the birth of liberal political economy and democratic practices of legislative review and accountability, the public sphere was constituted with the enforcement of private

commercial relations as an integral component. National systems of law assumed the tasks of resolving private disputes and enforcing private agreements when the jurisdiction of merchant courts was assumed by national courts and when national legislatures replaced commercial custom as a source of law.

Merchant activities were not only legitimized by the state, but reified as political authorities came to appreciate the significance of commerce to state power. This reification took the form of the disembedded, self-regulating market, championed by liberalism as the key to economic performance and success (Polanyi, 1944; Atiyah, 1979). Thus, the private sphere was constructed by disembedding, isolating, and insulating certain aspects of commercial activity from social and political controls. While dispute resolution and the enforcement of private bargains came to be the preserve of state authorities and the public sphere, negotiating the terms of exchange was regarded as a private matter to be governed by individual traders. Liberal mythology provided the ideological framework for this move by articulating a theory of contract law that reified the autonomous "legal subject," "freedom of contract," and the self-disciplining and autonomous nature of private commercial relations. It also provided the foundation for establishing the distinction between public and private international trade law and, ultimately, for the isolation of the latter from democratic scrutiny and review. The laws governing the international sales, transport, insurance, and financial transactions of private traders came to be governed by private international trade law and were neutralized of political content by assumptions concerning the apolitical, neutral, and consensual nature of private economic exchange.

With the proliferation of national legal commercial laws, there was an erosion of the universality of the law merchant, which generated a movement for the unification of private international law in the third phase of the development of the regime.

Chapter 6 reviews the third and contemporary phase in the development of transnational merchant law. This phase is witnessing the intensification of juridified commercial relations and their increasingly pluralistic and privatized character. These changes reflect a more bureaucratic and technocratic form of discipline, both locally and globally, which in turn is linked to a new mode of production in an increasingly globalized political economy. The relationship between law and capitalism is intensifying, both qualitatively and quantitatively as juridified commercial relations deepen their hold on local economies and spread

their influence globally. A global mercatocracy or an elite association of transnational merchants, private lawyers, government officials, and representatives of international organizations engaged in the unification and globalization of transnational merchant law is at the center of these developments. This elite association is able to exercise near hegemonic influence through its material links to transnational capital and through its monopoly of expert knowledge, thought, and institutional structures. The mercatocracy is an integral element of a nascent historic bloc associated with neoliberal discipline and the new constitutionalism. The contemporary focal point of the mercatocracy is the unification movement: a movement engaged in harmonizing, unifying, and globalizing merchant law.

The chapter identifies and describes the key public and private authorities in the unification movement that are contributing to considerable pluralism in both sources and subjects of law. The unification movement is argued to be an integral aspect of the social forces that are restructuring global political authority as a result of globalization. The movement is thus placed in the historical contexts of evolving global capitalism and contemporary disciplinary neoliberalism. The chapter argues that the modern unification movement emerged as a cooperative strategy for managing conflicting nationally based commercial laws and thereby facilitated the mobility of capital and national capital accumulation. While originally European and regional in scope, the movement attained global dimensions with the creation of an institutional framework under the auspices of the United Nations and with the leadership of the United States in the post-Second World War years. The initially lukewarm participation of the United States in the unification movement and a radical shift in favor of and, indeed, its acquisition of monopoly over the movement, coincided with the crisis of late capitalism (Jameson, 1991; Cox, 1996 a). The efforts that the United States and other developed states put into unifying commercial law with a renewed neoliberal or "hyperliberal" commitment to the efficacy and inherent superiority of the private and delocalized regulation of commerce reflect attempts by core states to consolidate capitalism and to facilitate the denationalization and transnational expansion of capital (Gill, 1995 b; Held, 1995; Harvey, 1990). This renewed assertion of the "primacy of the private" and the privatization of commercial relations coincided with the advent of the competition state, the advent of patterns of flexible accumulation, and a shift in structural power from nationally to transnationally based interests (Cerny, 1990). These developments are

manifested in the growing corporate legal preferences for delocalized merchant customs and nonbinding "soft law" over binding legislation and "hard law." This is part of a corporate strategy to further disembed commercial law and practice from the "public" sphere and to reembed it in the "private" sphere, free from democratic and social control. The devolution of authority to resolve disputes and to enforce agreements to the private sphere through the increasing legitimacy of delocalized private arbitration and the reassertion of merchant autonomy as the substantive norm are perfecting this reconfiguration of political authority. Significantly, this reconfiguration is reordering state/society relations locally and globally. State enforcement of commercial bargains remains crucial to the stability of the system; however, states are recasting their enforcement roles and conferring more powers on corporate actors. Juridified and privatized commercial relations are thus not working a "deregulation" of commerce, but a "re-regulation," casting the state in a different, but still crucial role (Santos, 1985: 324).

Chapter 7 concludes the book with the observation that these reconfigured authority structures portend a crisis of legitimacy for international law and for the global political economy. Positing that all constitutional orders require some degree of fit between their principles and practices, it argues that a legitimacy crisis exists when the lack of fit or asymmetry becomes so great that it strains the foundations of the order. The juridification, pluralization, and privatization of commercial relations are transforming the state system and producing a growing disjunction between the theories and the practices of international society. This disjunction "challenges the old Westphalian assumption that a state is a state is a state" (Cox, 1993 a: 263). The crisis is at once economic, political, sociocultural (Gill, 1993 b: 9), and legal, reflecting profound transformations in structures of local and global authority.

The dominant theories of international relations and international law are revisited and the chapter concludes that the field of international law is experiencing a legitimacy crisis because it is incapable of identifying and theorizing contemporary global authority. It is unable to theorize its "subject," reflecting what is referred to as the "problem of the subject." This problem is generating a growing disjunction between the theory and the practices of the Westphalian state system. The actors, structures, and processes identified and theorized as determinative have ceased to be the only sources of authority or subjects of law and practice. Private actors are increasingly functioning authoritatively. However, this is rendered invisible by an ideology that defines the private sphere in

apolitical terms. Liberal mythology makes the political content of the private sphere disappear by defining it out of existence. In so doing, liberalism reifies private commercial activity and effectively insulates it from societal and political controls, contributing further to the denationalization and delocalization of capital. A silencing of potential counterhegemonic voices is achieved through a knowledge structure that privileges expert knowledge. Liberal-inspired contract law provides the ideological foundation for a thought structure that values the private regulation of international commercial relations and thus limits its entry to lawyers trained to believe in the superiority of private law. Corporate global hegemony operates ideologically by removing private international law from critical scrutiny and review (Paul, 1988). In this way, private international law has been unable to generate a critical voice. Unlike public international law where critical theory is considerably well developed (see David Kennedy, 1988; Purvis, 1991), private international law remains isolated and is rendered nearly immune to criticism by an ideology that seriously inhibits challenge.

Another aspect of the legitimacy crisis concerns whether the mercatocracy will be able to sustain the internal support and consent necessary to maintain the ideological hold of liberal mythology. Global authority is increasingly based upon fragile foundations as major segments of society are peripheralized and relegated to the margins of the political economy. The possibility that the mercatocracy will be unable to bind these segments by delivering on the rhetoric of globalization and promises of efficiencies and economic development suggests the evolution of hegemony based upon fraud. To Antonio Gramsci, supremacy based on fraud signals a "crisis of authority" and is bound eventually to fail (Augelli and Murphy, 1988: 132).

The chapter argues that the first step is to wage Gramsci's "war of position" and challenge the hold of the mercatocracy by generating a counterhegemonic voice. This involves the critical scrutiny of distinctions that separate domains, such as private/public, apolitical/political, and economic/political. It also involves reconceptualizing global authority through historical materialist analysis that is sensitive to material, ideological, and institutional hegemony and that rejects the separation of existing ontological domains as natural and unconstructed separations. The second step is to rework the relationship between international theory and practice, which requires the development of critical thinking about international law as a form of praxis. This requires taking seriously Robert Cox's view that theory is always "*for* someone and *for*

some purpose" and cannot be "divorced from a standpoint in time and space" (1996 a: 87). Imagining international law as praxis promises a new approach that is aware of the dangers of legal formalism and fetishized understandings of law that block the development and recognition of the emancipatory potential of international law. This engagement involves a critical review of the analytical and normative foundations of international law, both in its private and public dimensions. Subjects and sources doctrines must be scrutinized and the interests and values they promote must be laid bare, as too must the remaining doctrinal foundations of both fields. The field of private international trade law is particularly in need of critical examination, especially as regards the theoretical, practical, and normative challenges posed by the expansion of private authority in the global political economy and the centrality of juridified, pluralized, and privatized commercial relations to world order. The book concludes that imagining international law as praxis is not simply a theoretical engagement, but a very practical one with profound normative implications for the future and, indeed, the desirability of the rule of law in international relations.

2 Conceptualizing the role of law in the global political economy

This chapter establishes the analytical foundations for examining the changing nature of authority and law in the regulation of international commerce. It begins by noting the ubiquity of law today regulating local, national, international, and transnational commercial transactions and identifies significant trends in governance that are linked to deeper transformations in the global political economy. The law merchant (*lex mercatoria*), or private international trade law, is argued to play a crucial role in the increasing juridification, pluralization, and privatization of commercial law and practices. However, this role is obscure and little understood by students of international relations for a number of reasons. The centrality of the law merchant to the historical and contemporary constitution of the global political economy is obscured by analytical, theoretical, and normative or ideological orientations in the dominant approaches to the study of international law and international relations. Analytically, the complexity of the way in which the rules of private international trade law operate, the contested nature of the relationship between public and private international trade law, and the location of the law merchant within this legal framework contribute to a lack of understanding of its significance. This problem is compounded by theories of law, politics, and economics that maintain a set of rigid conceptual distinctions, including the distinctions between private and public law, economics and politics, and civil society and the state. The dominant theories of international law, politics, and political economy are premised upon the liberal "art of separation," wherein markets and civil society are regarded as separate and distinct from politics, governments, and the state (Walzer, 1984). Private international trade law is, as a result, isolated from the sphere of politics through a barely perceptible

analytical move neutralizing it of political content as part of the private domain of consensual, economic activity (Paul, 1988). This orientation derives as well, as is addressed in Chapter 3, from a more general theoretical inability of the fields of law and politics, in both mainstream and critical approaches, to capture the significance of law as an historically effective social force.

This chapter opens with a discussion of the forces of juridification, pluralization, and privatization, linking these trends in governance arrangements to deeper transformations in the global political economy. It argues that the law merchant is a crucial element of new and changing processes and structures of governance, but that this central role is not well understood by students of international law, international relations, or political economy. While this obscurity is attributed to two reasons, the disputed analytical status of the law merchant order and theoretical uncertainty as to its political significance, the first forms the focus of this chapter. The second reason is addressed in the following chapter. The disputed analytical status of the law merchant order involves analysis of the complex history and nature of the relationship between private and public international trade law, contestation as to the analytical status of the former, and the role played by liberal theory in maintaining the private/public distinction, in the face of its apparent empirical decline.

Juridification, Pluralization, and Privatization

Significant trends in the regulation of the global political economy are transforming the nature of international commercial law.[1] Traditionally, international commercial legal regulation was a matter of national and local legal and regulatory systems (Fried, 1997: 261). When disputes involved commercial transactions between parties from different states they were resolved through the application of national laws or conflict of laws rules, the rules of private international law that constitute the branch of law concerned with private relations containing a foreign element. While this branch of law will be considered in greater detail below, it operates to localize such disputes in one system of national law

[1] The trends addressed here are evident in the findings of many studies of the governance of local and global political, economic, social, and legal relations. For useful bibliographical references to this literature, see Cutler (2000 a and forthcoming). See also Hall and Biersteker (2002).

so as to avoid potential conflict between differing national legal rules. However, the focus remains one of national law. With the expansion of international institutions under the auspices of the United Nations after the Second World War, the regulation of international commercial transactions became increasingly internationalized and transnationalized.[2] In the area of international trade, successive rounds of negotiations under the General Agreement on Tariffs and Trade (GATT) and the more recent institutional innovation of the World Trade Organization (WTO), the negotiation of first a Canada–US Free Trade Agreement (FTA) and then the North American Free Trade Agreement (NAFTA), and other regional legal developments in the European Union, Southeast Asian countries, and Latin American countries are subjecting increasingly more commercial transactions to internationalized and transnationalized legal disciplines. As subsequent chapters will show, the field of private international trade law has expanded in scope with the creation of new kinds of commercial activity and legal regulation and the creation of new subjects and sources of law. The development of new commercial laws and codes and specialized legal processes for dispute settlement under these regimes, as well as legal developments in the areas of investment, finance, and monetary relations, are resulting in the ubiquity of law, domestically, internationally, and transnationally (see generally, Cohn, 2000; Cutler 2001 b). Lawyers tend to analyze these developments in terms of the "globalization of law," while international relations scholars address the "legalization of world politics."[3] Here these general developments are referred to as the increasing *juridification* of commerce as legal and juridical concepts, institutions, and ideologies are used with increasing intensity, in terms of both their expanded scope and their deep penetration into local political/legal/social orders, to substantiate and legitimate claims to political authority.[4] This meaning draws in part on insights from those such as Max Weber, who posit the existence of a natural affinity between capitalism and rationalization through law, and economic historians such as Douglass North, who associate the development of legal institutions with the emergence of

[2] For a good introduction to the institutional developments of international society, see Roberts and Kingsbury (1993) and David Kennedy (1987 b).
[3] See Fried (1997); Twining (1996); the Special Issue on the Legalization of World Politics of *International Organization* (2000) containing articles on the legal regulation of many matters, including the European Union, NAFTA, the Asia-Pacific region, international trade and monetary affairs, and international human rights.
[4] For further discussion of this concept, see Chapter 5.

capitalist economic activity.[5] Both posit the specificity of the association between developments in legal regulation and capitalist business enterprise. The notion of juridification also draws upon the insights of Karl Marx and others that specific forms of economic organization involve very different regulatory orders. For example, Marx showed how the transition from feudalism to capitalism involved an historically specific transformation in regulation from customary norms deriving from status, to legal norms deriving from free exchange and contract (see Cain and Hunt, 1979: ch. 5). Jürgen Habermas (1994) also analyzes the transition from feudalism to capitalism as marked by a growing differentiation in public and private domains and a transition from economic exchange relationships based on estate and birth to relations based upon commodity relations secured by private law. This transformation in the nature of regulation is captured in the famous dictum coined by Henry S. Maine (1885: ch. 1) of the evolution of law "from status to contract." It will become evident in reviewing the historical evolution of the law merchant that feudal economic relations were regulated by society in a qualitatively different manner than were capitalist economic relations. While all social and economic orders give rise to forms of social control and regulation, it is argued here that the juridification of commerce is specific to capitalism. Moreover, contemporary juridification is qualitatively different from earlier forms. The increased salience and intensity of legal regulation that marks the process of juridification is, as Boaventura de Sousa Santos notes, an historically specific characteristic of contemporary capitalism that flows from postmodern conditions of "globalization," "global formation" or "global culture."[6] Such conditions, Anthony Giddens (1990 a: 64) observes, involve "the intensification of worldwide social relations, which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa." To Santos (1995: 268), the development is captured by the idea of the "transnationalization of the legal field," which is a "constitutive element of globalization." Forces of globalization and the privatization and deregulation of industries, sectors, commodities, and services are

[5] See Scheuerman (2000); Max Weber (1966); Beirne (1982); Milgrom, North, and Weingast (1990) and North (1990).
[6] Santos (1995: 252) identifies specifically postmodern developments as the increasing bureaucratization and the enhanced violence of law, and its declining rhetorical significance as modernity's paradigmatic preoccupation with emancipation is replaced by the new paradigm flowing from the postmodern preoccupation with regulation. And see Santos (1985: 307) where he discusses the striking feature of capitalist societies as the degree to which power relations are institutionalized and juridified.

transforming authority relations locally and globally and reconstituting state–society relations.[7] But the juridification of commerce and transnationalization of commercial law are not uniform processes and developments. Like forces of globalization more generally, they are uneven, sometimes discontinuous, and even contradictory for they involve a plurality of regulatory orders, legal forms, and agents or subjects of the law, operating subnationally, nationally, regionally, internationally, and transnationally.[8] Thus Santos identifies different manifestations of globalization and different forms of transnationalized legal relations.[9] The globalization of legal relations may take the forms of *globalized localism*, "when a given local phenomenon is successfully globalized," such as the worldwide adoption of American sales, copyright, or corporate laws (Santos, 1995: 263). Alternatively, they may take the form of *localized globalism*, concerning the "specific impact of transnational practices and imperatives on local conditions that are thereby destructured and restructured in order to respond to transnational imperatives," such as free trade enclaves, the adoption of structural adjustment programs, and deforestation to finance foreign debt (ibid.). As we shall see in the next section, the modern law merchant is a form of transnationalized law embodying both the globalization of local law, as Anglo-American corporate laws are adopted throughout the world, and the localization of global law, as states are subjected to increasing discipline from legal regimes developed by international, transnational, and global organizations. Moreover, forms of transnationalized legal relations are discontinuous and uneven. In some cases, merchant laws operate dialectically, creating deterritorialized transactions and agreements, but then reterritorializing them to facilitate enforcement.[10] Roland Robertson (1992: 15)

[7] There is a growing and vast literature on globalization. Some of the more interesting analyses include: Giddens (1990 a); Held (1995); Hirst and Thompson (1996); Jameson (1991); Robertson (1992); and Bauman (2000).

[8] A number of theorists emphasize the discontinuous and often contradictory nature of globalization, including, Jameson (1991) and Giddens (1990 a).

[9] Santos (1995: 268) identifies seven forms of transnationalized legal relations, including: transnationalized state law, the law of regional integration, *lex mercatoria*, law of people on the move, transnationalized infrastate law (generated by grassroots movements, NGOs, IOs and involving the politics of rights, self-determination, and local self-rule); cosmopolitan law (generated by NGOs, grassroots movements, states, and IOs and involving the politics of rights, international conventions, and tribunals, NGO alternative treaties, international human rights organizations), and *jus humanitas* or the common heritage of mankind (generated by NGOs, grassroots movements, TNCs, and IOs and involving the politics of nature rights and environment rights, international conventions, and NGO alternative treaties).

[10] Santos (1995: 375) identifies dialectical tensions between laws that deterritorialize and reterritorialize, globalize and localize, harmonize and differentiate social relations; that

refers to such phenomena as the "Janus-faced problem of the simultaneity of 'nationalization' and 'globalization'."[11]

In addition, pluralization extends beyond the legal form to include both sources and subjects of legal regulation, which is also a trend that is specific to contemporary capitalism. Subsequent chapters review the historical evolution of international commercial law in detail and reveal that at the time of the creation of the law merchant there was considerable pluralism in the processes of law-creation and enforcement. However, with the emergence of the European state system and the development of modern international law, the state and state-based sources came to dominate analytical and theoretical treatment of the "subjects" and "sources" of international law and national courts became the key agents for its enforcement. Modern international law identifies states as the "subjects" of international law, while international treaties and customary international law, which can be traced to state consent, comprise the legitimate "sources" of law.[12] However, today transnational corporations are significant *de facto* subjects of law, notwithstanding their analytical status as "objects" and not "subjects" of law and their theoretical insignificance or "invisibility" under international law.[13] Indeed, transnational corporations are identified as the "central organizers," the "engines of growth" (Strange, 1996: 45), the "most significant economic players" (Michalet, 1994: 17), the "key agents of the new world economy,"[14] and the "dominant private institutions of the world economy."[15] As we shall see, transnational corporations, most importantly, are crucial participants in the creation and enforcement of merchant laws and seriously challenge the state's monopoly over legislative and

maintain boundaries and transcend boundaries; follow capitalist and anticapitalist logic; regulate socially and emancipate. See Cutler (2002 d) for analysis of these apparently contradictory tendencies in the emerging transnational law governing intellectual property rights as manifestations of the dialectical operation of global capitalism.

[11] Another way of seeing this dialectic is as two processes of globalization involving the "universalization of the particular" and the "particularization of the universal" (see Robertson, 1992: 178).

[12] The analytical status of subjects and sources of international law is considered later in this chapter. For a good introduction to these matters, see Malanczuk (1997).

[13] See below and see Higgins (1985). For the state-centric nature of the analytical foundations of international law see Janis (1984 a: 61–78) and for the analytical and theoretical invisibility of transnational corporations under international law see Johns (1994).

[14] See Cutler (2000 a) for the centrality of the transnational corporation to analysts of international political economy. And see Santos (1995: 253).

[15] Picciotto (1999 a: 6) citing an UNCTAD *World Investment Report 1997* notes that by 1996 there were about 44,000 TNCs with some 280,000 foreign affiliates, but the top 25 firms controlled over half of outward investment stock, while about one third of interstate trade consists of flows between such affiliates.

adjudicative functions in international commerce.[16] Significant, as well, are the activities of other nonstate agents of law-creation and enforcement, including transnational lawyers and law firms; accountants and transnational accounting firms, insurers, bankers, and their private associations, such as the International Chamber of Commerce.[17] Indeed, later chapters will illustrate that the mercatocracy comprises a curious mix of private and public authority, drawing upon both private corporate and public state offices. The pluralism in subjects has created "a spaghetti bowl or spider's web of intertwined organizations and arrangements, which evade the traditional categories of private and public, national and international law," while "emerging forms of global governance are characterized by the fragmentation of the public sphere into a complex and multilayered network of interacting institutions and bodies" (Picciotto, 1999 a: 9).

Pluralism in contemporary "subjects" of the law is mirrored in the "sources" of law, as well. While customary law created by merchants formed the "source" of law for the early law merchant, the emergence of states and the advent of capitalist business enterprise replaced the customary order with positive law created by state authorities. In international law, "hard law" in the form of international conventions and customary international law formed the definitive sources of the law.[18] Today, they continue to provide the analytical and theoretical foundations for international law. However, new sources of law are emerging which do not emanate from public, state authority, but rather from privatized, nonstate authority. Examples include the legal norms emerging from the dominant legal practices and the contractual activities of transnational corporations and other professionals engaged in international commerce, including bankers, insurers, tax specialists, and the like.[19] Model codes, statements of principle, uniform rules for optional use in commercial contracting, and standardized contracts increasingly

[16] See Chapter 6.

[17] For the growing authority of private institutions and processes in the generation and enforcement of international economic regulation, see Cutler, Haufler, and Porter (1999 a: ch. 6).

[18] While this matter is taken up more fully in the subsequent section, "hard law" consists of binding international conventions and customary international law. "Soft law" may be defined as "guidelines of conduct (such as those formulated by the United Nations concerning the operations of transnational corporations) which are neither strictly binding norms of law, nor completely irrelevant political maxims, and operate in a grey zone between law and politics" and is considered a "special characteristic of international economic law and of international environmental law" (Malanczuk, 1997: 54).

[19] These matters are discussed in Chapter 6.

form the core of transnational business practices. International trade, investment, and finance are increasingly regulated by soft, porous, discretionary standards and procedures. This tendency is associated by many analysts with the increasing complexity of commercial transacting and the resulting enhanced significance of expert knowledge of the fields of law, accounting, and taxation.

In addition, transnational corporate activities are being regulated increasingly by "soft law" in the form of privately created codes governing business practices, such as those governing labor relations, consumer protection, environmental practice, and Memorandums of Understanding between subnational regulatory agencies (Picciotto and Mayne, 1999). This results in "complex and multi-layered interactions between laws, codes and guidelines, operating locally, nationally, transnationally, regionally and internationally" (Picciotto, 1999 a: 17). These developments have significant political and economic implications. For example, while "hard law" reduces transaction costs and strengthens the credibility of commitments, it restricts sovereignty and autonomy and is thus harder to achieve and, initially, very costly to negotiate.[20] Weaker states on the periphery of the global political economy tend to favor hard law because it provides a certain transparency, predictability, and locking-in of commitments that become more difficult for stronger states to renege upon. In addition, hard law, in the form of multilateral treaties, is negotiated in forums that provide rules governing participation and representation, leveling the playing field somewhat for weaker participants.[21] Soft law, in contrast, is cheaper and easier to achieve, but is easier to breach with impunity. It also gives rise to more opportunities for "creative lawyering" and the private shaping of legal regulation (McCahery and Picciotto, 1995). Hard and soft law thus operate differently, give rise to different political economies, and embody different power relations.

[20] See Abbott and Snidal (2000: 421) who define "hard law" as "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law." However, the terms hard and soft law are not particularly helpful either analytically or theoretically for they beg the question of what it means to be "legally binding," while their association with degrees of precision threatens to lead to legal formalistic analysis that obscures more than it clarifies.

[21] Abbott and Snidal (2000) note, however, that preferences are not necessarily uniform and they cite the preference of Mexican business groups for a hard, legalized NAFTA, that of high-tech corporations for a hard WTO agreement on TRIPS, and workers' preference for hard obligations in the ILO. See also Cutler (2001 a) and Sempasa (1992) for the tendency of developing countries to prefer hard law negotiated in multilateral institutions.

The increasingly heterogeneous nature of subjects and sources of law have important analytical, theoretical, and normative implications.[22] While states are typically regarded as the subjects of international law, the main architects of juridified commercial relations are private individuals and business enterprises, including, for example, transnational lawyers, accountants, bankers and private business associations, and transnational corporations, working in tandem with government officials and representatives of international organizations (Dezalay and Sugarman, 1995). The pluralism of legal subjects or agents contemplated here, however, does not draw on the liberal notion of a world of multiple regulatory orders in which no one order dominates. Nor is it, as Santos (1987) notes:

> the legal pluralism of traditional legal anthropology in which different legal orders are conceived as separate entities coexisting in the same political space, but rather a conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions . . . We live in a time of porous legality or legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassing. Our legal life is constituted by an intersection of different legal orders, that is by *interlegality. Interlegality is the key postmodern conception of law.* (297–300)

Whereas contemporary international commercial relations have typically been regulated by states, the new law merchant forms "an enclosure, a new particularism that empties or neutralizes the law of the land" and creates space for personalized and privatized law.[23] It challenges state and national legal orders with a personalized and privatized order comprising private international economic actors, agents, and subjects. Indeed, it operates in a transnational legal space, a space in which "different types of economic agents operate, whose behavior is regulated by new international rules and contractual relations established by dominant multinational corporations, international banks or international associations dominated by both" who have a certain immunity from both national and international law (Santos, 1987: 287). Private authority is exercised through a variety of means from highly informal industry alliances, joint ventures, networks, and business

[22] This argument is developed fully in Chapter 6.

[23] Santos (1987: 293) refers to this law as "egocentric" or highly personalized, as opposed to traditional, geocentric national or state law.

associations to highly institutionalized private international regimes.[24] Significantly, as we shall see, central to the expansion of private legal authority is the movement for the harmonization and unification of private international trade law.[25] The unification movement provides the material, institutional, and ideological framework for the influence exercised by the mercatocracy in the constitution of the law merchant order.

Importantly, notwithstanding the participation of public authorities in this order, the new law merchant constitutes a predominantly privatized legal order. While there is a "new working relationship between corporations and governments," noted by the Secretary-General of the United Nations, it is a relationship structured by the development of a "soft infrastructure" for the orderly conduct of business that is sensitive to the competitive needs of business corporations.[26] As a result, the dominant mode for regulating business corporations in the 1990s was through soft law, voluntary private codes of conduct, and private dispute settlement through international commercial arbitration. These developments are generally regarded to be consistent with privatization and deregulation of corporate activities, what Peter Muchlinski (1995) refers to as the declining "corporate control" function of states[27] and

[24] These include multinational law, insurance, management, and consultancy firms, debt-rating agencies, stock exchanges, and financial clearing houses (see Cutler, Haufler, and Porter, 1999 b: 10).

[25] See Chapter 6.

[26] See UN report: *Development of Guidelines on the Role and Social Responsibilities of the Private Sector, Report of the Secretary General of the United Nations* (2000: 7).

[27] See also Muchlinski (1997) where he indicates that efforts to regulate TNCs by protecting investors during the nineteenth century emanated primarily from private sources, such as the International Chamber of Commerce. By the twentieth century, states were engaged in investor protection regulation under arrangements like NAFTA, and the Uruguay Round of the GATT, which produced agreements protecting intellectual property investments (TRIPS), controlling performance requirements (TRIMS) and protecting providers of services (GATS). States also protected investors through bilateral investment treaties entered into under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) and the World Bank and through World Bank investment guarantee insurance. In contrast, efforts to regulate TNC behavior to protect host state interests have taken place in a multilateral intergovernmental context, such as the United Nations, the International Labour Organization, the World Health Organization, the Organization for Economic Cooperation and Development (OECD), and the World Bank, but neither the OECD Guidelines nor the World Bank Guidelines are legally binding. The recent failed initiative by the OECD to protect investors through the Multilateral Agreement on Investment was severely criticized by many unions, NGOs, and consumer protection groups who argued it favored the private interests of investors over the public interests of the host state. See also Mabey (1999) and Picciotto (1999 b).

their adoption of a regulatory orientation that is facultative, supportive, and more in line with contemporary free-market values.[28]

Analytically and theoretically, the state remains at the center of the international commercial order, but in practice the state-based order is being eclipsed by private subjects and sources of legal regulation. As we shall see, juridification, pluralization, and privatization are also occurring in the area of dispute settlement. Under the GATT, NAFTA, FTA, and through agreements between individual and corporate commercial actors, privatized processes of dispute resolution have eclipsed dispute settlement by national judicial authorities.[29] The proliferation of private institutions and rules for international commercial arbitration evidence remarkable pluralism in privatized methods for settling commercial disputes. In many instances, matters that were formerly regarded as justiciable in national courts of law, such as disputes involving matters relating to securities and antitrust or competition law and regulations, consumer protection and other areas of mandatory law, are being found to be arbitrable subject-matter. This effectively removes such matters from review in public judicial settings and places them in the privatized, closed world of international commercial arbitration (Dezalay and Garth, 1996). As a result, matters once governed by mandatory national law are being found to be arbitrable subject-matter subject to determination in private and closed arbitration proceedings, which are characterized by their informal and discretionary nature. The result is the removal of many politically sensitive matters, such as competition, securities, tax regulation, intellectual property, and consumer protection

[28] The free-market orientation is referred to by many as the Washington and post-Washington consensus. Picciotto (1999 a: 4) notes that the Washington consensus of the 1980s "stressed deregulation and the slimming down of the state," but reaction to this emerged from those advocating the success of state-led development and resulted in a "modified Washington consensus" that "now includes the importance of the state and regulation," advocating the "market-friendly state" for developing states.

[29] According to a leading practitioner (Aksen, 1990: 287), "in today's world the dispute resolution system will invariably be arbitration." And see Carbonneau (1990). Dezalay and Garth (1996: 6) note that over the past twenty-five to thirty years international commercial arbitration has become "big legal business" and the accepted method for resolving commercial disputes. While they note that there are no global statistics available, they refer to records kept by the leading international commercial centers, such as the International Chamber of Commerce arbitration facilities, which reveal a dramatic increase in arbitration requests (some 3000 requests in its first 50 years of operation compared to 3000 requests over the past decade alone). They also note a 1992 report (cf. 2) that identifies some 120 private arbitration institutions in the world, but they caution that the list is not comprehensive. An indication of the increased recourse to international commercial arbitration is evident in the proliferation of institutions engaged in providing this service. See also Graving (1989) and for a list of arbitration services, see Asser Institute (1988: 713–37).

disputes, from public supervision and control in national courts of law.[30] This undermines the ability of states to regulate many matters that raise national public policy concerns. Moreover, as subsequent chapters will show, governments, at least in the developed world, are participating in limiting their powers of review by providing a hospitable legal and regulatory framework for private, secretive, and closed arbitration proceedings. States are limiting the powers of their national courts to review the decisions of private international commercial arbitrations, while simultaneously committing public offices to the enforcement and execution of foreign and domestic arbitration awards.[31] The world of international commercial arbitration, which is increasingly transnational in its operation, institutional structures, and culture, thus comprises an interesting mixture of private and public authority.[32]

These developments give rise to important normative considerations. Typically, we associate processes of law-creation and dispute resolution with those vested with the authority to legislate and adjudicate.

[30] McConnaughay (1999: 453–4 and 479) argues that the separation between international commercial arbitration and national legal systems is now "complete." He analyzes a number of cases in the US where national courts have permitted the private arbitration of matters under the Securities Exchange Act, the Sherman Act (antitrust), the Carriage of Goods by Sea Act and other regulatory legislation. In each case mandatory law was at issue: "Mandatory national laws share most of the characteristics of that body of law traditionally referred to as 'public law:' they are typically expressed in statutory form, they are regulatory rather than elective, they frequently vary from nation to nation, and they are often enforced directly, although not exclusively, by an agency of government. Traditionally, the freedom of parties to privately arbitrate disputes and to contractually choose applicable law ended when mandatory law began and began when mandatory law ended"(474). In the antitrust case (*Mitsubishi v. Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985)) he notes that the court "effectively transformed arbitral adjudication from an instrument of private contractual autonomy into an exercise of delegated judicial authority from the state." And see Kronstein (1963) for the view that arbitration expands the authority of private interests.

[31] The recourse to private arbitration is being encouraged by states who are participating in creating uniform and mandatory rules that provide for the national recognition and enforcement of foreign arbitral awards. States are adopting legislation that curtails the power of national courts to intervene in private arbitration proceedings and limits judicial authority to set aside awards. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 10 June 1958, UN Doc. A/Conf. 9/22, is in force in some 123 states (as of 4 October 2000) and curtails the power of national courts to intervene in private arbitrations. In addition, states are voluntarily adopting the UNCITRAL Model Law on International Commercial Arbitration (adopted by some thirty-two states as of 4 October 2000) which, in tandem with the New York Convention, provides a comprehensive body of international arbitration law and procedure. For the most current information on the number of states adopting these and other legal instruments, see UNCITRAL Homepage, http://www.UNCITRAL.org/en-index.htm.

[32] For an excellent review of the closed and club-like nature of the international commercial arbitration community see Dezalay and Garth (1996).

In democratic and representative legal systems, legislatures and parliaments create laws, while the judiciary and state enforce them. Under public international law, states are vested with the authority to create and enforce laws in a system in which state consent forms the litmus test of law. Private authority over law-creation and dispute settlement thus raises important concerns about public participation and democratic accountability and legitimacy. As we shall see, the privatization of legal authority is generally inconsistent with conventional notions of the public and nonarbitrary "rule of law." It also challenges the analytical and theoretical foundations of international law as a state-centric and consent-based system of law.

The normative implications of privatized authority take on even greater significance when the juridification, pluralization, and privatization of commercial relations are placed in the context of deeper transformations in the global political economy. These trends in the governance of commercial relations are linked to fundamental transformations in the global political economy associated with postmodernism and late capitalism. While postmodernism suggests "a fluid, 'disorderly' global field of forms of life, identity presentation and consumerism" and parades "heterogeneity and variety" (Robertson, 1992: 178–9), it is as Frederic Jameson (1991: xii) notes, "the reflex and the concomitant of yet another systematic modification of capitalism itself." Late capitalism describes various phenomena relating to "multinational capitalism," new forms of multi- and transnational business enterprises, "the new international division of labour," new dynamics in international banking, stock exchanges, new forms of media interrelationship, computers, automation, the flight of production to advanced Third World economies, the crisis of labor, and global gentrification.[33] The transformations isolated in this analysis relate to the advent of the "competition state," the transnationalization or deterritorialization of capital, and related processes of "flexible accumulation." These transformations provide the ideological, material, and institutional foundations for the juridification, pluralization, and privatization of international commercial law and relations. They also provide insight into the material, institutional, and ideological characteristics of the unification movement and the conditions that secure the dominance of the mercatocracy in processes of law-creation and dispute settlement.

[33] Jameson (1991: xix). He also notes (xvii) that the term "late capitalism" originated in general use in the works of Theodor Adorno and Max Horkheimer of the Frankfurt School in the context of the "administered society."

The first transformation involves the replacement of the welfare state by the competition state in response to enhanced international commercial competition and the imposition of the new constitutionalism of disciplinary neoliberalism (see Gill, 1998; 1995 a; Cerny, 1997). The new constitutionalism legitimizes the increasing juridification of commercial relations as a *grundnorm* of the neoliberal order. It also creates a new ideological context for international and global commerce by providing the theoretical rationale for privileging the expansion of private legal regulation and the subordination of domestic policy concerns to neoliberal market discipline. Stephen Gill (1998: 23) associates the new constitutionalism with the insulation of dominant economic forces, such as transnational corporations, from democratic rule and popular accountability. It "operates in practice to confer privileged rights of citizenship and representation to corporate capital and large investors" subordinating the interests of society and public policy more generally to the interests of capital. The objective is the production of internationally competitive services and industries and the subordination of social welfare concerns of equity and justice to the discipline of market civilization. The goals and interests of competition states are generally consistent with the current deregulatory and privatized business ethos. They also facilitate the activities of the mercatocracy by assisting in creating national and international regulatory orders that minimize barriers to the free flow of trade, services, and capital. The emphasis upon creating regulatory orders that meet the criteria of competitiveness provides a powerful ideological influence, as well, by infusing the unification movement with competitive standards. Legal regulation that enhances global competition by minimizing the costs of negotiating and enforcing agreements, such as privatized standards, soft law, and private dispute settlement through international commercial arbitration, are thus to be preferred over more costly hard laws and public adjudicatory processes.

Relatedly, the transformation of an international political economy based upon patterns of national capital accumulation to a global political economy based upon transnational patterns of capital accumulation is creating new conditions and challenges for both state and nonstate authority and law.[34] Competition states are facilitating transnational trade, production, and finance by undertaking to minimize barriers to

[34] For the transnationalization of capital, see Gill and Law (1993); Robinson (1996 and 1998).

the mobility of goods, services, and capital through entry into hard legal obligations under the World Trade Organization (WTO) and the GATT, NAFTA, the FTA, the Maastricht Treaty and European Monetary Union (EMU), and bilateral investment treaties under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID). These legal arrangements create hard law that bites deeply into the autonomy of national legislative and public policy processes.[35] The law merchant plays a crucial role in harmonizing and unifying legal practices so as to minimize legal barriers to exchange and production, as well. In fact, the international movement for the unification of private law is the major institutional and ideological framework for facilitating legal adjustments to changing terms of global competition.[36]

The third transformation relates to the advent of patterns of "flexible accumulation" associated with post-Fordist production and efforts to improve productivity and competitiveness (Harvey, 1990). Post-Fordism involves enhanced capital mobility and flexibility or "flexible accumulation" and "flexibility with respect to labour processes, labour markets, products, and patterns of consumption;" the emergence of new sectors of production, new financial services and markets; intensified rates of technological, commercial, and organizational innovation; and the resulting time–space compression as the time horizon for decision makers shrinks (ibid., 147). Soft, flexible, discretionary, and *ad hoc* rules that are able to accommodate instantaneous transacting and are responsive to fast-changing economic conditions are mechanisms of flexible accumulation. In some cases the compression of time and distance, associated with advances in technology and communications, renders commercial transactions instantaneous and simultaneous, creating a dynamism that makes traditional forms of unified law quite irrelevant and dated.[37] This is evident in the growing commercial preference for nonbinding soft law in the form of voluntary statements of principle, model laws, and optional codes that provide a certain degree of unification without binding parties whose competitive interests and goals might shift over the course of a transaction. Soft-law agreements are easier to negotiate, require less compromise, are less

[35] For discussion of the impact of these legal agreements on the autonomy of domestic public policy processes and legislative authority, see Twining (1996); Fried (1997); Gill (1998); Cutler (2000 a); Abbott (2000); and Alter (2000).
[36] While this will be clarified in later chapters, for introductions to the institutional and ideological foundations of the unification movement, see David (1972 a).
[37] See Scheuerman (2000). And for a discussion of time–space compression, see Harvey (1990). For the increasing irrelevance of state-based law, see Santos (1993).

restrictive of domestic autonomy, and are easier to breach, if changing market conditions so require (see Abbott and Snidal, 2000; Cutler, 1999 b).

In addition, the privatization of law-creation and dispute resolution and the regulation of corporate conduct through privatized codes that provide a "soft infrastructure" for business are mechanisms of flexible accumulation created by competition states in the quest for enhanced market competitiveness. This "soft infrastructure" is sensitive to corporate interests and the need to facilitate business strategies, such as "cause-related marketing" that "links a company and its product to a social cause, the goal to create relationships with key stakeholders, enhance brand value, increase sales and differentiate similar products in a competitive market place while providing benefit to a cause or issue" (*Development of Guidelines*, 2000: 5 [UN report]).

The trend toward soft regulation appears to be inconsistent with the deepening of hard disciplines under the WTO and NAFTA and suggests, as mentioned earlier, that the juridification, pluralization, and privatization of international commerce are discontinuous and even contradictory processes. However, notwithstanding such apparent discontinuities, it is crucial to recognize that fragmentation occurs in a context marked by deeper sources of unification. The growing legitimacy of privatized lawmaking and dispute resolution is strengthening the material, institutional, and ideological unity and hold of the mercatocracy. As subsequent chapters illustrate, the mercatocracy functions to provide a unity of purpose and a coherence in regulation that is obscured by notions of pluralistic or fragmented governance. Indeed, notions of multiple and plural sources of governance tend to obscure the unity and coherence of contemporary global capitalism and threaten to dissolve "capitalism into an unstructured and undifferentiated plurality of social institutions and relations" (Wood, 1995: 247). Moreover, while the privatized and pluralistic nature of the new law merchant order is said by many to exhibit significant similarities with its medieval ancestor, the contemporary merchant order is here argued to be distinctive and particular to conditions of postmodernity and late capitalism. Notions of multiple and heterogeneous sources of governance also obscure the extent to which state–society relations are being reconfigured by a "privatization of public power" and the creation of an entirely new "'private' realm, with a distinctive 'public' presence and oppression of its own, a unique structure of power and domination, and a ruthless systemic logic" (Wood, 1995: 254; see Cutler, 2001 b). The

normative implications of this development are profound in terms of the implications of juridification, pluralization, and privatization of governance for state–society relations, both locally and globally. Privatized legal disciplines are increasingly finding their way into both international and national commercial legal orders, structuring domestic and foreign economic relations in ways that have a significant impact on state–society relations within states and on the political and economic relations between states. However, the centrality of the law merchant to new and changing processes and structures of governance is obscured by the complex relationship between private and public international trade law and the contested nature of the law merchant, to which attention will now turn.

Private and Public International Trade Law

The distinction between private and public international law is of crucial significance in the constitution of identity in the global political economy and subjectivity under international law. Public international law is a state-based order in which the authoritative subjects, actors, and voices in the global polity are more or less confined to states. In contrast, private international law is regarded as an order regulating nonpolitical matters, such as family matters and economic relations involving individuals and private associations. Although we tend to accept the distinction between private and public international law as a natural division, much like that differentiating between private and public law within domestic legal orders, it is important to recognize that it is only an analytical distinction. The distinction between private and public international law is not reflective of an organic, natural or inevitable separation, but is an analytical construct that evolved with the emergence of the bourgeois state (Cutler, 1997). Moreover, as we shall see, the distinction is in empirical decline as processes of juridification, pluralization, and privatization blur the separation between private and public authority. However, while in decline empirically, the distinction continues to hold powerful conceptual and symbolic meaning and is creating a disjuncture between commercial law and commercial practices. Commercial practices are increasingly recognizing the political significance of private actors in the regulation of global commerce, but international law remains steadfastly state-centric.

The distinction between private and public international law operates at multiple levels. It operates, legally, as a separation of academic

subjects and as a separation of legal doctrines (Paul, 1988). It also operates materially, as the determinant of political identity and subjectivity in international affairs, and symbolically, as a powerful ideological justification for liberal-inspired theories of international law and international political economy. The discussion will consider the basis for differentiating private and public international law, the subjects and sources of law, the nature and operation of private international trade law, and the history of the private/public distinction in international law.

Differentiating private and public international law

The distinction between private and public international law operates as a distinction between academic subjects and legal doctrine. In terms of subject-matter, public international law deals with matters relating to states, international organizations, and to a very limited extent to corporations and individuals, that raise "an international legal interest."[38] In contrast, private international law deals with matters relating to individuals, and significantly, to corporations, who are assimilated with individuals under legal theory.[39] As a system regulating private relationships, private international law refers to conflict or choice of law principles that determine the appropriate jurisdictional norms to apply to individual claims involving a foreign element or foreign persons (Paul, 1988: 150). It also includes international commercial transactions relating to "domestic and international regulation of foreign investment and the movement of goods and workers across national borders" (ibid., 151). James Fox (1992: 351) defines "private international law" as "rules which govern the choice of law in private matters (such as business contracts, marriage, etc.) when those questions arise in an international context, e.g., will country A enforce the divorce granted under the laws of country B." "Public international law," in contrast, is defined as "law

[38] These include the sources and subjects of international law; the application of international law by domestic and international tribunals; the enforcement of public international law; international organizations; regional associations; dispute settlement; the international law of treaties; the laws of war; the law of the sea and outer space; international protection of the environment and of international human rights; state responsibility for injury to aliens; foreign relations law; diplomatic recognition; diplomatic and sovereign immunities; state responsibility for the acts of nationals; state succession; and the right of states to make claims on behalf of their nationals (see Paul, 1988: 150, n. 50).

[39] See below and see Janis (1984 a); Higgins (1985); Cutler (2000 a and 2001 a) for discussion of the assimilation of transnational corporations and individuals with "objects" and not "subjects" of the international legal order.

dealing with the relationship between states" (ibid., 357). As Joel Paul (1988: 163 and 150) notes, private international law "is about private interests engaged in private transactions (and not about the exercise of public power);" it "excludes questions of international public policy, such as the role of multinationals on social and economic development or the effect of international arbitration clauses on the enforcement of domestic antitrust laws." International public policy concerns are the domain of public international law, for it is states who are deemed to have political identity as legal subjects and authoritative agents in the exercise of public power in international affairs. However, significant analytical and theoretical problems result from associating the subject matter of private international trade law with both *trade* matters and *private* matters. Moreover, these problems shade into the doctrinal nature of the distinction between private and public international law and resulting doubts about the legal status and political significance of private international trade law.

The definition of private international trade law as governing matters of *trade* obscures the scope and nature of legal regulation involved. As a subfield of private international law, private international *trade* law is variously known as international business law (Schmitthoff, 1961), the law of international trade (Schmitthoff, 1964 a), the new law merchant (Schmitthoff, 1961), and the transnational law of international commercial transactions (Horn and Schmitthoff, 1982). It includes matters relating to international trade, such as the international sale of goods and ancillary services including insurance, transportation, financing, and dispute resolution. However, its designation as private international *trade* law is increasingly inaccurate, because it extends well beyond the regulation of exchange to include a full range of international productive relations, including, for example, the regulation of international licensing, distributorships, joint ventures, construction contracts, and the extraterritorial application of tax, antitrust, and securities laws. In fact, the rules of private international trade law establish the fundamental rules governing private property and contractual rights and obligations operative across the full range of international commercial activity, including international trade, investment, finance, transportation, insurance, and dispute settlement (see Horn and Schmitthoff, 1982). In addition to comprehending far more than simple *trade* relations, the rules of private international trade law both connect states and reach inside states. They regulate the "interface" between differing legal and political systems, but also reach inside states to harmonize and unify their policies and

laws with those of other states.[40] They function to both *globalize localisms* and *localize globalisms*, mediating local and global political/legal orders by providing juridical links and harmonizing laws that are regarded as essential to the orderly regulation of the global political economy.[41] As such, the rules of private international trade law and the law merchant order are so foundational to the global political economy that they may be usefully regarded as both a constitutive element of global capitalism and an attribute of the capitalist order. This order provides the constitutional foundations of the global political economy through rules governing the protection and enforcement of private property and contractual rights and obligations across a range of international commercial activities that are not limited to cross-border exchanges, but that penetrate into local legal/political orders (Cutler, 1999 a: 6). These rules structure economic relations by providing for stability of possession. Indeed, they articulate the conditions that make economic relations possible in conditions of uncertainty and insecurity generated by nonsimultaneous transactions over time and space. The law merchant provides a common language and business culture, enabling merchants from diverse legal and political systems to speak to one another and to transact in a relatively stable, predictable, and secure environment. The law merchant thus forms part of the juridical foundations of global capitalism and is deeply "imbricated" "within the very basis of productive relations" of global capitalism.[42]

However, and here we come to the second analytical problem, the designation as *private* law obscures its political nature and distributional functions in determining the allocation of risks of international commercial transactions, in regulating the terms of commercial competition and market access, and in enforcing bargains. Most importantly, the way the law merchant assists in the reconfiguration of governance arrangements by deepening, expanding, and legitimizing the privatized regulation of international commercial relations is obscured by public definitions of authority that render privatized authority relations analytical and theoretical impossibilities.[43] As a result, the law merchant works to entrench

[40] See Cutler (1999 b) for analysis of the unification movement as extending beyond the regulation of the "interface" of legal orders.
[41] See Cutler (1995, 1999 a, and forthcoming).
[42] Wood (1995: 74) here cites the words of E. P. Thompson (1975: 260–1) on the untenability of treating law as solely part of the "superstructure" of capitalism. This matter is addressed in the next chapter.
[43] This matter is taken up in the next chapter but the argument is developed most fully in Cutler (1999 a and c).

and deepen the paradoxical exercise of public authority by private agencies who, as putative "objects" of the law, remain invisible as legal "subjects." Understanding this paradox requires a brief excursion into the analytical nature of "subjects" and "sources" of international law, the nature and operation of private international trade law, and the history of the private/public distinction in international law.

Subjects and sources of law

In international law, the public/private distinction forms the foundation for establishing the dominant authority structure as that of the territorial state and the states system, eliminating any potential rival claims to political identity and authority coming from individuals or from corporate entities. Mark Janis (1984 a: 62) notes, "[n]ineteenth century positivists promoted the notion that the individual was not a proper subject of international law . . . public international law went to matters affecting states, while private international law concerned matters between individuals." The doctrine of international legal personality forms the analytical core of this statist orientation. This doctrine identifies who or what is a "subject" of the law and, hence, who is politically authoritative. It determines who possesses "rights and duties enforceable at law . . . Legal personality is crucial. Without it institutions and groups cannot operate for they need to maintain and enforce claims" (M. N. Shaw, 1991: 135). Shaw elaborates on the doctrine:

> One of the distinguishing characteristics of contemporary international law has been the wide range of participants performing on the international scene. These include states, international organizations, regional organizations, non-governmental organizations, public companies, private companies and individuals. Not all such entities will constitute legal persons, although they may act with some degree of influence upon the international plane. International personality is participation plus some form of community acceptance. (ibid., 137)

The identification of states as the proper "subjects" of international law is generally associated with legal positivism, which attributes the binding force of international law to states and state consent. While we will consider this theory in the next chapter, it contrasts with and followed on from natural law theories,[44] whose assumption of a universal moral order transcending time and place fits more comfortably with a

[44] See Beck, Arend, and Vander Lugt (1996: chs. 2 and 3) for good reviews of natural and positive law theories of international law, respectively.

more inclusive notion of the subjects of international law.[45] Legal positivism developed along with the emergence of the modern states system providing the legal equivalent of the statist political theories advanced by theorists such as Jean Bodin and Thomas Hobbes (see Beck, Arend, and Vander Lugt, 1996). Today, the modern doctrine of international legal personality continues to run parallel to territorial/statist conceptions of international relations.[46] Only states are recognized as full members of the United Nations and the degree of legal personality possessed by international organizations is determined by and derived from their member states.[47] Only states may bring contentious proceedings before the International Court of Justice,[48] declare war, appoint ambassadors or claim the right of diplomatic immunity. Only states are entitled to claim the right of territorial integrity, a basic right recognized in the Charter of the United Nations. The Vienna Convention on the Law of Treaties applies only to treaties entered into by states.[49]

The international legal status of transnational corporations, which are probably the most visible private global actors today, has been likened to the status of the individual under international law.[50] Both are "objects" and not "subjects" of the law: they have no original rights or liabilities at international law; the only rights or liabilities they possess are derivative as nationals of a state, under the principles governing nationality.[51] As "objects" they are devoid of subjectivity: "that is to say, they are like 'boundaries,' or 'rivers,' or 'territory' or any of the other chapter headings found in the traditional textbooks" (Higgins, 1985: 478). Moreover, the rights or liabilities they do possess derivatively can only be asserted

[45] Inclusive of the individual, at least. See Cutler (1991) for the view that natural law theories are more accommodating of the individual as a subject of international law than are positive law theories.

[46] For a very good discussion of the territorial nature of state sovereignty and of contemporary challenges to territorial conceptions of political authority see Agnew (1994).

[47] *Reparations for Injuries Suffered in the Service of the United Nations Case* [1949] ICJ Rep 174, 180.

[48] Statute of the International Court of Justice, Art. 34 (1).

[49] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, in force 1980, Arts 2 and 3.

[50] The association of corporations with individuals has been a powerful influence and may be traced to the more general theorization of corporate legal personality in Anglo-American domestic law. See Cutler (2000 a: 57–8) for analysis of the development of corporate legal personality as an integral element of the emergence of market society and capitalist productive relations.

[51] Nationality is defined as "the bond that unites individuals with a given state, that identifies them as members of that entity, that enables them to claim its protection, and that also subjects them to the performance of such duties as their state may impose on them" (Von Glahn, 1996: 147). See also Brownlie (1990: 421–4).

or assumed by the state on behalf of the individual or the transnational corporation.[52] As one legal theorist notes, "[t]he law recognizes as 'international corporations' only those entities which are constructed by international law, that is by treaty... This format is not available to the private commercial enterprise which must content itself with stringing together corporations created by the laws of different states" (Vagts, 1970: 740). Another notes that the transnational corporation lacks "concrete presence in international law... it is an apparition... its actuality sifted through the grid of state sovereignty into an assortment of secondary rights and contingent liabilities" (Johns, 1994: 893). Yet another legal scholar observes the "awkward," but well-established assimilation of corporate nationality to the nationality of individuals (Brownlie, 1990: 421–2. See also, Brownlie, 1998). The result is the "invisibility" of the transnational corporation under international law, as corporate power and responsibility is filtered through the state.

The legal doctrine governing the sources of law mirrors the state-based order governing subjectivity. Article 38 of the Statute of the International Court of Justice is generally regarded as the authoritative statement of the sources of public international law and includes international treaties and customary international law as primary sources and general principles of law, judicial decisions, and the teachings of the most highly qualified publicists as secondary sources. While international treaties and customary law are definitely regarded as "hard law" in the sense of the creation of binding obligations, Article 38 notably does not mention "soft law." Neither are the recommendations of international organizations, such as the United Nations General Assembly, nor the deliberations of international nongovernmental organizations regarded as sources of law. Only states are the authoritative source and "voice" in international affairs, for not even the International Court of Justice (ICJ) can trump state consent as a source of law. Unlike many domestic legal systems where the principle of *stare decisis* applies (by which a precedent or decision of one court binds courts lower in the judicial hierarchy), the decisions of the ICJ are only subsidiary and not primary sources.

[52] There are some exceptions to the limited personality of individuals and private corporations, which might suggest some movement in legal practice that has yet to be reflected in legal theory. Notable exceptions include the status of individuals before the European Court and the status of private transnational corporations that have entered into contracts with states which are "internationalized" by provisions that bring the contract under the purview of public international law. On the individual, see Higgins (1985); Loucaides (1990), and Janis (1984 a). Concerning transnational corporations, see Johns (1994).

In the field of private international law, there is no equivalent to Article 38 as the authoritative statement of the sources of law. Indeed, as the subsequent sections will illustrate, there is considerable disagreement as to the sources of private international law, which derives from its contested status as an autonomous or international legal order. While we will have occasion to revisit the matter of legal subjects and sources in subsequent chapters, for the moment it will suffice to note the state-centric nature of the doctrine governing public international law, and the consequent political invisibility of private, nonstate authority and identities, who as "objects," are simply not accorded legal subjectivity. The differential treatment of state and nonstate subjectivity under law stems, as well, from peculiarities in the nature and operation of private international law.

Nature and operation of private international trade law

While the operation of private international trade law is a complex matter, it may be usefully regarded as functioning in at least three ways.[53] In one way, the rules of private international law operate as a conflict of laws system, providing rules that determine what national law applies to transactions involving persons or corporations from different states when there is uncertainty as to the law that should govern.[54] In this sense, private international law operates as a domestic conflict of laws system and derives its authority from and is an extension of the domestic political/legal order. As a conflict of laws system, the rules of private international law serve to *localize* international transactions in one national system of law, thus linking international and national political/legal arenas.[55] These links derive from the domestic application of foreign law under the rules of private international law and the

[53] In Cutler (1997) only two operations of private international law are identified; there is no differentiation between the second and third operations identified here.

[54] See generally, Baer et al. (1997) and Horn and Schmitthoff (1982).

[55] The rules of private international law operate to identify the national law to be applied in a situation of conflicting jurisdictional options. As noted by Starke (1936: 397), private international law "deals primarily with the application of laws in space" and indicates "the area over which the rule of law extends." Moreover, "the area of recognition, the sphere of authority, the rule of law is wider than the territorial jurisdiction of the sovereign power by which it is enacted." This is because, as Starke notes, the sovereign is in effect applying and upholding the rule of a foreign territorial law in applying the principles of private international law when those rules designate foreign law as the applicable law: "If, for instance, an English Court decides that the capacity of a person who bought the goods in France must be governed by French law, what it decides in effect is that the rule of the French territorial law relating to capacity is effective outside the territorial limits of the French law maker."

extraterritorial application of domestic law under the rules of comity. To the extent that sovereigns came to give effect to foreign laws in deference to the requirements of international comity,[56] private international law, like public international law, was regarded as facilitating relations between independent territorial entities.

However, private international trade law also operates in another way as a more or less independent source of governance through the application of international law generally by domestic and/or international tribunals. In this application, private international trade law operates neither as a conflict of laws system nor as an extension of domestic law, but as a source of governance that may be formulated internationally or transnationally through hard law in the form of international conventions or soft law in the form of model laws, codes, principles, and guidelines that are accepted as law voluntarily by commercial actors (see Cutler, 1997; 1999 a). In this regard, it exhibits some similarities to public international law. In some cases the legal rules are adopted by states into their national legal systems, becoming embedded in national political/legal orders. A good example, discussed later in the book, is the law governing international commercial arbitration that has been formulated multilaterally through both convention and model law and has been adopted by a multiplicity of states into national legal systems, enabling the enforcement of foreign arbitration awards in national courts of law. Globalized international commercial arbitration law illustrates *localized globalism*, as national laws and institutions for the judicial settlement of foreign commercial disputes are replaced by globalized laws and institutions.

There is, however, yet another way in which the laws of private international law operate, which creates considerable analytical uncertainty. Commercial actors may by private agreement adopt rules to govern their foreign contractual relations that form a law between the parties that is enforceable in a court or arbitration. Indeed, the parties may by contract agree to exclude the application of national law and national judicial systems, invoking perhaps the application of general business customs and practices, thus *delocalizing* the transaction and methods for enforcement and dispute resolution. For some, this operation is the essence of

[56] Comity in international law has been variously described or defined in terms of reciprocity, courtesy, politeness, convenience, goodwill between sovereigns, moral necessity, or expediency and is invoked to explain why courts enforce or apply the decisions of foreign courts or limit their own jurisdiction in the face of a competing foreign jurisdiction. See Paul (1991: 2–3).

the law merchant order and is said to give rise to its autonomy from local, national or international law (see Goldman, 1986; Lando, 1985; Paulsson, 1981). In this regard the rules of private international law operate to delocalize rather than to localize transactions, illustrating the dialectical way in which the law operates.

Analysts use a variety of terms to describe and define the law merchant, including "a set of general principles and customary rules" (Goldman, 1986: 116); "the rules of the game of international trade" (Langen, 1973: 21); "common principles in the law relating to international commercial transactions" (Schmitthoff, 1982: 19); "uniform rules accepted in all countries" (Schmitthoff, 1961: 139); "an international body of law, founded on the commercial understandings and contract practices of an international community composed principally of mercantile, shipping, insurance, and banking enterprises of all countries" (Berman and Kaufman, 1978: 272–3). However, these definitions do not disclose the extent to which the analytical status of the law merchant is contested. Some scholars tend to define the law merchant very narrowly, limiting it to harmonized or universalized customs and practices accepted by the merchant community. This book adopts the more expansive approach common in Anglo-American commercial law, regarding the law merchant as coterminous with the law of private international trade (see Schmitthoff, 1982; 1961).

There is, however, another more significant debate regarding the analytical status of the law merchant as an autonomous legal order. In general, European scholars tend to accept the existence of the law merchant as an autonomous legal order much more readily than do Anglo-American scholars. The latter tend to see it as an extension of domestic legal systems, which relates to their more general doubts about the independence of the broader field of private international law (see Cutler, 1997; Stoecker, 1990; Highet, 1989; Delaume, 1989). Doctrinally, private and public international law are treated as separate fields: private international law is regarded as deriving predominantly from municipal legal systems, while public international law derives from international sources.[57] However, although many of the principles of private international law are separate and distinct from those of public international

[57] As noted above, the sources of public international law are generally identified as those listed in Art. 38 of the Statute of the International Court of Justice, two of the most important being international conventions and customs. It should be noted, however, that increasingly private international law is being formulated internationally and embodied in conventions. This complicates the characterization of and distinction between private and public international law, at least as regards their sources.

law, often deriving from domestic or municipal law, the doctrinal status of private international law is contested. Legal theorists disagree about the status of private international law. Anglo-American theorists have traditionally expressed doubts that private international law is anything more than domestic or municipal law. In contrast, European scholars regard private international law as an integral part of public international law. Anglo-American doubts about the independent pedigree of private international law stem from its general isolation from public international law, as the distinction between private and public law emerged historically, as well as from its contested analytical status as an independent legal order.

History of the public/private distinction in international law

It is important to note at the outset that the public/private distinction is an historically specific analytical construct that has undergone revision with changing material, ideological, and institutional conditions.[58] Morton Horwitz (1982: 1,423) argues that the public/private distinction arose out of a "double movement in modern political and legal thought." One movement involved the emergence of the nation-state and theories of sovereignty in the sixteenth and seventeenth centuries in which a distinctly "public realm" began to crystallize. The second movement involved attempts to create "private spheres" free from state regulation. He traces the origins of a distinctively public realm in England to late medieval English law governing property rights in land and taxation laws. With regard to the former, the differentiation between the public and private roles of the monarch as landowner crystallized in the seventeenth-century conflicts over the King's power to alienate certain types of land that came to be regarded as Crown or public land. With regard to the latter, in the seventeenth century taxation came to be regarded as a part of public law, exacted by the state, and not as a private gift, as had been the case before. He notes that "it was only gradually that English and American law came to recognize a public realm distinct from medieval conceptions of property. And equally gradually legal doctrines developed the idea of the separate private realm free from public power" (ibid., 1424).

The public/private distinction was articulated through the emergence of the centralized and absolutist state. In Western Europe, an important

[58] See Cutler (1997; 1995; 1999 a) for the history of the private/public distinction in international law.

development was the reception of Roman law and the concept of unconditional and absolute property rights, which replaced the medieval notions of conditional property and parcelized sovereignty. The Roman law distinction between civil law (*jus*), which regulated private and economic relations among citizens, and public law (*lex*), which regulated relations between the state and its subjects, formed part of the foundation for what was to become distinct public and private domains. It also enhanced the concentration of the power of monarchs in centralized state institutions and anticipated the disembedding of economic relations from the sphere of political relations, a move so aptly depicted by Perry Anderson (1974 b: 27) as a "double social movement," wherein the "juridically unconditional character of private property consecrated by the one found its contradictory counterpart in the formally absolute nature of imperial sovereignty exercised by the other."

The separation of the public and private spheres did not occur uniformly throughout Europe. Moreover, the situation was somewhat different for England where Roman law was never received as it was in Europe. In England, the distinction between private and public evolved in the context of class relations attending the emergence of the bourgeois state and the growth of constitutional and responsible government (see generally, Horwitz, 1982; Hanson, 1970). It took the advancement of capitalism and the demise of the feudal order to affect the separation, which was articulated in the separation between politics and economics. Importantly, however, the distinction emerged not as a reflection of separate domains, but as an "evacuation of relations of domination from the realm of production" (Rosenberg, 1994: 84) and the "insulation" of economic relations from political controls (Giddens, 1987: 68). Ellen Meiksins Wood (1995) captures the essential nature of the separation between economics and politics:

> the differentiation of the economic and the political in capitalism is, more precisely, a differentiation of political functions themselves and their separate allocation to the private economic sphere and the public sphere of the state. This allocation reflects the separation of political functions immediately concerned with extraction and appropriation of surplus labour from those with a more general communal purpose . . . the differentiation of the economic is in fact a differentiation within the political sphere. (31)

While the emergence of the market as a central legitimating institution placed the public/private distinction at the center of political and

legal discourse in the nineteenth century, it is also important to emphasize that the emergence of market society was not an automatic or natural occurrence. Karl Polanyi (1944) shows that the self-regulating market characteristic of modern capitalism did not simply emerge spontaneously, but was the product of a complex set of legislative interventions to remove impediments to the exchange of labor, land, and money. He argues that this demanded "nothing less than the institutional separation of society into an economic and political sphere" (ibid., 71). This development was assisted and legitimized by liberal theories of political economy and law that rationalized the privatization of corporate, contractual, and tortious (wrongful) activities. Indeed, Horwitz (1982) argues that the public/private distinction was central to the development of an "independent" and "neutral" legal science:

> Above all was the effort of orthodox judges and jurists to create a legal science that would sharply separate law from politics. By creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be dangerous and unstable redistributive tendencies of democratic politics, legal thinkers helped to temper the problem of "tyranny of the majority." Just as nineteenth-century political economy elevated markets to the status of the paramount institution for distributing rewards on a supposedly neutral and apolitical basis, so too private law came to be understood as a neutral system for facilitating voluntary market transactions and vindicating injuries to private rights. (1,425–6)

In domestic law, in the United States, the public/private distinction drew criticism from legal realists in the 1920s and 1930s, in response to growing perceptions of the concentration of capital.[59] They emphasized the coercive and distributive nature of all law and ridiculed the notion

[59] Purvis (1991: 83, n. 10) notes that legal realism emerged in the 1930s primarily at Yale and Columbia and "set itself in opposition to legal formalism," or what is referred to as "classical legal thought." Classicism was formulated during the last third of the nineteenth century and was dominant until the 1930s. According to Fisher, Horwitz, and Reed (1993: xi and xiii–xiv), "[i]ts best-known manifestation was a series of decisions by appellate courts that strengthened the position of business corporations in their struggles with workers and consumers... The heart of the movement [legal realism] was an effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence." Horwitz (1982: 1426) identifies the case of *Lochner v. New York* 198 US 45 (1905) in which the Supreme Court enunciated the principle of freedom of contract as a constitutionally protected right as the beginning of attacks launched by Justices Holmes, Brandeis, and Cardozo, and theorists such as Roscoe Pound, Morris Cohen, and Karl Llewelyn on the conservative ideology of the public/private distinction.

of private law as independent, neutral, and apolitical. Of crucial significance to this attack on the distinction was the belief that "so-called private institutions were acquiring coercive power that had formerly been reserved to governments" (Horwitz, 1982: 1,428). By the 1940s Horwitz (ibid.) says it was a "sign of legal sophistication" to recognize the problem of the distinction. Yet, today the distinction is being revived in domestic law and persists virtually unchallenged in international law.

While the conceptual distinction between public and private international law only became clear in the nineteenth century as part of an effort to integrate domestic and international conflict of laws principles (Paul, 1988: 155), it is possible to trace the emergence of the distinction to earlier attempts to reconcile the emerging, individuated, territorial state with a notion of commitment to a broader community of states. The distinction became part of the constitutive separation of the modern state and the international system and was an attempt to address the growing dualism between domestic politics and international relations.[60] In international law, the distinction emerged as part of a twofold process of the emergence of the state system and of capitalism. Curiously though, while the distinction came under attack in domestic law by legal realists who exposed the public and political dimensions of domestic private law, international law largely escaped attack.[61] Paul (1988: 153 n. 12) suggests that the distinction escaped criticism in international law because "most legal realists in international law were too busy defining the field and arguing over the sources of international norms to address private international law issues." He also identifies deeper reasons that are directly relevant to this discussion. These relate to the isolation of private international law stemming from conceptual uncertainty about its status as an autonomous legal order and the belief held by some

[60] Bartelson (1995) provides a good analysis of the process by which the concepts of the state and the international system or society emerged through a process of constitutive separation. And see Steve Smith (1995) for a discussion of this dualism in terms of the tension between international theory and political theory. For a now classic statement of this tension, see Walker (1993).

[61] The public/private distinction came under attack in domestic law, where private laws, like contract law, were exposed to be as much about the exercise of public power as were public laws. However, public international law escaped this exposure. As Paul (1988: 153, n. 12) observes, "[t]he flowering of legal creativity that accompanied the realist attack on the public/private distinction did not directly reach international law, however. One reason for this may be that legal realists were interested in creating a more powerful, centralized administrative state bureaucracy; they were not interested in attacking state sovereignty nor challenging the nascent institutions of international law. After the War, realism was itself suspect as anti-democratic."

that private international law is not really "international law" at all, but as noted by another, has simply been "pompously baptized" as such (David, 1972 a: 209). Paul (1988: 153 n. 120) notes that "Kelsen affirmed that the public/private distinction was inapplicable to international law; private international law is municipal law. Thus, the public/private distinction was not a concern of legal realists in international law." A contemporary statement of this position may be found in one of the most authoritative texts on public international law that "there is no such thing" as "transnational law. No legal order exists above the various national legal systems to deal with transborder interactions between individuals (as distinct from states)" (Malanczuk, 1997: 72). The view that a stateless contract is a "logical impossibility and an intellectual solecism" analogous to "*un marteau sans maître* [a hammer without a master]" (Highet, 1989: 613) reflects the deep connection between law and state territoriality.

Conceptual uncertainty about the status of private international law has contributed to its obscurity and stemmed from obstacles posed by the principles and practices of state sovereignty, which posited the impossibility of an independent body of private international law, and by liberalism, which posited the apolitical nature of private relations. As Paul (1988: 153) observes, the more general distinction between private and public matters "began with the rise of liberal capitalism in the eighteenth century. It was closely associated with the idea that the market was a neutral, apolitical institution for allocating liability and maximizing productivity." In international law, the politics and ideologies associated with the emerging states system, capitalism, and liberal political economy were crucial in the constitution of the public and private spheres.

Although we do not know the specific origins of private international law, it is believed that elements of modern private international law derive from the medieval period and became "a serious question in Europe after the collapse of the Roman Empire and the emergence of city states" (Paul, 1988: 156). Following the collapse of the Roman Empire persons were generally subject to the law of their tribe. As feudalism developed in the tenth through twelfth centuries, persons were subject to the law of the feudal lord. As Paul notes (1988), foreign laws were disregarded and there was no concept of universal personal rights. However, in response to the differentiation in authority structures attending the emergence of city-states, thirteenth- and fourteenth-century Italian authors developed a system comprised of a comprehensive set of categories differentiating

local and universal rights.[62] The system was referred to as the doctrine of the statuists and it differentiated between local and universal rights: property rights were subject to local law (*lex loci*), while personal rights (i.e., contract, marriage) were subject to the law of the place of origin. Paul (1988: 157) argues, however, that this separation did not yet reflect the public/private distinction because the statuists presumed the existence of a natural and universal legal order, "so that in theory conflicts principles [governing personal rights] should be uniform everywhere." The emergence of nation-states in the seventeenth century and the articulation of the principle of state sovereignty "challenged the statuists to explain why sovereign states should sometimes apply foreign law in their courts" (Paul 1988: 157). This challenge was an instance of what John Ruggie (1993 a: 164) refers to as the "paradox of absolute individuation:" "Having established territoriality fixed state formations, having insisted that these territorial domains were disjoint and mutually exclusive, and having accepted these conditions as the constitutive bases of international society, what means were left to the new territorial rulers for dealing with problems of that society that could not be reduced to territorial solution?" The Dutch, seeking to limit the application of foreign law in their efforts to gain independence from Spanish hegemony, responded to this challenge with a conflict theory based on the notion of territoriality. They rejected the statuists' appeals to a higher, universal order with a theory of vested rights. According to this theory, the paradox of absolute individuation was in fact nonexistent because courts in applying the rules of private international law were regarded not as applying foreign law, but rather as enforcing rights that had vested in the individual whilst under foreign law. It was left to states to decide whether or not to apply a foreign law within their territory on the basis of international comity and reciprocal sovereignty and not as a necessity dictated by a higher law.

The Dutch thus began the reconciliation of the territorial state with the community of states, but did not yet distinguish between private and public international law. The Dutch view was not very influential in Europe, where natural law theories remained current. However, English and Scottish lawyers who were schooled in Holland in the eighteenth century introduced the vested rights theory to English law, which had no conflict system. Again, however, the theory did not rest on a distinction

[62] Earlier Roman civilization and law, too, differentiated between local and universal rights, but did not differentiate between public and private international law.

between public and private international law. It was Justice Joseph Story who invented the term "private international law" in *Commentaries on the Conflict of Laws*, published in 1834. The *Commentaries* became the foundation for American jurisprudence and were also famous throughout Europe. Story drew on the Dutch vested rights theory, identifying territoriality and comity as the foundations for private international law. The distinction between private and public international law thus evolved in the context of the growing territorial individuation of political and legal authority in the modern state. It became a method of managing conflicting territorialities and of addressing the paradox of absolute individuation. Private international law became the mechanism for the extraterritorial application of the law. It was the means by which states interacted with each other "by tolerating within themselves little islands of alien sovereignty" (Ruggie, 1993 a: 165). Paul (1988) notes in the following passage that in articulating the foundations of private international law, Story identified a basic symmetry in function that gave rise to a unity of the public and private domains. This symmetry lay in the role both systems of law play in facilitating international commerce and cooperation:

> the *Commentaries* reflects a faith in the essential unity of private international law as an integral branch of international law. Story saw conflicts [i.e., private international law] as the cohesive principle to hold together his system of law; public and private law could not be separated. Commerce thrived on political unity and political unity was fostered by commerce. This was as true internationally as it was true domestically . . . Like his contemporary Savigny, Story postulated that the goals of private international law were identical to those of public international law, and therefore, conflict of laws also should be resolved based upon the interests of international cooperation and commerce. This sentiment reflected an enlightenment belief in the rationality and science of law, even at the same moment that Story was asserting a more modern view of the state in the guise of the territorial principle.
>
> (161)

Despite the unity of the domains postulated in the *Commentaries*, there is no consensus regarding the foundation or status of private international law. Some scholars treat private international norms as municipal or local in origin and status, while others regard them as deriving from and forming an integral part of public international law.[63] Many, as

[63] See, for example, Shaw (1991) and earlier editions of Michael Akehurst's classic, *A Modern Introduction to International Law* (see, for example, Akehurst, 1987: 48–50).

noted earlier, deny the autonomous status of private law norms which are identified with municipal law. This view is associated with A. V. Dicey (1967) whose Hegelian view of the state and Austinian conception of sovereignty were incompatible with the notion of giving effect to the laws of another sovereign (see Starke, 1936). The contrary view, held primarily by European legal scholars, posits that private international law is subsumed by and is an integral part of public international law. This has been referred to as the "law of nations doctrine" and is traced to the work of Savigny in the nineteenth century (Stevenson, 1952: 564–5). According to Savigny, the law of nations, or public international law, developed customs and practices to ensure that private international cases would be decided in the same way regardless of the state within which the case was litigated (ibid.).

Contemporary theorists continue to contest the nature of the relationship between private and public international law, shedding doubt on the conceptual status and autonomy of private international law.[64] However, while private international lawyers were uncertain about the status of their discipline, public international lawyers became increasingly more certain about theirs, distinguishing private international law as a branch of public international law in the latter part of the nineteenth century. By the end of the Second World War, "the division of public and private international law became an article of faith for public international lawyers" (Paul, 1988: 163), as too did the association of private international trade law with apolitical and neutral economic transactions. Liberalism played a crucial role historically, in creating these associations and, contemporarily, in maintaining and deepening them through processes of juridification, pluralization, and privatization. As subsequent chapters illustrate, the public/private distinction is growing increasingly incoherent and may, indeed, be in collapse.[65]

[64] See Horn (1982). For a rejection of the autonomy of the law merchant see Delaume (1989) and for the contrary position see Teubner (1997 a).

[65] As noted in Cutler (1997), Duncan Kennedy (1982: 1,349 and 1,355) argues that for a distinction to be meaningful it must meet two requirements. First, it must make sense intuitively to divide something between its two poles and this sense should be generally shared. Second, the distinction must make a difference in that "it seems plain that situations should be treated differently depending on which category of the distinction they fall into." He identifies the public/private distinction as one of a particular set of distinctions that constitutes "the liberal way of thinking about the social world" that has been in decline since the turn of the century. The distinction is passing through six stages in decline from "robust good health to utter decrepitude." These include: the emergence of *hard cases* that test a distinction; the development of *intermediate terms* in recognition of the inadequacy or indeterminacy of a distinction; the *collapse* of a distinction; the creation of continuums

Moreover, to the extent that the distinction is merely a construct of historical, material, and ideological conditions and reflects no organic or natural differentiation between spheres of activity, one may regard it as having achieved the final stage in its decline. The dissolution of the distinction and the coming together of the private and public institutions and activities are crucial moves in the consolidation of contemporary global capitalism. However, the distinction still operates conceptually and ideologically, serving to conceal the foundational role played by private international law in legitimizing processes of juridification, pluralization, and privatization.

The incoherence of the distinction in international law admits to three explanations that may be referred to as empirical, conceptual, and ideological.[66] The first relates to a blurring of the distinction caused by empirical changes in the nature of the activity constituting the two spheres. This suggests that the distinction may at one time have reflected empirical conditions, but has ceased to do so. Of concern here is the growing interpenetration of the spheres in that private actors are acting publicly and public actors are acting privately. The former is illustrated by the activities of multi- and transnational corporations, private trade associations, and private arbitrations, or cartels that impact on matters of national public policy, eroding the policy-making autonomy of states. The latter is illustrated by state trading and other economic activities in which states engage as private commercial actors. There appears to be much evidence to support this view.[67] Robert Cox (1996 a) argues that the distinction between the polity and economy, between the state and civil society:

> made practical sense in the eighteenth and early nineteenth centuries when it corresponded to two more or less distinct spheres of human activity or practice: to an emergent society of individuals based on contract and market relations which replaced a status-based society, on the one hand, and a state with functions limited to maintaining internal peace, external defense, and the requisite conditions for markets, on the other. (86)

(continuumization); the creation of stereotypes *(stereotypification)*, dissolving distinctions; and lastly, *loopification*, whereby the ends of the continuum come together. The final stage of loopification is described thus: "one's consciousness is loopified when one seems to be able to move by a steady series of steps *around* the whole distinction, ending up where one started without even reversing direction." He illustrates this last stage in the decline of the public/private distinction in domestic law with the nature of the market and the family as both parts of the private sector.

[66] This discussion further develops the analysis in Cutler (1997).

[67] This trend has been noted by a number of people and forms the subject of a collection edited by Cutler, Haufler, and Porter (1999 a). See also, Held (1995); Gill (1997); and Ruggie (1995 a).

He continues that "[T]oday, however, state and civil society are so interpenetrated that the concepts have become almost purely analytical (referring to difficult-to-define aspects of complex reality) and are only very vaguely and imprecisely indicative of distinct spheres of activity" (ibid.). Cox identifies the internationalization of production and finance as central contemporary developments that are reconfiguring state–society relations and recasting the public/private distinction. In a similar vein, Susan Strange (1995 a: 56) emphasizes the increasing porousness of the boundaries between public and private activities, noting the development of the "defective state," wherein "state authority has leaked away, upwards, sideways, and downwards. In some matters, it seems even to have gone nowhere, just evaporated." The growing significance of nonstate authority and the erosion of state authority has been likened to a re-medievalization of the world (Held, 1995: 137; Strange, 1995 b; Cutler, 2001 b). But, as subsequent chapters illustrate, there is a crucial distinction between medieval and modern authority structures. In the medieval period, private authority operated by virtue of the absence of political authorities desirous or capable of disciplining international commerce, whereas in the modern period private authority operates with the full support of state authorities.[68] Indeed, this volume will show that the contemporary period is experiencing a merging of public and private authority in a transnational managerial and commercial elite committed to neoliberalism and the privatization and globalization of authority. To the extent that contemporary incoherence is a result of the interdelegation or merging of public and private authority, one may identify the distinction, empirically, in the final stage of decline. However, it continues to be invoked to justify the private regulation of international commerce, the explanation of which is linked to conceptual and ideological considerations.

Conceptual uncertainty as to the status of private international law as an autonomous legal order, as an entity *sui generis*, contributes to the obscurity of private international trade relations. This in turn leads to the

[68] See also Held (1995) and Perraton et al. (1997) for the continuing role of the state in the face of forces of globalization.

invisibility of the enhanced "political" authority of the private sphere. The sarcastic observation of a leading scholar, René David (1972 a: 209; see p. 46), that private international law has been "pompously baptised international law" by fuzzy-thinking international lawyers, reflects profound doubt as to the conceptual status of the distinction. The view that private international legal norms are no more than municipal law norms reflects a tension between private international law conceived of as the embodiment of national power and sovereignty and the view that it exists as an extension of, or projection beyond, state territoriality. The latter view challenges the territorial foundations of political/legal authority in that it contemplates the extraterritorial application of legal norms. To the extent that this threatens the orthodoxy of the territorial state as "the geopolitical container for human relationships" and as "coterminous with the minimum self-sufficient human reality" (Neufeld, 1995: 11), the autonomy of private international law poses a multifaceted and deeply subversive challenge to territorial conceptions of authority in international relations. Modern textbooks on international law exhibit a subtle imprecision over the status of private international law, which relates very much to conceptual incoherence as to its status as an autonomous legal order.[69]

Arguably, doubts about the autonomy of private international law have been present since the distinction between public and private international law emerged. However, what intensifies the uncertainty today is the reaffirmation of the public/private distinction in assertions of the distinctive nature of private international trade relations as the source of legitimacy for enhancing and deepening the private regulation of international commerce. This raises the ideological nature and role of the public/private distinction. Private international trade law differs from public international trade law, we are told by trade experts, in its essentially "apolitical" nature. (Schmitthoff, 1961; 1982). Private regulatory arrangements are said to be natural, neutral in application, consensual, efficient, and, ultimately, more consistent with globalizing and privatizing trends than are public regulations. Liberalism reaffirms the vitality of the private/public distinction in the face of its decline. The paradoxical nature of the disjunction evident in elite reaffirmations of the analytical vitality of the public/private distinction and empirical evidence of its decline points to the operation of changing ideological conditions. Karl Klare (1982) emphasizes that the ideological function

[69] For an illustration of conceptual incoherence see Horn (1982: 12–15).

of the public/private distinction is reflective of the role played more generally by legal discourse:

> The peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate. The *modus operandi* of law as legitimating ideology is to make the historically contingent appear necessary. The function of legal discourse in our culture is to deny us access to new modes of conceiving of democratic self-governance, of our capacity for and experience of freedom. (1,358)

He describes the "chameleon-like alterations in public/private imagery" that encode ideological messages, suggesting that the distinction operates most significantly at a symbolic level (ibid., 1390). Indeed, the associations of the private realm with civil society and the market and the public realm with the state and government are powerful symbols. However, Antonio Gramsci (1971: 160) observes that the distinction between civil society and the state is not organic, but methodological. *Laissez-faire* liberalism "is a deliberate policy, conscious of its own ends, and not the spontaneous, automatic expression of economic facts." Moreover, liberalism, Klare (1982: 1416) argues, is caught in a dilemma of being incapable of rejecting a distinction that is vested with such ideological significance and yet which cannot capture human experience. Liberalism responds with the "ever-renewed effort to refract the complexities of social life through the basic dualities like public/private . . . liberal discourse has become an intellectual practice designed to generate images of the world conducing to a belief that one can meaningfully conceive of the realm of social and economic intercourse apart from the realm of politics." The "essence" of the public/private distinction is "the conviction that it is possible to conceive of social and economic life apart from government and law, indeed that it is impossible or dangerous to conceive of it any other way" (ibid.). The distinction operates to deny the mutually constitutive nature of the economic and the political domains, thus inhibiting belief that the institutions that order social life are the product of human agency and therefore can be altered. In the context of trade relations, it operates to obscure the political nature of private trade relations and the role of private trade law in the material and ideological constitution of global capitalism.

The artificiality and untenability of the separation of economics and politics in contemporary international relations has been noted by

students of international relations and economics alike.[70] The separation, as maintained by the public/private distinction, is reproduced by academic and practical lawyers and by governmental and private elites, obscuring the paradoxical result of private actors legitimately exercising public functions.[71] While the reverse situation of public actors exercising private functions is also the case, it does not raise the same concerns of democratic accountability. The public/private distinction is today maintained by powerful liberal mythology, to which discussion will now turn.

Four Liberal Myths

Four myths form the foundation for the distinction between the public and private spheres. They originate in liberal political economy and posit the natural, neutral, consensual, and efficient nature of private exchange relations (Cutler, 1995).

The first myth is that the private ordering of economic relations is consistent with natural or normal economic processes. In this vein, international trade law distinguishes between normal and deviant trade relations. Private international trade law deals with normal and natural activity, while public international law deals with deviant, unnatural behaviour. As David Kennedy (1991) notes:

> [i]n normal situations, governments adopt a passive *laissez-faire* attitude. The regime of "private international law" sustains trade rules about property and contract, mechanisms to stabilize jurisdictional conflicts while liberating private actors to choose forums, and *ad hoc* mechanisms of dispute resolution. The dominant players are private traders, and to a far greater extent than in even the most *laissez-faire* national system, they legislate the rules that govern their trade through contract. And when governments do participate, they operate "commercially" – as private actors. (380)

In contrast, public international trade law deals with unnatural activities such as dumping, cartels, subsidies, price supports, and the like. The public regime is thus regarded as ancillary or "supplemental" to the

[70] See Strange (1995 a; 1995 b). For a critical evaluation of the distinction in the context of Susan Strange's work, see Cutler (2000 b). And see Heilbroner and Milberg (1995). For what continues to be probably the most thoughtful analysis of the relationship between politics and economics in international relations, see Ashley (1983).

[71] See Held (1995: 133) for a similar identification of paradoxical notions of authority in the global economy generated by the internationalization of production and finance.

private, in that it deals with the reduction or punishment of interventionist abnormalities. In contrast, the private regime constitutes normal and natural economic activities.

The second myth posits the neutral and apolitical nature of the private sphere. Liberalism casts the world in a series of dichotomies: the public/private constituting a central division of authority, and the domestic/international another. Under liberalism, private relations are associated with the domain of neutral economic processes, while public relations are related to the realm of politics. As a political theory, liberalism "purports to be neutral, advancing only the goals of liberty and procedural justice . . . Liberal ideology provides the mode of governance, based on liberty, and a dispute resolution process, based on the rule of law" (Purvis, 1991: 100–1; see also Kymlicka, 1992). As a legal theory, liberal-inspired contract law embodies and reproduces the separation of the spheres, associating the private sphere with neutral and objective processes of resource allocation and the public sphere with contentious and political processes of resource distribution (Horwitz, 1979–80). Liberalism deems the private sphere to operate according to neutral principles. It does not question the "rightness or propriety of dividing international life into spheres of sovereign authority," but "presenting itself as a neutral and objective system, liberal legality provides no awareness of the political and moral nature of its hidden substantive commitments" (Purvis, 1991: 102). Contract law is endowed with objective foundations and has the "appearance of being self-contained, apolitical, and inexorable" as it regulates transactions amongst market participants who are presumed to be of equal bargaining power (Horwitz, 1975: 252).[72] Its role is to facilitate exchange, ensuring procedural fairness, but it does not inquire into the substantive fairness of a transaction. Thus the law functions as a "mechanism of exclusion," reproducing "the relationship it posited between law and society," in the attempt "to project a stable relationship between spheres it creates to divide" (David Kennedy, 1988: 8).

The identification of certain types of political activity as "private" and thus, apolitical, removes that activity from public scrutiny and review. This process of transforming public and political activity into private and apolitical activity is a central "structural separation" of capitalism

[72] Horwitz (1975: 254) notes that most of the basic dichotomies in legal thought, including that between law and politics and between distributional and allocational goals, "arose to establish the objective nature of the market and to neutralize and hence diffuse the political and redistributional potential of law."

and may be "the most effective defense mechanism available to capital" (Wood, 1995: 20). It also contributes to the third liberal myth concerning the consensual and noncoercive nature of private exchange relations. Mark Rupert (1995: 22–4) cogently illustrates how the coercive aspects of the exchange relationship are obscured by what appear to be impersonal market forces and natural economic laws. "To the extent that capitalism is supported by an explicitly coercive power, that power is situated in the putatively communal sphere occupied by the state, and appears as law and order enforced in the public interest;" the private sphere is "insulated from explicitly communal and political concerns, the 'private' powers of capital are ensconced in the sanctuary of civil society." Similarly, Hazel Smith (1996: 209) reminds us that the depiction of capitalist economic relations as free and just is merely a formalistic move that obscures the fundamental "unfreedom" of capitalist productive relations.

The fourth liberal myth posits the inherent efficiency of the private regulation of commercial relations. This myth also draws upon the other myths, since, for liberals it is not difficult to derive the value of efficiency from allegedly natural, neutral, and consensual processes. Indeed, the proponents of the enhanced private regulation of international commerce invoke precisely these attributes to support liberal-inspired functional and transaction cost analysis of private regulation (see Cremades and Plehn, 1984; Trakman, 1983). Private regulation is thus said to produce greater efficiencies by reducing the costs of doing business and by achieving greater economies. The superiority of the system of private regulation flows as a natural result from the fairness and efficiency of allowing merchants maximum scope for managing their own affairs. The right of freedom of contract becomes the legal equivalent of the liberal principles of freedom of trade, commerce, and markets.[73]

While some legal theorists explicitly engage in transaction cost analysis to explain the origin and continuing influence of law merchant practices (see Benson, 1988–9; William C. Jones, 1958), it is students of

[73] The influence of liberal economic thought on commercial law is profound. For a brilliant discussion of the liberal foundations of modern contract law see Atiyah (1979). Certainly, among Anglo-American scholars the tendency is to assume *a priori* the validity of liberal economic accounts of the efficiency value of the private international trade regime. See generally, Berman, and Kaufman (1978) and Cremades and Plehn (1984). Economic theories of law, such as that developed by R. A. Posner, explicitly develop transaction cost analysis, although it is related to domestic and not international law. Posner's ideas on the evolution of primitive legal orders do, however, provide interesting suggestions for conceptualizing international law. See Posner (1980 a; 1980 b).

"new institutional theory" who develop the approach most fully.[74] The emergence of an institution such as the law merchant is explained as a response to the transaction and information costs and insecurity experienced by merchants engaging in trade over wide geographical regions. It is argued that the merchant courts provided an efficacious system for settling merchant disputes and for enforcing transactions. The self-enforcement actions of merchants included the imposition of the sanctions of market exclusion, bankruptcy, and loss of reputation and provided the foundation for a system of private adjudication suited to the needs of commercial actors. By centralizing enforcement in merchant courts, the system provided invaluable information about the creditworthiness of those with whom a merchant traded and functioned as a valuable reputation system, enforcing honesty (Milgrom, North, and Weingast, 1990). According to this logic, the system of private enforcement made commercial exchange over time and space possible by lowering the costs of exchange and providing merchants with some security that their agreements would be honored. However, in reviewing the history of the law merchant, subsequent chapters reveal the problems of applying liberal transaction cost analysis to the medieval political economy and then drawing a direct link to modern practices. The problems support the accuracy of charges that new institutionalism has a "need for history" and effectively reduces the political landscape to efficiency arguments (Spruyt, 1994: 532–3). As we will see, the supposed symmetry of the medieval and modern law merchant begins to break down when one considers the absence in the medieval period of a clear conceptual distinction between the public and the private spheres and the shifting boundary between public and private authority structures.

In addition, liberal transaction cost analysis and economic theories of law advance neoliberal discipline by presenting the private ordering of commercial and legal relations as the most effective way of managing interdependence and adjusting to the intensification of global competition. Like the market, private legal ordering is presented as most consistent with freedom and justice.

Michael Walzer (1984: 317 and 319) associates the public/private distinction with the liberal practice of the "art of separation," wherein "political community is separated from the sphere of economic competition and free enterprise." In the private sphere of free economic

[74] A pioneering work in this regard is Milgrom, North, and Weingast (1990). See also North and Thomas (1973); North (1981); and Spruyt (1994).

exchange, there are no restrictions on prices or the quality of goods bought and sold – *caveat emptor* prevails. However, while Walzer justifies the liberal art of separation on the grounds that it is a "necessary adaptation to the complexities of modern life," he recognizes that critics on the left are suspicious of the practice, regarding it as "an ideological rather than a practical enterprise" and "an elaborate exercise in hypocrisy" (ibid.). Indeed, the separation obscures significant temporal differences in the ordering of public and private relations. The conception of a commercial contract founded upon the free will of the parties was an historically specific construct of the bourgeois state and "modelled on the exchange transaction of freely competing owners of commodities" (Habermas, 1994: 75). Private law reduced the relationship of private people to private contracts assuming that the laws of the free market were of a model or natural character. Legal rights ceased to be determined by estate and birth as they had been in the feudal era. Instead, they were determined by "fundamental parity among owners of commodities in the market" (ibid.). The adage "from status to contract" encapsulates the evolution from feudal to capitalist conceptions of property rights. Private law "secured the private sphere in the strict sense, a sense in which private people pursued their affairs with one another free from impositions by estate and state, at least in tendency" (ibid.). As mercantilist regulations more or less disappeared, the private sphere was secured by private law and the force of the state. The law was, in theory at least, supposed to operate amongst equals and in a neutral fashion, protecting commercial freedoms and markets. State intervention was frowned upon as interfering with the "natural" operation of the market, which for merchant law, translated into the ability to predict transaction costs in accordance with rational and calculable expectations.

While liberalism provides a rationale for the distinction between the two spheres, it provides no sense of the historical specificity and the function of their separation. It is simply unhistoric to posit the distinction as a natural division, for it has not always figured as part of the natural world. Moreover, it is reductionist to attribute the complex public–private and state–society relationships to functional efficiency arguments. Transaction cost and efficiency arguments do not capture the complex character of the historical conditions that give rise to different permutations of the private/public distinction. They conflate the modern and medieval periods, missing crucial shifts in the boundary between public and private authority. Nor do they grasp the essentially

coercive and political nature of private commercial exchange relations. However, the complexity of the way in which the rules of private international trade law operate, the contested nature of the relationship between private and public international trade law, the location of the law merchant within this legal framework, and liberal mythology contribute to a lack of understanding of the significance of the law merchant order to the constitution of the global political economy. While subsequent chapters will illustrate the historical specificity of relations between public and private authorities in the context of the emergence and ideology of the bourgeois state, consideration will now turn to how dominant theories in both law and politics also contribute to the obscurity of the law merchant order.