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Globalizing Property Law: An Institutional Analysis

*Amnon Lehavi**

ABSTRACT

This Article identifies the key role that institutions play in moving toward an effective cross-border regime in property law. Property is based on an in rem principle, which should provide a single system for ranking rights, powers, and priorities in assets that applies to all interested parties. In a global context, this feature of property law requires a cross-border legal ordering by an array of domestic and supranational institutions: legislative, administrative, and adjudicative.

The Article argues that the present fragmentation of property norms across national borders, and the incompleteness of supranational institutions that deal with property law, may place limits on the ability to create and enforce a comprehensive global ordering of property rights. This current deficiency impacts a broad plethora of assets: land, tangible goods, monetary claims, intellectual property and other intangible assets, and resources such as tradable emission rights. Whereas "soft law" instruments do not require binding supranational institutions, the need for such institutions proves critical for more ambitious strategies for globalization, such as increasing attempts to provide supranational constitutional protection of the right to property, or establishing a property law infrastructure for a global market in capital, goods, and services.

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I. INTRODUCTION

Institutions play a key role in the ability of top-down actors, such as states, and bottom-up ones, such as individuals or corporations, to promote various strategies for globalization. This Article argues that the challenge of establishing authorized and coordinated institutions

in the global context is particularly difficult—but is nevertheless essential—in the case of property systems.

Property law is based on creating norms for the *in rem* ranking of rights, powers, and priorities in regard to assets.¹ This means that property legal interests, such as ownership, leases, security interests, and servitudes, possess a qualitative trait of general applicability toward a broad class of stakeholders. Property law establishes a set of legal rights, powers, and priorities in regard to various types of assets: land, tangible goods, intellectual property and other intangible assets, and resources such as tradable emission rights. Unlike purely contractual disputes, legal scenarios such as conflicting sale transactions, good faith purchase of voidable or void title to assets, and bankruptcies with multiple creditors fighting over priority to a limited pool of the debtor's assets highlight how property law must often decide conflicts between parties that have no contractual privity or any type of preset arrangement for dispute resolution.²

Accordingly, the *in rem* principle of property should optimally provide a single ranking of property interests for different types of assets through structural and legal features, such as some version of a “closed list” principle, registries and other forms of publicity, and principles for the prioritization of certain interests over others.³ From an institutional perspective, these features of property law call for a dominant role for the legislative, administrative, and judicial branches in devising the list of recognized property rights, establishing formalities for their validation (e.g., through registration), and setting the ranking of property interests in case of conflicting claims.

This Article shows how the challenge of devising a workable property system becomes much more onerous, both qualitatively and quantitatively, in the cross-border context. From an institutional perspective, the *in rem* feature of property requires a cross-border legal ordering by an array of domestic and supranational institutions: legislative, administrative, and adjudicative. This is especially so because unlike cross-border disputes that apply only among contractual parties, the *in rem* feature of property law places practical limits on the ability to engage in private ordering, such as through a contractual dispute resolution clause, to circumvent

1. See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 777 (2001) (distinguishing *in rem* property rights from *in personam* contract rights).

2. AMNON LEHAVI, THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES 39–41 (2013).

3. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 60–66 (2000) (summarizing the consequences of legislatures creating the law of property).

potential problems of legal uncertainty or other types of incongruence of norms across national borders.

At present, the framework of supranational institutions dealing with property law is fragmented and incomplete, and this in turn entails challenges for the ability of top-down or bottom-up actors to move closer to global legal ordering in various contexts of property law.

This Article argues that the need for establishing and operating supranational institutions, whether legislative, administrative, or judicial, depends on the specific globalization strategy chosen in a certain property context. Whereas "soft law" instruments do not require binding supranational institutions, the need for such institutions proves critical for more ambitious strategies for globalization. The Article identifies three types of "hard law" strategies for the globalization of property law, shows how each such strategy currently relies on a certain set of institutions, and demonstrates how a fuller realization of each such strategy may call for better institutions.

The three "hard law" strategies for globalization analyzed in the context of property law are as follows: (1) *conflict of laws strategy*, which aims at improving certainty about the national forum that would have jurisdiction and the law that would apply, while leaving the mainstay of property ordering to the respective domestic systems; (2) *approximation strategy*, usually promoted through treaties or conventions that introduce "minimum standards of protection" in a certain field of law (most prominently in intellectual property), while leaving to states and their courts the chief power of lawmaking and enforcement of such norms; and (3) *supranationalism strategy*, which establishes norms that explicitly enjoy some type of a superior legal status over national norms in case of conflict. Leading examples of the supranationalism strategy are property clauses in binding human rights treaties, such as Article 1 of the First Protocol of the European Convention of Human Rights.⁴

The need for comprehensive and effective supranational institutions is positively correlated with the substantive scope of a certain strategy for promoting cross-border norms. Accordingly, a soft law instrument or a conflict of laws strategy may settle for relatively modest supranational institutions. In contrast, the establishment of binding supranational institutions may prove critical for the approximation strategy, and even more so for the supranationalism strategy. The Article identifies the current gaps in the institutional context and examines future paths for progress.

4. See Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

This Article is structured as follows. Part II demonstrates the complete nature of domestic legal institutions. It shows how in well-functioning states, legal systems include generally acceptable and comprehensive rules that cover the: (1) authority of institutions for lawmaking and enforcement; (2) capability of complete coverage, such that no issue worthy of legal ordering would remain in a vacuum, with no institution authorized to act in the matter; and (3) resolution of potential conflicts among governmental institutions (e.g., legislature vs. judiciary).

Part III shows that unlike nation-states, the international setting is largely lacking in all of the abovementioned institutional aspects. These gaps pose a significant challenge for property law in moving from the domestic level to effective global governance. This Part highlights the interface of sovereignty and institutional capacity in the international arena; the interplay between bottom-up and top-down forces in driving cross-border activities that implicate property law; and the unique features of property law that require both institutional completeness and normative coherence.

Part IV outlines the web of supranational institutions that currently impact property law, based on the taxonomy of the strategies for globalization set out above: soft law instruments, conflict of laws strategy, approximation strategy, and supranationalism strategy. It examines the growing role of supranational tribunal and courts, but also the limited jurisdiction that such judicial institutions have, especially in the context of property disputes between private parties. It underscores global administrative mechanisms that have been developed over the past few years, including a global registry for mobile aircraft equipment and regional patent registries. The biggest challenge remains in regard to global legislative institutions. Relying on theme-specific supranational conventions, property law falls significantly short of global legislative ordering. This is so because the international setting lacks a supranational legislature with comprehensive authority to craft the entire array of *in rem* property interests, implicating both public law and private law aspects. These types of institutional gaps vividly illustrate the persisting impediments to moving toward an effective global governance of property rights.

II. THE COMPLETE NATURE OF DOMESTIC INSTITUTIONS

Under well-established rules of international law, one of the inherent features of a state is the existence of an effective

“government.”⁵ This term should be understood as going beyond the ability to identify some sort of a sovereign power that is generally recognized by persons located inside the state’s territory and by other states outside of it. Securing a “general habit of obedience”⁶ to a person or collective body identified as the sovereign is the first step in moving away from an anarchic state of nature, but it must be complemented by establishing an orderly system of government. For a state to properly function, it needs to have a complete set of institutions that are formally authorized and practically capable of making, administering, and enforcing an entire set of legal norms that would apply within the state’s territory.

Scholarly accounts of legal systems have traditionally sought to identify the types of fundamental legal norms that define a legal system, but they have also realized that such rules cannot be detached from the institutions that make and enforce them. Hans Kelsen focused on the hierarchy of norms in a legal system by identifying the “basic norm” (*Grundnorm*) as the ultimate authoritative source that legitimizes subsequent lawmaking and on which the “validity of all the norms of our legal systems depends.”⁷ Such a basic norm does not hinge, however, on possessing some sort of moral superiority or other substantive virtue. It may be simply the result of identifying the first link in a chain of norms or authoritative acts. The basic norm may come down to the postulation by which “one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained.”⁸ Thus, the fundamental features of a legal system rely on identifying not only certain core norms, but also the institutions that crafted those norms.

H.L.A. Hart mapped the varieties of rules that typify a legal system.⁹ Alongside primary rules that impose certain obligations or duties on norm-bearers (associated with John Austin’s view of legal norms as orders backed by threats),¹⁰ legal systems also include types

5. See Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 19 (Under Article 1, the other features of the state are a permanent population, a defined territory, a government, and the capacity to enter into relations with the other states).

6. H.L.A. HART, *THE CONCEPT OF LAW* 23-24 (2d ed. 1994) (identifying the general traits of a sovereign power based on the works of British legal theorist John Austin).

7. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 115 (Anders Wedberg trans., 1945).

8. *Id.*

9. HART, *supra* note 6.

10. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 199-200 (1832) (noting that one of the distinguishing features of sovereignty is that “the bulk of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons”).

of secondary norms that are essential for their operation.¹¹ One such set of norms concerns “power-conferring rules,” which grant persons certain powers to “mould their legal relations with others by contracts, wills, marriages,” and so forth.¹² Another set of norms includes “rules of recognition,” which help to identify the types of norms considered legally valid and included, therefore, as items in the “authoritative list of rules.”¹³ The identifying criteria under such rules of recognition for viewing certain norms as legally binding may include, *inter alia*, “the fact of their having been enacted by a specific body.”¹⁴ Finally, “rules of change” empower “an individual or body of persons to introduce new primary rules for the conduct of the life of the group.”¹⁵ The variety of secondary norms identified by Hart thus emphasizes the essential role of institutions in a legal system and shows how the identity of a certain institution may implicate the validity of substantive norms.

It is furthermore essential to distinguish between the identity and authority of the *sovereign* in a certain state and the formal capacity of *institutions* in charge of lawmaking and enforcement. This distinction is especially essential in view of the growing dominance, at least among democratic societies, of the idea of popular sovereignty, by which the People at large or the electorate body of citizens is considered to be the ultimate sovereign within the state.¹⁶ The capacity for lawmaking thus hinges on the authority granted by the sovereign, explicitly or implicitly, not only to elected institutions—particularly the legislature—but also to nonelected branches of government, most notably courts, administrative agencies, and other public officials.

As Hart notes, according to this perspective on sovereignty, “the difference between a legal system in which the ordinary legislature is free from legal limitations, and one where the legislature is subject to them, appears merely as the difference between the manner [sic] in which the sovereign electorate chooses to exercise its sovereign powers.”¹⁷ Thus, the lesser limits imposed on the British Parliament in its lawmaking capacity as compared with the US Congress—which is constrained both by the limits of federalism and the superior status

11. HART, *supra* note 6, at 79 (portraying Austin’s theory as insufficient to account for the variety of legal norms).

12. *Id.* at 27–28.

13. *Id.* at 94–99.

14. *Id.* at 95.

15. *Id.*

16. See Kenneth Anderson, *Through our Glass Darkly: Does Comparative Law Counsel the Use of Foreign Law in U.S. Constitutional Adjudication?*, 52 DUQ. L. REV. 115, 122–25 (2014) (asserting that popular sovereignty is the U.S. Constitution’s source of legitimacy).

17. HART, *supra* note 6 at 74.

of the US Constitution over regular lawmaking—can be attributed to the different scope of authority granted by the sovereign electorate to the various types of institutions operating within the legal system.¹⁸ In a representative democracy, the fact that the People or the electorate body is identified as the “sovereign free from all legal limitations” tells only part of the story about how the system of governance and its legal system operate. It is the way in which a lawmaking power is transferred from the sovereign to various governmental institutions that truly defines a state’s legal system.

For a state and its legal system to function properly, one needs to identify the: (1) authority of each institution to make, revise, or enforce legally binding norms; (2) capability of the state’s institutions as a whole of complete coverage of all themes considered to be ones that should be governed by legal norms or authoritative acts; and (3) interinstitutional allocation of power, including resolution of conflicts or other frictions among such institutions. This latter component may require elements of hierarchy within the same governmental branch, such as the capacity of a court of appeals to review and overturn decisions made by courts of first instance,¹⁹ or the decision-making hierarchy that exists within the executive branch.²⁰ Moreover, any legal system must have rules on the potential hierarchy, or any other type of resolution mechanism for potential conflicts, among different branches of government. These mechanisms may obviously be very controversial at times, both legally and politically, with judicial review of legislative acts being a particularly contested issue.²¹ Federal systems also exhibit tensions between state and federal institutions.²² Difficult as these issues may be, every legal system must establish a set of rules for resolving potential frictions among governmental branches about lawmaking powers.

To sum up, in well-functioning states, a legal system must include generally acceptable and comprehensive rules that cover the: (1) authority of institutions for lawmaking and enforcement; (2) capability of complete coverage, such that no issue worthy of legal ordering would remain in a vacuum, with no institution authorized to

18. *Id.*

19. See P.S. ATIYAH & R.H. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 267-97 (1987) (discussing the respective roles of lower and upper courts in the Anglo-American system).

20. See Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1994-2002 (2015) (explaining how to specify general rule-of-law principles in the context of administrative governance).

21. See JOHN H. MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION 137-40 (3d ed. 2007) (examining the concept of judicial review across civil law systems); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519 *passim* (2012).

22. See GEORGE ANDERSON, FEDERALISM: AN INTRODUCTION 21-29 (2008).

act in the matter; and (3) resolution of potential conflicts among governmental institutions. When this is the case, one can speak of the state's domestic institutions as being authorized, complete, and coordinated among themselves.²³

III. THE GLOBAL SETTING: INCOMPLETE INSTITUTIONS AND NORMATIVE FRAGMENTATION

Unlike individual states, the international setting is largely lacking in all three institutional parameters that were identified in Part II, namely: (1) authority to act on an international scale; (2) capability of complete coverage of all legal norms that are relevant for cross-border legal ordering; and (3) interinstitutional mechanisms for resolving potential conflicts both between international and domestic institutions and among different types of supranational institutions. These gaps, generally dubbed here as problems of "incomplete institutions" and "normative fragmentation," pose a significant challenge for the ability of any field of law, and property law in particular, to move from the domestic level to an effective global governance of property law.

As Part IV will show, the potential implications of these institutional deficiencies hinge on the type of "hard law" strategy that is adopted to handle a certain cross-border aspect of property law. A conflict of laws strategy is generally the most modest in its need for establishing supranational institutions, because it relies on states agreeing only about the authorized national forum and the law that would apply. Once this choice has been made, domestic institutions will engage in lawmaking and its enforcement. An approximation strategy requires a more extensive array of international institutions, which would establish the scope and content of the norms that would then serve as a benchmark for state lawmakers tasked with adjusting their local laws. The supranationalism strategy calls for the most comprehensive set of institutions and lawmaking on the supranational level, because by its nature, it relies on the preeminence of such norms for lawmaking, administration of the laws, and their adjudicative interpretation and enforcement. Part IV will map out the institutional landscape, and the deficiencies of the current state of incomplete institutions and normative fragmentation, based on these strategies for globalization.

23. See ROBERT S. SUMMERS, *FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY* 307–08 (2006) (identifying how "second-level systematizing devices" unify diverse institutions "into the coherent whole of an operational legal system" based on ideas such as hierarchy, priorital relations, coordination, and so forth).

Prior to doing so, this Part highlights a few essential points concerning the: (a) interface of sovereignty and institutional capacity in the international arena; (b) interplay between bottom-up and top-down forces in driving cross-border activities that implicate property law; and (c) unique features of property law that require both institutional completeness and normative coherence.

A. *Sovereignty and Institutions: An International Perspective*

Under the conventional account of international law, it is a body of law that exists “between states recognizing common principles and ways of doing things.”²⁴ Unlike the hierarchal or otherwise-coordinated structure of domestic institutions and norms, the international system is viewed in principle as horizontal, meaning that all states are sovereign and equal, and no entity has superior authority over them. This means, therefore, that there is no such thing as global or supranational sovereignty that, by definition, supersedes the sovereignty of individual states.²⁵

That said, the mechanisms of international law do establish institutions and norms with an international validity, or some sort of a supranational reach, binding more than one country.

Treaty-based international law is the chief mechanism by which both institutions and norms are established and are binding on states that have approved and ratified the treaty.²⁶ As such, however, these sources of law do not bind states that have not joined the treaty, or states that decide to retract their membership in the treaty at a later stage.²⁷ As Part IV will show, many treaties not only devise norms that apply to a certain cross-border matter, but also establish institutions in charge of consequent lawmaking and enforcement. The supranational institutions thus become authorized to act and bind states by virtue of the treaty.

The other main source of international law (i.e., custom) refers to certain practices and other forms of conduct that have been broadly accepted by states over time and which can be attributed to a sense of legal obligation—known as *opinio juris* (acceptance of law)—that states feel toward abiding by such a norm.²⁸ While such a customary norm, once identified, can be attributed in principle to all states across the globe, it is also more limited in the sense that by its customary nature, it does not in itself establish institutions authorized to enforce such customary norms, and it might also not

24. MALCOLM N. SHAW, *INTERNATIONAL LAW* 4-5 (7th ed. 2014).
25. *See id.*
26. *See id.* at 66-68.
27. JAN KLABBERS, *INTERNATIONAL LAW* 41-43 (2013).
28. *Id.* at 28-30.

apply to states that have persistently objected to applying such a custom.²⁹ The custom's enforcement would have to rely either on domestic institutions, such as local courts, reaffirming the custom, or on pre-existing supranational institutions, formed by a past treaty, whose authority is viewed as extending to apply and enforce customary international law.

The key lesson that should be derived about the interface between sovereignty and lawmaking institutions in the international setting is that the general concept of sovereignty does relatively little work in explaining the scope of international law when it is viewed in isolation from the institutional perspective. In the domestic setting, the sovereign entity—the People or electorate body—has effective channels, such as general elections or referenda to directly decide normative matters, if needed. The sovereign electorate in a state can thus resolve potential conflicts among government entities, and ensure that there is no legal vacuum because no institution has the capacity to act. In contrast, in the international or supranational arena, there is no global or supranational sovereign electorate that can act directly. This means that cross-border legal ordering will simply not exist without clearly authorized institutions and a normative framework that is both coherent and comprehensive enough.

B. *Top-Down and Bottom-Up Institutions*

Processes of globalization may be driven by top-down forces, i.e., states working together to promote a certain cross-border agenda. Alternatively, such processes can be led by bottom-up drivers, such as corporations or individuals engaging in cross-border market activity, development of technology, interpersonal networks, and so forth. In some cases, these two types of forces may work in the same direction (e.g., when states promote free trade measures that follow up on decentralized cross-border trade). In other cases, these forces may work at cross-purposes, such as when states impose trade barriers that undermine commerce.³⁰

The identity of the driving force for a certain process of globalization has clear institutional implications for the legal

29. For more about the long-standing debate in international law about the “persistent objector rule” as exempting states from abiding by norms that have been otherwise identified as being part of customary international law, see COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L L., INT’L L. ASS’N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 27–29 (2000), <https://ruwanthikagunaratne.files.wordpress.com/2011/04/ila-customary-law-study.pdf> [<https://perma.cc/ZBM4-8N9J>] (archived Sept. 29, 2017).

30. See Amnon Lehari, *Unbundling Harmonization: Public versus Private Law Strategies to Globalize Property*, 15 CHI. J. INT’L L. 452, 459–62 (2015).

ordering of such a process. When states collaborate to facilitate the movement of capital, goods, services, or persons, or to otherwise promote some type of cross-border activity, they are likely to create a top-down institutional arrangement, especially if the scheme is based on an approximation strategy or a supranationalism strategy. For example, the World Trade Organization (WTO) deals with the rules of trade between nations. It is a “rules-based, member-driven organization—all decisions are made by the member governments, and the rules are the outcome of negotiations among governments.”³¹ The institutional structure of the WTO and its dispute settlement mechanism are clearly typified by a top-down approach, wherein member states both make trade policy and take part in the dispute settlement process through an array of international institutions.³²

Oppositely, when a process of globalization is driven largely by an aggregation of decentralized actions taken by individuals and corporations, these forces have to rely at the outset on private ordering mechanisms, mostly through contracts and other types of bottom-up mechanisms for interpersonal coordination. Gunther Teubner points to the spontaneous, grassroots development of a new body of law that “emerges from various globalization processes in multiple sectors of civil society independently of the laws of the nation states.”³³ Teubner notes in particular the emergence of the contemporary *lex mercatoria*—the transnational law of economic transactions—alongside other practices of private global norm production, including the internal legal regimes of multinational corporations, private lawmaking by labor unions, technical standardization, internet arrangements, and international rules on sports.³⁴ A notable international institution that is privately organized is the International Chamber of Commerce (ICC), which seeks to promote “international trade, services and investment.”³⁵ While the ICC has no general binding force on states or individuals, its professional prominence often leads contractual parties to adopt terms of reference crafted by it, and in many cases parties agree to arbitrate contractual disputes before the ICC’s International Court of

31. *The WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Oct. 8, 2017) [<https://perma.cc/P6QQ-MRLM>] (archived Sept. 29, 2017).

32. *See infra* Part IV.C.1.

33. Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3–4 (Gunther Teubner ed., 1997).

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

35. SABINO CASSESE, *THE GLOBAL POLITY* 19 (2012), <http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf> [<https://perma.cc/E8BA-MGH8>] (archived Oct. 8, 2017) (quoting the preamble of the ICC Constitution).

Arbitration.³⁶ Therefore, while there is debate about whether one can truly identify a comprehensive contemporary *lex mercatoria* that allows merchants to bridge gaps created by national norms,³⁷ privately organized institutions, such as the ICC, definitely capture a growing role in the international arena.³⁸

However, these bottom-up institutions have their limits, especially in the context of property law. Contractual parties, including those located across borders, can engage in private ordering if they are displeased with the general laws of contracts in their respective countries or with the default conflict of laws rules governing international contacts. In so doing, parties can resort to privately organized international institutions, such as the ICC, not only by adopting their terms of reference in drafting the contract, but moreover by resolving potential disputes before its court of arbitration, while agreeing on the substantive and procedural rules that would apply. But such an agreement, and the subsequent work of institutions such as the ICC in implementing the parties' contractual freedom, is generally binding only on these parties. The lawmaking and adjudication capacities of such institutions do not generally bind third parties, which may have competing legal claims or causes of action, and that have not been party to the agreement about the underlying contract or the mechanisms for dispute resolution. As Part III.C below highlights, the structure of property law is different, particularly because it purports to set up legal priorities and ranking of property interests that have an *in rem* effect. As such, property law also orders legal relations among parties that have no contractual privity or other preset mechanism for private ordering. This feature of property law places a limit on the power of bottom-up institutions that derive their authority from the explicit consent of the parties. To bind also parties that have not engaged in such private ordering, institutions must derive their authority from the coercive and general legal power of top-down institutions. What this means in the international context is that the power to legislate broadly binding property norms and to resolve conflicts with an *in rem* effect is vested in institutions that derive their authority from the conventional sources of international law. This refers mostly to top-down institutions authorized by international treaties.

36. *Dispute Resolution*, INT'L CHAMBER OF COMMERCE, <http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/> (last visited Oct. 8, 2017) [<https://perma.cc/R8A5-BTSS>] (archived Sept. 28, 2017).

37. See GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 556 (2001). For a historical discussion of merchant law, see Emily Kadens, *Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012).

38. See CASSESE, *supra* note 35.

C. In Rem *Effect of Property Law: Institutional Implications*

Due to the considerable disparities between the substantive and procedural property norms of different nations—including the list and content of the *numerus clausus* of property rights in each system—attempts at facilitating some level of globalization cannot settle for bottom-up institutions for lawmaking and enforcement.³⁹ The cross-border ordering of property requires at least some kind of an interstate agreement about the identity and authority of legal institutions.

Moreover, due to the *in rem* feature of property rights, and the respective need for sufficient clarity, comprehensiveness, and predictability of property rights, the field of property law calls for a considerable degree of legislative lawmaking, even in traditionally common law systems.⁴⁰ The role of legislative institutions is no less crucial in the international setting, where the need to bridge disparities requires a coordinated effort to provide a comprehensive set of rules, whether providing for joint rules on jurisdiction and applicable law in cross-border settings (conflict of laws strategy), a minimal level of similarity among national systems (approximation strategy), or direct establishment of supranational binding norms (supranationalism strategy). At the same time, the subjection of state lawmaking powers to a supranational authority may be particularly sensitive due to the specific association of legislatures with national sovereignty.

Alongside legislative institutions, cross-border property law, under any of the strategies for globalization, requires significant collaboration among executive or administrative agencies and at times also the establishment of an interstate executive body. This is particularly so when a cross-border activity requires the registration, administration, or regulation of property interests. This is demonstrated, for example, in Part IV.D.6, which deals with the international registration of security interests in mobile aircraft equipment.

Finally, any cross-border property regime requires adjudicative institutions, such as courts or tribunals, with authority and practical ability to decide property disputes, while also considering, in appropriate cases, the potential property interests of third parties beyond the litigating parties. As with other types of institutions, the appropriate level (state or supranational) and nature of adjudicative institutions hinge on the type of strategy chosen for globalizing property norms. A conflict of laws strategy focuses on national courts.

39. See Lehavi, *supra* note 30 at 480–83.

40. See Merrill & Smith, *supra* note 3.

An approximation strategy and, moreover, a supranationalism strategy require some type of a cross-border adjudicative institution, whether it is operating alongside domestic courts or is explicitly authorized to preempt national case law. This breakdown of adjudicative institutions will be featured throughout Part IV below.

A final note about the general institutional implications of the *in rem* nature of property law has to do with the interface between private law and public law aspects. Property law deals both with public law issues (such as the scope of permissible governmental intervention with private property rights) and with private law issues (having to do with the entire array of interpersonal legal relations in regard to assets).⁴¹ Domestic legal institutions generally address both aspects, even if in diverging settings or by distinctive institutions, so that there are normally no legal vacuums and no lack of institutions authorized to act on both fronts.

The situation may be different, however, in the international arena. Because the authority of cross-border institutions—be they legislative, administrative, or adjudicative—hinges on identifying an underlying source, the result can be one in which legal norms and respective institutions deal with only one aspect (public or private) of a property law issue. As the next Part shows, this deficiency may at times lead to normative fragmentation and incomplete institutions, which could be detrimental to designing property norms with *in rem* validity in a global context.

IV. INSTITUTIONAL ANALYSIS OF CROSS-BORDER PROPERTY NORMS

This Part offers an institutional analysis of the current landscape of cross-border property norms. The delineation of these norms is based on the different strategies for globalization, starting with soft law strategies, such as model laws, and then moving to the hard law ones: conflict of laws strategy, approximation strategy, and supranationalism strategy.⁴² The main argument cutting through the analysis is that the type of strategy chosen for a certain theme in property law should be correlated with the level (local or supranational) and scope of authority of the institutions tasked with making, administering, and enforcing the norms. A conflict of laws strategy generally requires a treaty that establishes rules on jurisdiction and applicable law, but otherwise relies on domestic judicial institutions. An approximation strategy necessitates a treaty or convention, which establishes the substantive and procedural

41. LEHAVI, *supra* note 2, at 43–45.

42. See *infra* Part I.

norms that need to be equated or approximated. Administration of these norms would usually be carried out by local institutions. Judicial interpretation and interstate dispute resolution of the treaty might require a supranational court or tribunal, while adjudication among private parties would usually be done by local courts. Finally, a supranationalism strategy would usually require granting some sort of preemptive authority to various types of supranational institutions—legislative, administrative, or judicial—while establishing the general allocation of powers among local and supranational institutions.

A. *Soft Law Instruments*

While most of the focus of this Part lies in identifying “hard law” norms and the institutions that make and enforce them, it is also essential to underscore the significant role of “soft law” or private ordering mechanisms in the promotion of cross-border property norms and practices.⁴³

Although such norms are not directly binding on states, soft law or private ordering mechanisms can practically influence the ways in which both states and private actors across borders design and administer arrangements that pertain to property law. The following subparts discuss the work of some top-down and bottom-up institutions in this context.

1. Declarative International Instruments

One of the most prominent institutions that promote soft law mechanisms, touching also on property law, is the quintessential top-down international institution: the United Nations and its various agencies. Part IV.A.2 below will discuss some of the work done by UN agencies in drafting model laws, legislative guides, and practice guides, which are then offered as a model for the different nations of the world. But to start with, it is worth considering the role of the UN General Assembly in adopting a number of nonbinding declarations or resolutions that have a bearing on property law, and which in some cases have influenced property law concepts in various national legal systems. In this sense, these UN declarative instruments can be seen as soft law mechanisms, which nevertheless have had an impact on the global legal landscape.

43. For the general distinction between ‘hard law’ and ‘soft law’ in the international setting, see Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421–24 (2000).

The most prominent example is the 1948 Universal Declaration of Human Rights.⁴⁴ Article 17 reads: "(1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property."⁴⁵ As with all other rights included in the Declaration, the right to property is subject to the provision of Article 29(2) that enables states to limit the right to property in order to respect the rights and freedoms of others or to promote "just requirements of morality, public order and the general welfare in a democratic society."⁴⁶

This somewhat exceptional conception of property, which includes not only private property, but also property held "in association with others," can be attributed to pressures levied by the Soviet Union and its allies prior to adopting the Declaration.⁴⁷ The same kind of resistance to recognizing the special status of private property led the Soviet bloc to veto later attempts to enshrine the right to property in international instruments, such as in the 1966 International Covenant on Economic, Social and Cultural Rights⁴⁸ and in the 1966 International Covenant on Civil and Political Rights.⁴⁹ Article 17 of the Universal Declaration of Human Rights has therefore remained as part of a declaratory instrument, which was not followed by subsequent binding international treaties. As such, the special status of the right to property remains a matter of soft law on the universal scale.

That said, Article 17 has proven to be significant, at least in the sense that it was embraced by various courts around the world for giving content to the right to property on the domestic level. Although courts around the world stress that the Declaration in general has no binding force, some national courts—such as those of India or Sri Lanka—do resort to the various provisions of the Declaration as a tool for interpretation of domestic constitutional provisions.⁵⁰ Some scholars go further to argue that the provisions of Article 17 in

44. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

45. *Id.* art. 17.

46. *Id.* art. 29(2).

47. See JOHN G. SPRANKLING, *THE INTERNATIONAL LAW OF PROPERTY* 10 (2014).

48. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

49. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

50. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law III: The Status of Future of the Customary International Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 287, 299–300 (1995).

particular are now part of international customary law, albeit on a limited scale, and although this right is not universally recognized.⁵¹

Another declarative international instrument that has gained some prominence and which touches on property law is the 2007 UN Declaration on the Rights of Indigenous Peoples.⁵² Article 26 of the Declaration refers specifically to the protection of property interests, by providing, *inter alia*, that “indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁵³ It further calls on states to “give legal recognition to these lands, territories, and resources.”⁵⁴

The Declaration on Indigenous Peoples initially received a cool reception from countries that might be particularly affected by the call to actively validate customary interests. Canada initially rejected the Declaration by arguing that the provisions were “overly broad” and “not balanced” in that they suggested that “indigenous rights prevail over the rights of others.”⁵⁵ Later, however, Canada reframed its position by supporting the Declaration, with the understanding that its provisions were vague enough to allow for various interpretations. The vagueness of the provisions, alongside the soft law nature of the Declaration, therefore, allowed states such as Canada, Australia, and New Zealand to somehow get along with the Declaration. The Declaration currently serves mostly as a symbolic international instrument, and as such, it proves particularly dominant in political campaigns launched by various indigenous and tribal groups around the world, without formally binding the property laws of the respective states.⁵⁶

2. Collaboration on Best Practices, Guidelines, and Model Laws

Numerous international institutions, including UN Agencies and other interstate entities, engage in collaboration and coordination with the purpose of promoting “best practices,” guidelines, or suggested blueprints for domestic law and regulation, including in matters dealing with property law. Therefore, while these international institutions are essentially top-down organizations, the

51. See *id.* at 347 (citing Luis Valencia Rodriguez, *The Right of Everyone to Own Property Alone as Well as in Association with Others*, U.N. Doc. E/CN.4/1993/15 (Dec. 15, 1992)).

52. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

53. *Id.* art. 26(1).

54. *Id.* art. 26(2).

55. Seth J. Frantzman, Havatzelet Yahel & Ruth Kark, *Contested Indigeneity: The Development of an Indigenous Discourse on the Bedouin of the Negev, Israel*, 17 *ISR. STUD.* 78, 83 (2012).

56. See *id.* at 80–81.

products of their labor are soft law measures that do not immediately bind states or any of their governance organs. At the same time, these suggested guidelines or model laws are not entirely powerless. This is so, for example, because the adoption of such measures by a particular state may confer concrete benefits to it, such as when financial support granted by bodies like the World Bank or the International Monetary Fund (IMF) is explicitly or implicitly conditioned on reforming domestic systems, based on such model laws or guidelines.⁵⁷

The following paragraphs highlight the work of some of these international institutions in promoting “best practice” mechanisms, guidelines, and model laws in matters pertaining to property law. The list of institutions and depiction of their work are obviously non-exhaustive.

The Basel Committee on Banking Supervision, an international institution tasked with overseeing banks and other significant financial institutions, is one of the most prominent intergovernmental entities in charge of setting professional standards.⁵⁸ The Basel Committee’s suggested practices operate initially as soft law, but may then be embraced by states, via their central banks, as binding domestic policy. Created in the mid-1970s, in the aftermath of several cross-border crises involving the banking industry, the Basel Committee currently comprises members of G-20 countries, but its professional standards also resonate among, and are often embraced by, non-member states.⁵⁹ In so doing, the Basel Committee also sets the tone for other international institutions engaged in standard-setting, such as the International Organization of Securities Commissions,⁶⁰ and the International Association of Insurance Supervisors.⁶¹

From its inception, the Basel Committee has been occupied not only with promoting general “best practices” across the banking industry, but also with controlling the potential cross-border effects of inadequate standards, such as when the failure of local branches of

57. See generally, Poonam Gupta et al., *Legal and Judicial Reform in Europe and Central Asia* (World Bank Operations Evaluation Dep’t, Working Paper No. 27811, 2002).

58. *About the Basel Committee*, BANK FOR INT’L SETTLEMENTS, <http://www.bis.org/bcbs/about.htm> (last updated Aug. 10, 2017) [<https://perma.cc/YBZ4-9MW8>] (archived Sept. 29, 2017).

59. CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM* 77–78 (2015).

60. INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, https://www.iosco.org/about/?subsection=about_iosco (last visited Oct. 8, 2017) [<https://perma.cc/E5FB-3WYT>] (archived Oct. 4, 2017).

61. INTERNATIONAL ASSOCIATION OF INSURANCE SUPERVISORS, <http://www.iaisweb.org/home> (last visited Oct. 8, 2017) [<https://perma.cc/M45P-FDRA>] (archived Oct. 4, 2017).

foreign banks impacts the relevant domestic market.⁶² Accordingly, the capital adequacy requirements adopted in the 1988 Basel I Accord,⁶³ and revised in subsequent accords, were driven to a large extent by concerns over the arbitrage or differences in regulatory approaches across national boundaries.⁶⁴ Furthermore, more recent accords have sought to close the gaps that still existed in the Basel I Accord, particularly about the criteria for assessing risks. Capital reforms under the Basel II⁶⁵ and Basel III⁶⁶ frameworks seek to more closely coordinate the standards for capital adequacy.⁶⁷

A recent measure taken by the Basel Committee, which has a direct bearing on property law, is the revised Basel III document on “Revisions to the Securitisation Framework” published in July 2016.⁶⁸ Securitization, the process by which loans or other claims to monetary rewards are bundled, packaged, and sold off to investors, played a major role in the subprime lending fiasco, which led to a global financial crisis.⁶⁹ The process of removing risk from the original borrowers, and creating different tranches of securities and derivatives generated from bundled loans, allowed securities market speculators to collude with credit-rating agencies in selling high-risk securities to dispersed and practically ignorant investors across the globe. When interest rates began to rise in 2006-2007, and house values fell below outstanding balances on home mortgages, the chain reaction of overexposure to risk quickly unfolded across borders.⁷⁰ Further, the over-fragmentation of property interests among the various stockholders made it extremely difficult to restructure the underlying debts so as to decrease the devastating effects of the massive foreclosure of underwater assets.⁷¹ Therefore, the need to monitor against the hazards of irresponsible securitization of mortgage-backed assets concerns not only the financial risk of steep

62. BRUMMER, *supra* note 59, at 77.

63. BASEL COMM. ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENTS AND STANDARDS (1988), www.bis.org/publ/bcbsc111.pdf [<https://perma.cc/5EK2-44SV>] (archived Oct. 8, 2017).

64. BRUMMER, *supra* note 59, at 235.

65. BASEL COMM. ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENTS AND STANDARDS: A REVISED FRAMEWORK (2004), <http://www.bis.org/publ/bcbs107.pdf> [<https://perma.cc/T2MG-WKPG>] (archived Oct. 8, 2017).

66. BASEL COMM. ON BANKING SUPERVISION, BASEL III DOCUMENT: REVISIONS TO THE SECURITISATION FRAMEWORK (2016), <http://www.bis.org/bcbs/publ/d374.pdf> [<https://perma.cc/ZD5G-5TJ3>] (archived Oct. 8, 2017).

67. BRUMMER, *supra* note 59, at 243–45.

68. See BASEL COMM. ON BANKING SUPERVISION, BASEL III DOCUMENT, *supra* note 66.

69. BRUMMER, *supra* note 59, at 219–21.

70. *Id.*

71. See David Daña, *The Foreclosure Crisis and the Anti-Fragmentation Principle in State Property Law*, 77 U. CHI. L. REV. 97, 98 (2010).

decreases in the price of securities across global markets, but also the legal risk of inefficient over-fragmentation of the property regime that governs the underlying assets.

The Basel III framework for assessing risks, establishing credit ratings, and constructing the hierarchy of entitlements thus serves the important goal of decreasing the regulatory arbitrage among different national systems—dealing with both property and securities regulation aspects. While the work of the Basel Committee is principally a soft law mechanism, the Committee's prominence creates an effective mechanism that decreases the risks of uncontrolled cross-border securities trade and allows for the development of shared property concepts about securitization.

The United Nations Conference on Trade and Development (UNCTAD), a permanent intergovernmental body established by the UN General Assembly in 1964, is a prominent body in advancing soft law mechanisms tying economic development and international investment.⁷² These instruments have a direct bearing on property law on both the national and supranational levels. This is so because the suggested blueprints for law and regulation concerning economic development may incentivize countries to reform their property law, and land law in particular, especially when UNCTAD's financial support is somehow conditioned on such a legal reform.⁷³ Moreover, international investment, by its nature, has a cross-border effect on property law, especially when investors seek, via an International Investment Agreement (IIA), to protect their property rights beyond the application of the “national treatment” standard by the host country.⁷⁴

A recent example for such a soft law instrument designed by UNCTAD is the 2015 Investment Policy Framework for Sustainable Development.⁷⁵ It is aimed at serving as a “point of reference for policymakers in formulating national investment policies, in negotiating or reviewing IIAs, and in designing concrete policy initiatives to promote investment in priority sectors for sustainable

72. *About UNCTAD*, UNITED NATIONS CONF. ON TRADE AND DEV., <http://unctad.org/en/Pages/aboutus.aspx> (last visited Oct. 8, 2017) [<https://perma.cc/Q2LY-RQU7>] (archived Oct. 4, 2017).

73. *See Projects*, UNITED NATIONS CONF. ON TRADE AND DEV., <http://unctad.org/en/Pages/technicalcooperation.aspx> (last visited Oct. 8, 2017) [<https://perma.cc/N9TH-LRE5>] (archived Oct. 4, 2017) (tying assistance from UNCTAD to approved development projects).

74. *See infra* Part IV.D.4 (discussing the property effects of BITs).

75. *See generally*, UNITED NATIONS CONF. ON TRADE AND DEV., INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2015), http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf [<https://perma.cc/3QLY-C6QT>] (archived Oct. 4, 2017).

development.”⁷⁶ This document identifies, *inter alia*, strategic and normative goals that states should pursue in promoting investment, balancing state commitments to investors with maintaining the state’s regulatory space for development, and launching regional initiatives to promote sustainability-driven investment, especially for cross-border infrastructure development and regional clusters of sector-specific firms.⁷⁷ This soft law mechanism thus seeks to shore up national property laws to promote UNCTAD’s goal of sustainable development and to alleviate property-related tensions over cross-border investment.

The United Nations Commission on International Trade Law (UNCITRAL), another UN-based intergovernmental institution, concerns itself with the “modernization and harmonization of rules on international business.”⁷⁸ UNCITRAL drafts convention texts, model laws, legislative guides, and practice guides in various legal fields touching on commercial law, with the purpose of enhancing interstate coordination and streamlining international trade and investment.⁷⁹ Therefore, alongside the facilitation of hard law instruments, such as the 1980 UN Convention on Contracts for the International Sale of Goods⁸⁰ or the 1988 UN Convention on International Bills of Exchange and International Promissory Notes,⁸¹ UNCITRAL has proven to be a key institution in promoting soft law mechanisms, including in the context of property law.

A prominent soft law mechanism dealing with property law is the UNCITRAL Legislative Guide on Insolvency Law. Published in three parts, between 2004 and 2013,⁸² this legislative guide is

76. *Id.* at 6.

77. *Id.* at 4–6.

78. *About UNCITRAL*, UNITED NATIONS COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/about_us.html (last visited Oct. 8, 2017) [<https://perma.cc/5QF2-G9HT>] (archived Oct. 4, 2017).

79. *See generally* UNITED NATIONS COMM’N ON INT’L TRADE LAW, A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (2013), <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> [<https://perma.cc/PFH3-FJCY>] (archived Oct. 4, 2017).

80. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 25567.

81. G.A. Res. 43/165, United Nations Convention on International Bills of Exchange and International Promissory Notes (Dec. 9, 1988).

82. UNITED NATIONS COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW: PARTS ONE AND TWO (2004), http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf [<https://perma.cc/8SBQ-RK9K>] (archived Sept. 21, 2017); UNITED NATIONS COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW: PART THREE (2010), <http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf> [<https://perma.cc/E7KX-636Z>] (archived Sept. 21, 2017); UNITED NATIONS COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW: PART FOUR (2013), <http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part4-ebook-E.pdf> [<https://perma.cc/6TAH-5BJ4>] (archived Sept. 21, 2017).

intended to “inform and assist insolvency law reform around the world, providing a reference tool for national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.”⁸³ Interestingly, the legislative guide purports to present “different approaches and solutions available” for balancing the interests of debtors, creditors, other stakeholders, and the public at large, so that each legal system would be able to “choose the one most suitable to the local context.”⁸⁴

That said, UNCITRAL’s work on insolvency law is definitely concerned with cross-border effects and the need to better coordinate among legal systems, even if states preserve power over their domestic law. This is particularly so with UNCITRAL’s 1997 Model Law on Cross-Border Insolvency, revised in 2013 to include a “Guide to Enactment and Interpretation.”⁸⁵ The model law refers to situations in which the “insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.”⁸⁶ While the model law suggests that “in incorporating the text of a model law into its system, a state may modify or leave out some of its provisions,”⁸⁷ it also provides that “in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the Model Law into their legal systems.” UNCITRAL thus sees the model law as a “vehicle for the harmonization of laws.”⁸⁸

Finally, the Unification of Private Law (UNIDROIT) also plays a significant role in devising soft law mechanisms dealing with property law. UNIDROIT is an intergovernmental organization set

83. *UNCITRAL Legislative Guide on Insolvency Law*, UNITED NATIONS COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html (last visited Oct. 2017) [<https://perma.cc/J69J-TZ9X>] (archived Sept. 21, 2017).

84. *Id.*

85. United Nations Comm’n on Int’l Trade Law, *Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014), <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> [<https://perma.cc/5396-ZK43>] (archived Sept. 21, 2017) [hereinafter *Model Law on Cross-Border Insolvency*].

86. UNITED NATIONS COMM’N ON INT’L TRADE LAW, *UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY* (1997), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html [<https://perma.cc/8LQT-SHYK>] (archived Sept. 21, 2017).

87. *Model Law on Cross-Border Insolvency*, *supra* note 85, at 25.

88. *Id.* at 24.

up in 1926 by the League of Nations and re-established in 1940 on the basis of a multilateral agreement, the Statute of UNIDROIT.⁸⁹

UNIDROIT's purpose is to modernize, harmonize, and coordinate "private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives."⁹⁰ It drafts conventions, model laws, principles, and legal and contractual guides. In the context of property law, one of its prominent soft law instruments is the 2011 UNESCO-UNIDROIT Model Legislative Provisions on State Ownership of Undiscovered Cultural Objects.⁹¹ This model law identifies the underlying commitment of the state to "take all necessary and appropriate measures to protect undiscovered cultural objects and to preserve them for present and future generations."⁹²

Although the model law focuses on national lawmaking, the theme of cultural objects cannot be understood outside of its cross-border context. The model law should be seen as intertwined with a number of international and regional conventions—dealing with instances of the border crossing of cultural objects due to armed conflicts, thefts, or unauthorized international sales—such as the 1995 UNIDROIT Convention on Stolen or Illegally Imported Cultural Objects.⁹³ The soft law mechanism embedded in the model law on state ownership of undiscovered cultural objects is intended, *inter alia*, to facilitate the ability of states to request restitution of cultural objects that end up in another country. The model law is therefore intended to put states on equal footing as both sovereigns and property owners in remedying illegal cross-border transfers.⁹⁴

B. Conflict of Laws Strategy

Moving to "hard law" strategies, this subpart focuses on institutions that play a prominent role in bridging interjurisdictional

89. INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, STATUTE (last revised 1993), <http://www.unidroit.org/english/presentation/statute.pdf> [<https://perma.cc/24PX-H3WY>] (archived Oct. 8, 2017).

90. *Id.*

91. INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, MODEL LEGISLATIVE PROVISIONS ON STATE OWNERSHIP OF UNDISCOVERED CULTURAL OBJECTS (2011), <http://www.unidroit.org/instruments/cultural-property/model-provisions> [<https://perma.cc/EJV5-NAR5>] (archived Sept. 21, 2017) [hereinafter Model Legislative Provisions].

92. *Id.* at Provision 1.

93. Int'l Inst. for the Unification of Private Law, Convention on Stolen or Illegally Exported Cultural Objects (June 24, 1995), <http://www.unidroit.org/instruments/cultural-property/1995-convention> [<https://perma.cc/ZS28-94QR>] (archived Sept. 21, 2017).

94. Model Legislative Provisions, *supra* note 91.

disparities by employing the conflict of laws strategy. Therefore, the legal instruments produced by such institutions seek, in dealing with cross-border property cases, to improve coordination and certainty about the domestic judicial forum that would have jurisdiction to decide the cross-border case, the substantive and procedural laws that would apply to it, and the extent to which judgements would be enforced in other jurisdictions.

At the same time, the conflict of laws strategy refrains from establishing supranational norms regarding the substance of property law doctrines, or from requiring states to approximate such substantive rules. The mainstay of property law ordering is reserved to the respective domestic institutions. This subpart exemplifies how such institutions work to implement the conflict of laws strategy in the contexts of (a) matrimonial property and succession, and (b) insolvency law.

1. Treaties on Matrimonial Property, Succession

This subpart highlights two types of intergovernmental institutions that have proven dominant in devising conflict of laws instruments on matrimonial property and succession law.

The Hague Conference on Private International Law (HCCH) is an intergovernmental organization, currently comprised of eighty-two members,⁹⁵ with other countries also becoming parties to some of its conventions and other legal instruments.⁹⁶ The key goal of the HCCH is to facilitate a “progressive unification” of the rules of private international law.⁹⁷ The various conventions facilitated by HCCH since its establishment in 1893 thus embrace the conflict of laws strategy.

The thirty-eight conventions adopted to date cover a broad array of private law, commercial law, and civil procedure issues.⁹⁸ In the context of property, one might observe the lack of conventions dealing generally with *in rem* rights pertaining to land, chattels, and other

95. *The Kingdom of Saudi Arabia Becomes the 82nd Member of the Hague Conference*, HAGUE CONF. ON PRIVATE INT'L L. (Oct. 19, 2016), <https://www.hcch.net/en/news-archive/details?varevent=525> [https://perma.cc/V2XJ-P5M7] (archived Sept. 21, 2017).

96. *About HCCH*, HAGUE CONF. ON PRIVATE INT'L L., <https://www.hcch.net/en/about> (last visited Oct. 8, 2017) [https://perma.cc/23MF-LXFG] (archived Sept. 21, 2017).

97. *Id.*

98. For a full list of HCCH conventions, see HAGUE CONF. ON PRIVATE INT'L L. CONVENTIONS, PROTOCOLS AND PRINCIPLES, <https://www.hcch.net/en/instruments/conventions> (last visited Oct. 8, 2017) [https://perma.cc/8GW6-6JCH] (archived Sept. 21, 2017).

assets. Property law issues do receive treatment, however, in the context of matrimonial property and succession.

The Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, which entered into force in 1992, focuses on the applicable laws that apply to matrimonial assets.⁹⁹ Under Article 3, the parties may designate, before their marriage, the law that would apply to their assets, with special provisions pertaining to the designation of the law for all or some of the spouses' immovable property. Articles 6–8 detail the options available to spouses to establish the governance of an applicable law at a later stage. Article 4 lists the criteria based on which the applicable law would be determined, where no agreement exists between the parties. The chief criterion established in Article 4 provides that the matrimonial property regime would be governed by the law of the state in which “both spouses establish their first habitual residence after marriage.”¹⁰⁰ Under any of these scenarios, and with respect to the *in rem* effect of the laws that apply to the matrimonial property, Article 9 establishes the general principle by which “the effects of the matrimonial property regime on the legal relations between a spouse and a third party are governed by the law applicable to the matrimonial property regime in accordance with the Convention,” with some exceptions to this rule detailed in Article 9.¹⁰¹

The Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons—which is not (yet) in force—offers rules on succession that generally validate the choice of applicable laws made by a person in regard to her/his estate, while establishing criteria for determining the applicable law that would apply where no such choice was made.¹⁰²

Other HCCH conventions touch on issues that have a bearing on property interests in similar contexts. Such is the Convention of 13 January 2000 on the International Protection of Adults, in force as of 2009, which deals, *inter alia*, with conflict of laws rules about the property of adult persons who are unable, due to physical or mental disabilities, to take care of their interests.¹⁰³

99. HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONVENTION ON THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES (Mar. 14, 1978), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=87> [<https://perma.cc/SWE6-BLXN>] (archived Sept. 21, 2017).

100. *Id.* art. 4.

101. *Id.* art. 9.

102. HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONVENTION ON THE LAW APPLICABLE TO THE SUCCESSION TO THE ESTATES OF DECEASED PERSONS (Aug. 1, 1989), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=62> [<https://perma.cc/2HAC-94MR>] (archived Sept. 21, 2017).

103. HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS (Jan. 13, 2003),

The HCCH conventions provide the most prominent international framework for the employment of the conflict of laws strategy in the context of property law. Given the fact that legal fields such as marital property and succession are often embedded in locally-determined moral, social, or religious aspects, the work of an intergovernmental institution such as HCCH and its facilitation of a conflict of laws strategy is no small feat. It allows for a significant degree of certainty and predictability in identifying the national laws that would apply to the matrimonial property or succession. This strategy may also enable either third parties outside of the marital household or immediate relatives to reasonably plan their actions about such assets.

A different supranational institution that has largely embraced a conflict of laws strategy in the case of matrimonial property and succession is the European Union (EU). As shown throughout the Article, the EU employs all types of strategies for globalization—or more exactly, regionalization—with respect to property matters. This means that alongside the embracement of the conflict of laws strategy for matrimonial property and succession, the EU also employs the approximation strategy and the supranationalism strategy in other contexts of property law.

Prior to discussing the use of the conflict of laws strategy for matrimonial property and succession, the following paragraphs identify the EU's general structure and competences.

The EU, comprising twenty-eight member states¹⁰⁴ and featuring seven major institutions,¹⁰⁵ is the most extensive supranational framework in the world.¹⁰⁶ The new Treaty on European Union (TEU),¹⁰⁷ Treaty on the Functioning of the European Union (TFEU),¹⁰⁸ and Charter of the Fundamental Rights of the

<https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>
[<https://perma.cc/A2AJ-WF5W>] (archived Sept. 21, 2017).

104. The count still includes the United Kingdom, which issued a formal notice of withdrawal from the European Union on March 29, 2017, following the results of the June 23, 2016 referendum in favor of leaving the EU. *Brexit: The UK's letter triggering Article 50*, BBC (Mar. 29, 2017), <http://www.bbc.com/news/uk-politics-39431070> [<https://perma.cc/6N56-S44S>] (archived Oct. 8, 2017).

105. The seven main EU institutions are the European Parliament, European Council, Council of the European Union, European Commission, Court of Justice of the EU, European Central Bank, and European Court of Auditors. *European institutions*, EUR-LEX, http://eur-lex.europa.eu/summary/glossary/eu_institutions.html (last visited Oct. 8, 2017) [<https://perma.cc/8NU6-WEQQ>] (archived Sept. 21, 2017).

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

107. Consolidated Version of the Treaty on European Union, Dec. 13, 2007, 2012 O.J. (C 326) 13.

108. Consolidated Version of the Treaty on the Functioning of the European Union, Dec. 13, 2007, 2012 O.J. (C 326) 47.

European Union (EU Charter)¹⁰⁹ cover more thematic ground than ever before. At the same time, the EU still falls short of being a full-fledged federal entity.¹¹⁰

Article 2 of the TFEU identifies three distinct categories of EU competence: exclusive, supporting, and shared.¹¹¹ *Exclusive* competence entrusts legislative powers only to the EU, unless members are empowered to act by the EU or work to implement the acts of the Union. The scope of exclusive competence is defined in Article 3(1) of the TFEU, which refers to customs union, competition rules, Euro monetary policy, marine conservation, common commercial policy, and some aspects of external relations addressed in Article 3(2).¹¹²

Supporting competence enables the EU to support, coordinate, and supplement the actions of Member States without superseding their actions in these areas. This competence applies to matters such as protection of human health, industry, culture, tourism, and education.¹¹³

The most intricate type of competence, which is also understood to serve as a residual category, is that of a *shared* competence. Article 2(2) of the TFEU provides that member states “shall exercise their competence to the extent that the [EU] has not exercised its competence” or “has decided to cease exercising its competence.”¹¹⁴ The principal (though unclosed) list of areas of shared competences in Article 4(2) of the TFEU includes eleven items, the most notable of which for the property context is the “internal market.”¹¹⁵ The concept of the internal market, which has been a mainstay of the European economic community from the EU’s inception and which still serves as its major pillar, is articulated in Article 26(2) of the TFEU: “[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.”¹¹⁶

109. Charter of the Fundamental Rights of the European Union, Dec. 12, 2007, 2012 O.J. (C 326) 391.

110. Thus, the EU has some state-like features, such as an autonomous legal order; rules addressed directly to member states; power to legislate; a system of democratic governance; judicial controls; and economic and monetary union. But it also has some significant non-state features, such as reservation of core elements of national sovereignty in matters such as security and defense or taxation; and the lack of concepts such as territory and population. See ALLAN ROSAS & LORNA ARMATI, *EU CONSTITUTIONAL LAW: AN INTRODUCTION* 15–19 (2d ed. 2012).

111. See Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 108, art. 2.

112. *Id.* art. 3.

113. *Id.* art. 6.

114. *Id.* art. 2(2).

115. *Id.* art. 4(2).

116. *Id.* art. 26(2).

It is in the context of the EU's shared competence to promote the "internal market" that one should consider the use of the conflict of laws strategy for matrimonial property and succession.

To start with, Regulation No. 650/2012 on jurisdiction, applicable law, and enforcement of decisions in matters of succession is intended to ensure that a "given succession is treated coherently, by one single court applying one single law."¹¹⁷ At the same time, it "in no way alters the substantive national rules on succession."¹¹⁸ The EU Regulation on succession therefore clearly embraces the conflict of laws strategy.

The Succession Regulation generally establishes the deceased's habitual residence at the time of death as the basis for both national jurisdiction and the law that applies to the succession as a whole.¹¹⁹ While allowing for some flexibility regarding both jurisdiction and applicable law, especially when a person chooses to apply the law of his or her nationality to the succession—if different from the place of habitual residence—the Regulation principally promotes the concept of the unity of the succession.¹²⁰ This has obvious implications for the ranking of cross-border property interests. The entire pool of assets included in the estate is to be governed by a single law. This means that the recognition and prioritization of property interests in regard to assets, including those located outside of the respective territory, are subjected to the unity principle.

In those cases in which there is a divergence between the jurisdiction and applicable law, and the two legal systems differ on the recognition of a certain type of an *in rem* right, Article 31 of the Regulation provides that:

Where a person invokes a right in rem to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State¹²¹

In addition to the abovementioned rules on conflict of laws, the Regulation also establishes a European Certificate of Succession, which is issued by the authorized national court and is recognized in

117. See Regulation 650/2012 of the European Parliament and of the Council, July 4, 2012, 2012 O.J. (L 201) 107.

118. *Succession and wills*, EUROPEAN COMM'N, http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm (last visited Oct. 8, 2017) [<https://perma.cc/FRY4-JH9H>] (archived Sept. 21, 2017).

119. Regulation 650/2012, *supra* note 117, art 2.

120. Jan von Hein, *Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques* (2016) (working paper) (on file with author).

121. Regulation 650/2012, *supra* note 117, art. 31.

all EU countries without any special procedure.¹²² This mechanism allows for an effective enforcement of this type of a conflict of laws strategy.

In June 2016, the EU adopted regulations for implementing “enhanced cooperation” in the area of jurisdiction, applicable law, and enforcement of decisions in property matters concerning both married couples (Council Regulation (EU) 2016/1103)¹²³ and registered partners (Council Regulation (EU) 2016/1104).¹²⁴ Agreed to by eighteen EU member states, this “enhanced cooperation”¹²⁵ follows a conflict of laws strategy in property matters upon the dissolution of spousal relations with a cross-border dimension. In so doing, the “enhanced cooperation” seeks to increase certainty about rules on jurisdiction, applicable law, and enforcement in an area of law otherwise marked by considerable substantive differences among various states. In particular, it seeks to “end parallel proceedings—costing around €1.1bn annually—in various member states whose courts have to settle such property disputes.”¹²⁶

2. Treaties on Insolvency

The EU is also employing the conflict of laws strategy in another prominent field that has a major bearing on property interests: insolvency law. The essence of an insolvency proceeding, and bankruptcy in particular, can be essentially conceptualized as a property law setting: the bankruptcy court must rank competing

122. *Id.* arts. 62–73; Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, 2014 O.J. (L 359) 30.

123. Council Regulation (EU) 2016/1103 of June 24 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, 2016 O.J. (L 183) 1.

124. Council Regulation (EU) 2016/1104 of June 24 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, 2016 O.J. (L 183) 30.

125. Under Article 31 of TFEU, enhanced cooperation allows a group of at least nine Member States to implement measures if all 28 Member States fail to reach an agreement. Other EU countries keep the right to join the enhanced cooperation framework at a later time. Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 108, art. 31.

126. EUROPEAN PARLIAMENT PRESS RELEASE, INTERNATIONAL DIVORCES: NEW RULES ON WHOSE COURTS SETTLE PROPERTY DISPUTES (JUNE 23, 2016), <http://www.europarl.europa.edu/news/en/news-room/20160622IPR33203/international-divorce-new-rules-on-whose-courts-settle-property-disputes> [https://perma.cc/QQ8Q-P3VE] (archived SEPT. 21, 2017).

property interests in deciding how and to whom to allocate priority over a limited pool of assets.¹²⁷ With the ever-growing increase in the number of insolvency proceedings that have a significant cross-border dimension, in the sense that a certain person or corporation has creditors and/or assets in many jurisdictions, the EU has engaged in legislation aimed at providing rules on jurisdiction, applicable law, and enforcement.

Thus, according to Council Regulation (EC) No 1346/2000,¹²⁸ which was recast in 2015 in Regulation (EU) 2015/848,¹²⁹ the debtor's "centre of main interests" is identified as the basis for establishing the territory whose national courts are authorized to open insolvency proceedings.¹³⁰

The law of the member state in whose jurisdiction the insolvency proceedings are opened is generally the applicable law that governs the proceedings.¹³¹ At the same time, according to Article 8, which deals with third parties' rights *in rem*: "[t]he opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets . . . belonging to the debtor which are situated within the territory of another member state at the time of the opening of proceedings."¹³² Article 8 thus seeks to balance the role for a unified settlement of insolvency proceedings with the need to respect and validate *in rem* rights in favor of third parties where certain assets are located.

The essentiality of providing an effective solution for insolvency proceedings with a cross-border element has led to efforts for a similar conflict of laws strategy on a broader scale. As Part IV.A.2 showed, UNCITRAL has been promoting soft law mechanisms, comprising a legislative guide on insolvency law and a model law on cross-border insolvency. At the same time, UNCITRAL is currently considering the possibility of developing a binding international convention on selected aspects of international bankruptcy law.¹³³ This shift seems essential especially because, as of the beginning of 2017, only forty states had adopted some version of the model law on

127. Barry E. Adler, *Bankruptcy as Property Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 206–220 (K. Ayotte & H.E. Smith eds., 2011).

128. Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L 160) 5.

129. Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings, 2015 O.J. (L 141) 19.

130. *Id.* art. 3.

131. *Id.* art. 7(1).

132. *Id.*

133. Comm'n on Int'l Trade Law, Annotated Provisional Agenda for the Fiftieth Session of Working Group V (Insolvency Law), U.N. Doc. A/CN.9/WG.V/WP.141 (Sept. 26, 2016).

cross-border insolvency. It may be the case that UNCITRAL's soft law mechanisms have reached their limits of effectiveness, so that a binding convention would now be required.¹³⁴ The current agenda, though still in early consideration, seems to focus on a conflict of laws strategy, establishing rules on jurisdiction, law, and enforcement of cross-border bankruptcy proceedings.

C. Approximation Strategy

This subpart examines how cross-border institutions implement the approximation strategy, by which binding supranational instruments such as conventions require states to approximate their substantive and procedural norms on a certain theme. Some of the institutions featured below were presented in the contexts of soft law mechanisms and the conflict of laws strategy. The discussion will start, however, with introducing the World Trade Organization (WTO) and its role in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

1. Intellectual Property Conventions

The WTO, established in 1995, is the successor of the 1948 General Agreement on Tariffs and Trade (GATT) as the chief international institution for trade issues. Designed to streamline cross-border trade, the WTO serves as a negotiation forum for resolving trade problems, and specifically for crafting binding international instruments.¹³⁵

The WTO Agreement is actually made up of about sixty agreements, falling into six main parts: (1) umbrella agreement that sets up, *inter alia*, the WTO organization and its different organs; (2)–(4) three agreements, each covering one key area of trade addressed by the WTO: goods, services, and intellectual property; (5) dispute settlements; and (6) reviews of governments' trade policies.¹³⁶

Prior to introducing the TRIPS Agreement and its use of the approximation strategy in the context of intellectual property, one should take note of a significant institutional feature of the WTO: its binding dispute settlement mechanism. In many ways, it is the

134. Bob Vessels, *Towards a Worldwide International Insolvency Convention?*, UNIVERSITEIT LEIDEN: LEIDEN L. BLOG (May 24, 2016), <http://leidenlawblog.nl/articles/towards-a-worldwide-international-insolvency-convention> [https://perma.cc/9B9A-S88C] (archived Sept. 21, 2017).

135. *Who we are*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Oct. 8, 2017) [https://perma.cc/H9UG-DRET] (archived Sept. 21, 2017).

136. JOOST H.B. PAUWELYN, ANDREW T. GUZMAN & JENNIFER A. HILLMAN, *INTERNATIONAL TRADE LAW* 100 (3d ed. 2016).

existence of this institutional feature that enables the WTO to promote and enforce an approximation strategy in the context of intellectual property.

The WTO's dispute settlement mechanism is administered by its Dispute Settlement Body (DSB), which is part of the WTO's General Council, so that all WTO members are members of and may participate in the DSB.¹³⁷ The DSB sets up panels to adjudicate specific disputes among states. The panel's final report is referred to the DSB for formal adoption, which takes place within sixty days unless there is a consensus among member states *not* to adopt it or an appeal has been filed to the WTO Appellate Body.¹³⁸

This institutional structure has a direct bearing on property. This is so because the TRIPS Agreement¹³⁹ was tied to the WTO from its inception as part of a package, and accordingly, the DSB has jurisdiction to adjudicate conflicts between states in matters of intellectual property under TRIPS.¹⁴⁰ This mechanism enables a state to initiate proceedings against another state for taking measures that do not comply with the respondent state's commitments under TRIPS. In contrast, disputes between private parties about an alleged infringement of a certain intellectual property right, whether such a case involves a cross-border dimension or not, are left to the authorized domestic courts.

The TRIPS Agreement advances the approximation strategy for intellectual property rights—which include patents, copyrights, trademarks, geographical indications, industrial designs, and layout designs of integrated circuits—in a number of ways.¹⁴¹

First, it sets out minimum substantive standards of protection to be provided by each national system of the signatory states. Beyond reiterating the minimum standards set out in the Paris Convention on Patents and Trademarks¹⁴² and the Berne Convention on Copyrights,¹⁴³ the TRIPS Agreement goes on to establish additional minimum standards for the different rights.¹⁴⁴

137. *Id.* at 128–31.

138. *Id.* at 135. The negative consensus rule is a fundamental change from the previous dispute settlement system under GATT, where a positive consensus was required to adopt a final report, thus permitting a dissatisfied losing party to block any action on the report. *Id.*

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

140. PAUWELYN ET AL., *supra* note 136 at 708–19.

141. *Id.*

142. Paris Convention for the Protection of Industrial Property, Mar. 20, 1888, 828 U.N.T.S. 305.

143. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221.

144. PAUWELYN ET AL., *supra* note 136, at 708.

Second, TRIPS requires national legal systems to strengthen their enforcement mechanisms, prescribing both civil and criminal procedures.¹⁴⁵ This facet of the approximation strategy thus underscores the institutional role that national bodies must play in ensuring that the cross-border substantive commitments undertaken by signatory states are credible and effective.

Third, TRIPS seeks to ensure the international enforcement of intellectual property rights by subjecting the Agreement to the WTO's binding dispute settlement mechanism, operating through the DSB and backed up by the possibility of trade sanctions in the case of systematic noncompliance.¹⁴⁶ This aspect of TRIPS therefore relies on the general institutional mechanisms that proved essential in making the WTO work.¹⁴⁷ For the approximation strategy to be effectively applied, cross-border and domestic institutions must be mutually reinforcing in meeting the minimum standards set up by TRIPS. This institutional dimension is also what sets TRIPS apart from the earlier generations of intellectual property conventions, which were lacking in domestic and international enforcement.¹⁴⁸ Thus, under Article 33 of the Berne Convention on Copyrights, the settlement of interstate disputes should have been resolved by the International Court of Justice (ICJ), but this provision was subject to state reservations and has never effectively resulted in even a single ICJ dispute settlement process over copyrights.¹⁴⁹

2. Cultural Property

UNIDROIT, the international organization whose work in promoting soft law mechanisms was depicted in Part IV.A.2, has also facilitated several binding international instruments. One such example, employing an approximation strategy, is the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.¹⁵⁰ The Convention, aimed at aiding the "fight against illicit trade in cultural objects," does so by "establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States."¹⁵¹

The Convention's use of the approximation strategy in regard to national legal systems concerns two different types of scenarios: (1) the stealing of cultural objects, whether such an act remains within

145. *Id.* at 709.

146. *Id.*

147. *Id.*

148. *Id.* at 708.

149. Jane C. Ginsburg, *International Copyright: From a 'Bundle' of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC'Y U.S. 265, 278 (2000).

150. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 93.

151. *Id.* para. 4.

the territory of a certain state or whether it involves the crossing of national borders; and (2) the unlawful removal of cultural objects from their state of origin and their transfer to another contracting state.¹⁵² The Convention sets substantial standards for claims of restitution and the right of the possessor, under certain circumstances, to compensation upon such restitution. It gives additional instructions to national courts on how to balance the interests of the different parties—concerning both disputes between private parties and those between a possessor and a foreign government—in the case of an unauthorized transfer of a cultural object across national borders.¹⁵³

The Convention provides that “[n]othing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention.”¹⁵⁴ It therefore could be seen as setting minimum standards for the protection of cultural objects, somewhat similar to the TRIPS Agreement discussed in Part IV.C.1. Moreover, the fact that the Convention relies on national courts for the enforcement of its substantive and procedural provisions, rather than establishing a supranational tribunal for adjudication of disputes over cross-border transfers of cultural objects, further shows how the UNIDROIT Convention generally opts for an approximation strategy.

D. *Supranationalism Strategy*

This subpart highlights the institutional aspects of the supranationalism strategy, which entrusts supranational institutions with binding lawmaking and enforcement powers. The resulting supranational norms enjoy some type of a superior legal status over national norms in case of conflict, even if the application of such norms may be tempered or limited by adopting certain principles that defer to domestic rules in some cases. As demonstrated below, the supranationalism strategy for property law relies on the existence of binding and effective supranational institutions—be they legislative, administrative, or adjudicative. This state of affairs demonstrates that as we move up the ladder of the strategies for globalization from the more constrained ones of “soft law” mechanisms or the conflict of laws strategy, to the midlevel approximation strategy, and up to the most ambitious supranationalism strategy, there is greater need for

152. SJEF VAN ERP & BRAM AKKERMANS, CASES, MATERIALS AND TEXT ON PROPERTY LAW 1121–22 (2012).

153. *Id.*

154. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 93.

effective supranational institutions that may preempt national laws in appropriate cases.

1. EU – Negative/Positive Harmonization

As Part IV.B.1 has shown, the European Union is the most comprehensive international organization in the world, and its different institutions carry out legislative, administrative, and adjudicative roles based on the division of competences between the European Union and the member states. In some cases, such as in matrimonial property and succession, the European Union settles for a conflict of laws strategy, which leaves to the states the power to legislate substantive legal norms. In other cases, the European Union may opt for a more ambitious strategy, such as the supranationalism one. In such instances, EU institutions seek to create EU law that could supersede conflicting national norms.

The move toward supranational norms in the European Union is depicted as comprising “negative” and “positive” components.¹⁵⁵ The negative feature relates mostly to the protection of substantive principles set forth in EU treaties, such as those relating to the freedom of movement of capital, goods, services, and persons within the internal market, enshrined in Article 26 of the TFEU.

To enforce the “negative” component, the Court of Justice of the European Union (CJEU) is entrusted with ensuring that member states and EU institutions abide by EU law, and that it would be interpreted the same way in every state,¹⁵⁶ while granting states some leeway through principles such as proportionality.¹⁵⁷

Another major setting of “negative” harmonization through treaty law, enforced by the CJEU, concerns the Charter of Fundamental Rights of the European Union, which went into force in 2009.¹⁵⁸ The right to property is explicitly articulated in Article 17 of the Charter.¹⁵⁹ The CJEU is thus tasked both with ensuring that state law does not violate the right to property in the Charter, and

155. VAN ERP & AKKERMANS, *supra* note 152, at 1024–25.

156. *Court of Justice of the European Union*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en (last visited Oct. 8, 2017) [<https://perma.cc/3S5T-74VL>] (archived Sept. 21, 2017).

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

158. 2012 O.J. (C 326) 393.

159. Article 17 states as follows: “1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.” 2012 O.J. (C 326) 399.

that other EU law—regulations, directives, etc.—does not contradict this and other rights.¹⁶⁰

Alongside the “negative” component, legislative EU institutions also engage in “positive harmonization,” i.e., promulgating regulations, directives, and other legislative acts that seek to equate or otherwise harmonize private law doctrines, including in matters of property law.

The competence of EU institutions to do so is a highly complicated matter. This is particularly so with respect to Article 114 of the TFEU, which reads, *inter alia*, that EU institutions shall “adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in member states which have as their object the establishment and functioning of the internal market.”¹⁶¹ While this provision could have been interpreted as an open-ended mandate for EU institutions to engage in supranational norm-making, the CJEU has held in *Germany v. Parliament and Council* (the *Tobacco Advertising* case)¹⁶² that the EU legislature does not have a “general power to regulate the internal market” and that a “mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition” forms an insufficient basis to establish EU competence to act.¹⁶³ However, later ECJ cases seem to have opted for a less stringent approach,¹⁶⁴ approving in one case the use of “minimum harmonization” contract legislation adopted under the former version of Article 114 of the TFEU.¹⁶⁵ In the context of property, one could mention the 1993 directive on cultural property,¹⁶⁶ a 2011 directive on late payments

160. For example, in its 2013 *Trabelsi* decision, the CJEU invalidated the Council of the EU’s decision to freeze the assets of one of the petitioners, finding it violative of the petitioner’s right to property. Holding that a limitation on the exercise of the right of property must (1) “have a legal basis,” (2) “refer to an objective of public interest, recognized as such by the EU,” and (3) “not be excessive”—meaning that it “must be necessary and proportional to the aim sought” without impairing the “essential content” of the right—the CJEU held that the Council failed to meet this test in the specific circumstances. Case T-187/11, *Trabelsi v. Council*, ¶¶ 74–117 (May 28, 2013), <http://curia.europa.eu/juris/document/document.jsf?docid=137742&doclang=EN> [<https://perma.cc/79GF-HL3J>] (archived Oct. 8, 2017).

161. Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 108, art. 114(1).

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

163. *Id.* ¶¶ 83–84.

164. Lucinda Miller, *European Contract Law after Lisbon, in THE EUROPEAN UNION AFTER THE TREATY OF LISBON* 247–49 (D. Ashiagbor et al. eds., 2012).

165. Case C-205/07, *Lodewijk Gysbrechts and Santurel Inter BVBA*, 2008 E.C.R. I-9947.

166. Directive 93/7/EEC of the European Parliament and of the Council of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, 1993 O.J. (L 74) 74.

addressing the issue of retention of title,¹⁶⁷ and the regulation on insolvency proceedings.¹⁶⁸ More ambitious efforts, such as designing an EU-level single system of security rights through a European Security Right in movables,¹⁶⁹ or a Eurohypothec for real estate,¹⁷⁰ have so far not come to fruition. The most significant achievement so far in the context of EU “positive harmonization” on property law—the EU Patent Package—will be discussed in Part IV.D.6.

2. European Convention on Human Rights

The evolution of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁷¹ and the European Court of Human Rights (ECHR) is often depicted as one of the most incredible phenomena in the history of international law.¹⁷² The European Convention, signed by forty-seven member states of the Council of Europe,¹⁷³ establishes the right to property in Article 1 of the First Protocol.¹⁷⁴ As the following paragraphs show, the increasing role of the ECHR in interpreting the scope of the right to property, by applying substantive principles such as “fair balance” and “proportionality,” has resulted in a thick body of case law that employs a substantial supranationalism strategy in property law across Europe.

The property jurisprudence of ECHR had initially opted for a relatively narrow review of the deprivation or regulation of property, focusing on lawfulness or a “quality of law” principle, under which

167. Directive 2011/7 of the European Parliament and of the Council of 16 February 2011 on Combating Late Payments in Commercial Transactions, 2011 O.J. (L 48) 1.

168. Commission Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings, 2015 O.J. (L 141) 19.

169. EVA M. KIENINGER, SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW 6 (2009).

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

171. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter CPHRFF].

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

173. For a list of members of the Council of Europe see 47 Member States, COUNCIL OF EUR., <http://www.coe.int/en/web/portal/47-members-states> (last visited Oct. 8, 2017) [<http://perma.cc/B7BS-KAT2>] (archived Sept. 21, 2017).

174. The first paragraph reads: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” The second paragraph states: “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” CPHRFF, *supra* note 171, art. 1.

states had only to demonstrate that they complied with the formal requirements of their legal system and that such rules were sufficiently accessible, precise, and foreseeable. This early approach has thus served as a procedural check, focusing on formalities and due process, rather than on constructing a set of supranational substantive concepts.¹⁷⁵ This approach changed in the 1982 *Sporrunga and Lönnroth v. Sweden*¹⁷⁶ and 1986 *James v. United Kingdom*¹⁷⁷ cases. In these cases, the ECHR developed self-standing criteria of “fair balance” and “proportionality” for reviewing domestic legislation or regulation.¹⁷⁸ These supranational criteria now cover the entire array of rights in the European Convention.¹⁷⁹

Therefore, while leaving states with a “margin of appreciation” in defining both the public purpose and the means required to achieve it,¹⁸⁰ the ECHR’s review of state legislation, administrative actions, and state court decisions has in many cases resulted in the ECHR overturning or otherwise preempting national property law. Property issues are featured prominently in the ECHR’s docket. Between 1959 and 2015, 12.2 percent of all cases in which the ECHR found a violation of the Convention dealt with the right to property.¹⁸¹ This means that during that period, the ECHR found a violation of the right to property in about three thousand cases, leading in many cases to invalidation of the state action that resulted in an infringement.

It should be noted, however, that there is a difference between the scope of the margin of appreciation granted in cases said to implicate the “deprivation” of property under the first paragraph of Article 1 of the First Protocol and in those dealing with regulation that works to “control the use of property” under Article 1’s second paragraph.¹⁸² The first type of case is usually subject to a higher level of scrutiny and stricter application of supranational standards, such as fair balance and proportionality.¹⁸³ On the other hand, when evaluating a regulation that controls the use of property without

175. Tom Allen, *Compensation for Property under the European Convention on Human Rights*, 28 MICH. J. INT’L L. 287, 292–93 (2007).

176. *Sporrunga v. Sweden*, 52 Eur. Ct. H.R. (ser. A) (1982).

177. *James v. United Kingdom*, 8 Eur. Ct. H.R. 123 (1986).

178. *Id.* para. 50.

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

180. Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* 1–4 (2002).

181. EUR. CT. OF HUM. RTS., *OVERVIEW 1959-2015* (2016), http://www.echr.coe.int/Documents/Overview_19592015_ENG.pdf [<http://perma.cc/GC9A-W82A>] (archived Sept. 21, 2017).

182. See CPHRFF, *supra* note 171.

183. Arai-Takahashi, *supra* note 180, at 149–50.

expropriating it *de facto* or *de jure*, the ECHR has granted states a particularly wide margin of appreciation to design an underlying policy, choose the means to achieve the public goal, and evaluate the effects such means have on property.¹⁸⁴

With this differentiation in mind, the jurisprudence of the ECHR currently serves as probably the most extensive judicial application of the supranationalism strategy in property. This is made possible first and foremost by the institutional power granted to the ECHR and its expansive right of standing.¹⁸⁵ The ECHR serves, therefore, as a clear example of how a supranationalism strategy in property law hinges to a large extent on effective supranational institutions.

3. American Convention on Human Rights

The American continent is home to a regional supranational ordering that has a bearing on property law, although the scope and authority of the Organization of American States (OAS) and its various institutions, presented below, is significantly narrower than the European context.

The OAS, established in 1948 and currently comprised of all of the continent's thirty-five states, has adopted a series of instruments, including ones intended for the protection of human rights.¹⁸⁶ The key binding instrument adopted by OAS is the American Convention on Human Rights, which was signed in 1969 and went into force in 1978.¹⁸⁷ So far, twenty-five OAS Member States have ratified the Convention.¹⁸⁸ Interestingly, the United States and Canada have not done so.¹⁸⁹

The two key OAS institutions operating under the American Convention are the Inter-American Commission on Human Rights, tasked with, among other things, submitting petitions for alleged

184. AGOSI v. United Kingdom, 108 Eur. Ct. H.R. (ser. A) para. 52 (1986) (“[T]he State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”).

185. BATES, *supra* note 179, at 319–49.

186. INTER-AMERICAN COMM’N ON HUM. RTS., INTRODUCTION, http://www.oas.org/en/iachr/mandate/basic_documents.asp (last visited Oct. 8, 2017) [<http://perma.cc/3539-KTP5>] (archived Sept. 21, 2017).

187. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [hereinafter ACHR].

188. For a list of the signatories and the current status of ratifications, see *Multinational Treaties, American Convention on Human Rights*, ORG. OF AM. STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Oct. 8, 2017) [<http://perma.cc/R9ER-AMTB>] (archived Sept. 21, 2017).

189. *Id.*

violations of human rights,¹⁹⁰ and the Inter-American Court of Human Rights, authorized to apply and interpret the American Convention following such petitions.¹⁹¹ The work of these institutions plays a significant role in the ability of the American Convention to allow for some kind of a supranationalism strategy in human rights, including under Article 21, which articulates the right to property.¹⁹² The most prominent cases handed down by the Court, according to Article 21, have dealt with indigenous tribes' rights to land.¹⁹³

4. Bilateral Investment Treaties

International investment treaties, prominently taking the form of Bilateral Investment Treaties (BITs), are a burgeoning phenomenon. As of 2016, BITs numbered about 2,950 worldwide, following a dramatic rise in the early 1990s, with about 350 other

190. *What is IACHR?*, INTER-AMERICAN COMM'N ON HUM. RTS., <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Oct. 8, 2017) [<http://perma.cc/VGV8-DCTC>] (archived Sept. 21, 2017).

191. INTER-AMERICAN COURT OF HUMAN RIGHTS, <http://www.corteidh.or.cr/corte/estatuto.cfm?lang=en> (last visited Oct. 8, 2017) [<http://perma.cc/W72Q-TAFZ>] (archived Sept. 21, 2017).

192. Article 21 reads: "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law." ACHR, *supra* note 187.

193. See, e.g., *Sawhoyamaxa v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (2006). The Sawhoyamaxa tribe argued that the government of Paraguay had failed to complete its own initiative to recover part of the ancestral lands of the tribe of over 14,000 hectares in the Chaco region of Paraguay, even though Paraguayan law recognizes the right of indigenous peoples to preserve their way of life in their habitat and to protect the claimed lands. The government contended that, although it was committed to solving the matter, the lands in question had been formally purchased by a German citizen, who uses the land for beef production. Consequently, the executive branch's efforts to expropriate the land had been met with staunch resistance by the legislature in view of the provisions of the 1993 BIT between Germany and Paraguay. In March 2006, ruling in favor of the tribe, the Inter-American Court reasoned that the enforcement of bilateral investment treaties may not allow a state to infringe its obligations under the American Convention. As for the problem of conflicting rights in the land, the Court reasoned that although it is 'not a domestic judicial authority with jurisdiction to decide disputes among private parties,' it is nevertheless competent to 'analyze whether the State ensured the human rights of the members of the Sawhoyamaxa Community.' According to the Court, the government's recognition of the tribe's rights to traditional lands remains 'meaningless in practice if the lands have not been physically . . . surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right . . . are lacking.' The court ordered the State to adopt measures to return the land to the Sawhoyamaxa Community. *Id.* paras. 136–43. For further elaboration, see Amnon Lehavi, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 452–55 (2010).

treaties—such as those dealing with free trade—including special provisions about protection of investments.¹⁹⁴ BITs tie together not only developed-developing country dyads, but also developed country dyads and developing country dyads. Just about every country is party to at least one such treaty.¹⁹⁵ As the following paragraphs show, BITs prove to be a significant force in the implementation of a supranationalism strategy (albeit in the form of *bilateral* treaties), due to the focus of the term “investment” on property rights and the institutional role of independent arbitration tribunals.

To put things in historical context, the first BIT is commonly traced to the agreement signed in 1959 between Germany and Pakistan in the aftermath of the end of colonialism and the decline of customary international law norms on the protection of foreign investments.¹⁹⁶

During the 1950s, a number of newly independent countries embarked on a series of massive expropriations of properties and enterprises controlled by foreign investors from Western economies. Nationalizations and expropriations have been a recurring theme in international investment, reaching another peak during the 1970s, and never truly disappearing.¹⁹⁷

Despite the slow start, the number of BITs grew from a handful to a few dozen each year following a series of key events—notably, the debt crisis of developing countries in the 1980s and the collapse of the Soviet bloc—and in response to the advancement of a neoliberal policy by the World Bank and the International Monetary Fund. The current scope of BITs extends, however, well beyond the paradigm of a developed, capital-exporting country conditioning the flow of investments into a capital-dependent developing country on signing a BIT. Capital is currently flowing also from “South” to “North” through sovereign wealth funds, government subsidiaries, and private corporations based in China, Russia, the Persian Gulf, and elsewhere.¹⁹⁸

From a legal and institutional perspective, BITs typically implement three related measures: (1) a commitment by host

194. UNITED NATIONS CONF. ON TRADE AND DEV., WORLD INVESTMENT REPORT – INVESTOR NATIONALITY: POLICY CHALLENGES 101–02 (2016), http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf, [http://perma.cc/3SYL-NMZC] (archived Sept. 21, 2017).

195. For a list of International Investment Treaties, see *International Investment Agreements Navigator*, INV. POL’Y HUB, <http://investmentpolicyhub.unctad.org/IIA> (last visited Oct. 8, 2017) [http://perma.cc/F65M-AA6D] (archived Sept. 21, 2017).

196. Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L. & POL’Y 157, 169 (2005).

197. Amnon LeHAVI & Amir N. LICHT, *BITs and Pieces of Property*, 36 YALE J. INT’L L. 115, 120 (2011).

198. WORLD INVESTMENT REPORT, *supra* note 194, at 3–12.

countries to a certain set of substantive standards of treatment for foreign investment; (2) a direct right of action for investors against host countries for an alleged breach of these commitments; and (3) a resolution of disputes by international arbitration, most often by the International Centre for Settlement of Investment Disputes (ICSID), which is affiliated with the World Bank.¹⁹⁹ The substantive commitments that states undertake in BITs typically include the duties of national treatment, most-favored-nation treatment, fair and equitable treatment, and guarantees of compensation with respect to expropriation (direct or indirect). The term “investment” is typically defined as comprising a list of rights in various assets, with immovable property featured regularly in such lists, and the types of property rights covered in BITs, including not only ownership but also leases, mortgages, liens, pledges, etc.²⁰⁰

Consequently, BIT jurisprudence has gradually shifted toward a “property discourse,” focusing on investors’ property rights as the object of legal protection, and balancing these rights against states’ legislative and regulatory powers, while also borrowing from the property jurisprudence of the European Convention, the US Constitution, and other legal instruments.²⁰¹

Recent years have also seen dramatic growth in the number of arbitration cases. By the end of 2015, the total number of known treaty-based cases stood at 696, with a record of seventy new disputes filed during 2015. So far, 107 countries have been sued at least once for an alleged breach of a BIT.²⁰² Moreover, the success rate of investors in such arbitrations has been significant. Out of all the decisions made on the merits of the case up until the end of 2015, a majority of the cases—60 percent—have been decided in favor of the investor.²⁰³ This means that the interpretation of BITs and the consequent protection of “investments” go well beyond the application of host governments’ laws, and thus implement a supranationalism strategy.

199. INTERNATIONAL CENTRE FOR SETTLEMENT FOR INVESTMENT DISPUTES, <https://icsid.worldbank.org/en/> (last visited Oct. 8, 2017) [<https://perma.cc/2KQD-T5DG>] (archived Oct. 8, 2017).

200. *International Investment Agreements Navigator*, *supra* note 195.

201. Lehavi & Licht, *supra* note 197, at 128–32.

202. UNITED NATIONS CONF. ON TRADE AND DEV., INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENT IN 2015, at 2 (2016), <http://investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf> [<http://investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf>] [<http://perma.cc/9E3A-6LZ8>] (archived Sept. 21, 2017).

203. *Id.* at 7.

5. European Unified Patent

The EU is currently in the process of introducing a unitary patent package, which will include an EU-wide registry for patents and a Unified Patent Court.²⁰⁴ The patent package will introduce a significant supranationalism strategy for this type of intellectual property, going well beyond the current approximation strategy embedded in TRIPS. This scheme serves as yet another vivid example of the centrality of authorized institutions—here, the current institutions of the EU and the new court—for the supranationalism strategy.

The unitary patent is the first piece of the EU patent package.²⁰⁵ It is based on two EU regulations that went into force in 2013. Regulation (EU) No. 1257/2012 on “implementing enhanced cooperation in the creation of unitary patent protection”²⁰⁶ lays the foundations for a unitary patent, which would be granted by the European Patent Office,²⁰⁷ and to which a unitary effect for the territories of the twenty-six participating states (all EU countries except for Spain and Croatia) would be given after its grant.²⁰⁸ Council Regulation (EU) No. 1260/2016 on “applicable translation arrangements”²⁰⁹ sets out the translation arrangement required for such unitary protection across the twenty-six participating states.

Both regulations will be applicable once the Agreement on a Unified Patent Court,²¹⁰ signed by twenty-five EU member states in February 2013, has been ratified by at least thirteen states. As of

204. *Unitary Patent & Unified Patent Court*, EUROPEAN PATENT OFFICE, <https://www.epo.org/law-practice/unitary.html> (last visited Oct. 8, 2017) [<http://perma.cc/2ZB9-VJHM>] (archived Sept. 21, 2017).

205. *Id.*

206. Commission Regulation 1257/2012 of the European Parliament and of the Council of 17 December 2012 on Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, 2012 O.J. (L 361) 1.

207. The European Patents Office (EPO) is one of the two bodies of the European Patent Organization (alongside the Administrative Council). EPO has 38 member states across Europe. *European Patent Organization*, EUROPEAN PATENT OFFICE, <https://www.epo.org/about-us/organisation.html> (last visited Oct. 8, 2017) [<http://perma.cc/3X6W-85JH>] (archived Sept. 21, 2017).

208. *Unitary Patent*, EUROPEAN PATENT OFFICE, <https://www.epo.org/law-practice/unitary/unitary-patent.html> (last visited Oct. 8, 2017) [<http://perma.cc/KZ9T-J9RT>] (archived Sept. 21, 2017).

209. Commission Regulation 1260/2012 of the European Parliament and of the Council of 17 December 2012 on Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, 2012 O.J. (L 361) 89.

210. For the full text of the Agreement on a Unified Patent Court, see 2013 O.J. (C 175) 1.

February 2017, twelve member states have already ratified the Agreement.²¹¹

The Unified Patent Court will have exclusive jurisdiction for litigation over European patents with unitary effect. It will include a Court of First Instance, a Registry, and a Court of Appeal.²¹² The Unified Patent Court will thus become the second EU-level supranational court, after CJEU.

6. International Registry of Interests in Mobile Equipment

Aircraft are probably the quintessential example of assets that constantly defy national borders in the age of globalization. With about fifty thousand routes being served globally and one hundred thousand flights per day,²¹³ the movement of aircrafts across national borders is a trivial matter, but its legal implications are not. This is especially so with respect to security interests in aircrafts and their equipment, and the enormous difficulties that financiers/creditors might face in enforcing their property rights in view of such a constant movement of the underlying asset.²¹⁴ When a security interest over the aircraft is registered in one country, but the vehicle is located in the territory of another country when foreclosure is required, conflict of laws rules and the *lex rei sitae* principle may prove particularly problematic for the creditor and other stakeholders. This problem is even more acute than in the case of conventional commercial goods, in which the financier/creditor may have some advance knowledge about the cross-border destination of the goods. In the case of an aircraft, the underlying asset may be found at any point in the world at any given time. The property strategy that has been devised to address this problem presents what may be considered the most ambitious version of a supranationalism strategy today: a global registry.

The UNIDROIT Convention on International Interests in Mobile Equipment,²¹⁵ and the Protocol to the Convention on International

211. For a list of the current state of ratifications, see *Agreement on a Unified Patent Court*, EUROPEAN COUNCIL, <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2013001> [<http://perma.cc/B2Y2-BZCL>] (archived Sept. 21, 2017).

212. *Unified Patent Court*, EUROPEAN PATENT OFFICE, <https://www.epo.org/law-practice/unitary/upc.html#tab1> (last visited Oct. 8, 2017) [<http://perma.cc/G3TC-KB8J>] (archived Sept. 21, 2017).

213. The overall number of flights relates to both domestic and international flights. Gunner Garfors, *100 Flights a Day*, GARFORS GLOBE (June 2, 2014), <http://www.garfors.com/2014/06/100000-flights-day.html> [<http://perma.cc/7WZQ-YEJ7>] (archived Sept. 22, 2017).

214. VAN ERP & AKKERMANS, *supra* note 152, at 1109–110.

215. Convention on International Interest in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285 [hereinafter Cape Town Convention].

Interests in Mobile Equipment on Matters Specific to Aircraft Equipment,²¹⁶ ratified so far by seventy-three countries,²¹⁷ establish this unified registry system.²¹⁸ The Convention, typically referred to as the Cape Town Convention, relies on three core institutional and legal features.²¹⁹ First, it establishes an “international interest” in aircrafts or their equipment—airframes, aircraft engines, and helicopters—that is recognized by all ratifying states.²²⁰ Second, it sets up an international registry, which provides for the electronic registration of such “international interests,” with priority in case of conflicting interests being determined on a “first-to-file” basis.²²¹ A registered “international interest” prevails also over an unregistered interest, even if the holder of the registered interest actually knew of that unregistered interest.²²² Third, the Convention provides interest holders with various remedies in the event of default.²²³

The Cape Town Convention establishes the Registrar, as well as the Supervisory Authority, which is charged, *inter alia*, with establishing administrative procedures, supervising the Registrar, setting fees to be charged for the services, and reporting to the contracting states.²²⁴ The Convention provides, therefore, the supranational *administrative* institutional framework required to operate the international registry and to register the “international interests.”

At the same time, the Convention does not establish a supranational court or another *adjudicative* body in charge of interpreting and applying the Convention or of enforcing the international interests. In this aspect, the Convention’s institutional structure is fragmented.

Moreover, the Convention does not establish a self-sufficient legal system that covers all aspects of conflict of laws issues regarding

216. Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, 2307 U.N.T.S. 517.

217. In some cases, the Convention has been ratified but has not yet gone into force in that state. For the current status of the Convention, see *Convention on International Interests in Mobile Equipment*, INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, <http://www.unidroit.org/status-2001capetown> (last visited Oct. 8, 2017) [<http://perma.cc/D2WV-C24S>] (archived Sept. 22, 2017).

218. Additional Convention Protocols on railway equipment and space assets are not yet in force. SPANKLING, *supra* note 47, at 60.

219. *Id.* at 60–62.

220. *Welcome to the International Registry*, INT’L REGISTRY OF MOBILE ASSETS, <https://www.internationalregistry.aero/ir-web/> (last visited Oct. 8, 2017) [<http://perma.cc/PR53-AUPR>] (archived Sept. 22, 2017).

221. *Id.*

222. SPANKLING, *supra* note 47, at 61.

223. *Id.*

224. Cape Town Convention, *supra* note 215, art. 17.

both jurisdiction and applicable law.²²⁵ As for jurisdiction, the Cape Town Convention does not include a default rule on jurisdiction.²²⁶ This means that if a legal proceeding under the Convention is not covered by one of the specific scenarios set out below, the question of jurisdiction will be decided by the court of the forum state in which proceedings have been initiated, based on its internal conflict of laws rules.²²⁷

The specific scenarios that are covered by the Convention in regard to jurisdiction include: (1) the freedom of the parties to choose the court of any of the contracting states, and to award exclusive jurisdiction to such a court;²²⁸ (2) the authority of the court chosen by the parties, or of a court in whose territory the equipment is located, to grant some types of temporary relief under Article 13 of the Convention, with other types of temporary relief granting authority to the court in whose territory the debtor is situated,²²⁹ and (3) the granting of exclusive authority to award damages or make orders against the Registrar to the courts in which the Registrar has its center of administration.²³⁰ In the case of the registry of aircrafts, this center is located in Ireland.²³¹ Moreover, the Convention explicitly provides that the jurisdictional rules will not apply to insolvency proceedings.²³² The rules on jurisdiction are thus incomplete in a number of ways.

As for the applicable law, although the “international interest” should be supranational in nature, many substantive and procedural issues may still require further articulation during the legal proceedings. Questions concerning matters within the scope of the Convention, but not settled by its substantive law provisions or by agreement of the parties, would be resolved by domestic substantive laws. Article 5 of the Convention gives the gap-filling mandate mostly to the court of the forum state to determine the complementary substantive law that would apply.²³³

Summing up, the Cape Town Convention is truly innovative in its particular application of the supranationalism strategy for property law. It is the first global (applying to seventy-three states) registry system for any form of property rights. Moreover, although it focuses on security interests, the ability to register the title of the

225. Karl F. Kreuzer, *Jurisdiction and Choice of Law under the Cape Town Convention and the Protocols Thereto*, CAPE TOWN CONVENTION J. 148, 149–51, (2013).

226. *Id.*

227. *Id.*

228. Cape Town Convention, *supra* note 215, art. 42.

229. *Id.* art. 43.

230. *Id.* art. 44.

231. Kreuzer, *supra* note 225, at 154.

232. Cape Town Convention, *supra* note 215, art. 45.

233. Kreuzer, *supra* note 225, at 156–57, 163–64.

seller/financier under a reservation-of-title clause also expands the scope of the system to include an ownership registry.²³⁴ In the sense of defining a genuine "international interest," it is the most ambitious manifestation of the supranationalism strategy.

The institutional facets of the Cape Town Convention and its Protocols show the prospects, but also the current limits, of bypassing the national systems. The existence of the Registrar and the Supervising Authority allow for a truly universal registration of security interests and a single ranking of priorities of property interests to the underlying asset. At the same time, the lack of a supranational court or an adjudicative body may allow for locally based arbitration in interpreting the Convention and its application. Moreover, the reliance of the Convention's rules, regarding both jurisdiction and applicable law, on the domestic conflict of laws rules of the forum state allows for some uncertainty among the various stakeholders. This somewhat undermines the ability of the international registry of security interests in aircrafts to be truly detached from national rules.

V. CONCLUSION

Institutions play a key role in the ability of top-down or bottom-up forces to promote the various strategies for globalization. The challenge of establishing authorized and coordinated institutions is particularly acute in the case of property law. Property rights are based on an *in rem* principle, which should optimally provide a single ranking of property interests for different types of assets through structural and legal features, such as some version of a "closed list" principle, registries and other forms of publicity, and principles for prioritization of certain interests over others.

In a global context, this feature of property law requires a cross-border legal ordering by an array of domestic and supranational institutions: legislative, administrative, and adjudicative.

As this Article demonstrates, whereas "soft law" instruments or a conflict of laws strategy may not require binding supranational institutions, the establishment of such bodies may prove to be critical for the approximation strategy, and even more so for the supranationalism strategy.

The scope and authority of such supranational institutions, and legislative institutions in particular, is currently still fragmented and incomplete. This institutional deficiency in turn entails challenges for the ability of bottom-up or top-down forces to move closer to a

234. SPRANKLING, *supra* note 47, at 61.

supranational ordering in the various contexts of property law. Binding supranational institutions with comprehensive lawmaking power are essential to advance the globalization of property law.
