PRIVATIZING INTERNATIONAL LAW

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THE old understanding of international law as something created solely by and for sovereigns is defunct. 1 Today the produc-

1 Jeremy Bentham, who originated the term “international law,” saw it as a project to promote general welfare, principally through “general and perpetual treaties” enacted by sovereigns. Jeremy Bentham, Principles of International Law, in 2 The Works of Jeremy Bentham 550 (John Bowring ed., Edinburgh, Simpkin, Marshall & Co. 1843). He also called for the “homologation” of custom, id. at 540, presumably by sovereigns. The objects of his scheme were sovereign acts, namely the renunciation of treaties that convey commercial preferences or of war or alliances to obtain them. Id. at 550; see also Mark W. Janis, Jeremy Bentham and the Fashioning of “International Law,” 78 Am. J. Int’l L. 405, 409 (1984) (“[H]e assumed that international law was exclusively about the rights and obligations of states inter se and not about rights and obligations of individuals.”) For modern conceptions of international law, before the recent rise of privatization, see J.L. Brierly, The Law of Nations (6th ed. 1963), which defines international law as:

[T]he body of rules and principles of action which are binding upon civilized states in their relations with one another. . . . [A]s a definite branch of jurisprudence the system which we now know as international law is modern, . . . for its special character has been determined by that of the modern European state system . . . .
tion and enforcement of international law increasingly depends on private actors, not traditional political authorities. As with other public services that we used to take for granted—schools, prisons, energy utilities, and transportation and telecommunication networks—privatization has come to international law.  

Examples abound. Most multinational treaties of any significance now emerge from negotiations where nongovernmental organizations (“NGOs”) take a vocal and influential part. In recent years, formal state-to-state dispute resolution, whether in the World Trade Organization (“WTO”) or through binational arbitration, has brought in private amici to shape the arguments and the terms of debate. A committee set up by a Paris-based private club drafts the terms employed in the great majority of contracts for the international sale of goods, in particular the terms of payment, and then provides the arbitration mechanism that resolves disputes under these contracts. Another private-industry committee continu-

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Id. at 1; see also Restatement (Third) of the Foreign Relations Law of the United States § 102(1) (1987) (characterizing rules of international law as those “that [have] been accepted as such by the international community of states”).


The promulgation of these standardized contractual terms goes back to the 1930s, but their use in international commerce has grown significantly in the last three decades. See Paul B. Stephan, The Futility of Unification and Harmonization in Interna-
ously updates the detailed terms used in derivative contracts. The minimum international standards for testing drugs on human subjects resulted from a lawsuit between a major pharmaceutical company and its alleged victims. The obligation of multinational businesses to boycott a racist regime similarly rests on a private lawsuit, not on legislation or a treaty. A private arbitration service run by a Virginia nonprofit company determines when internet domain names intrude on the intellectual property of others. A private Swiss nonprofit organization staffed largely by Swiss nationals makes authoritative pronouncements on the laws of war. Some jurists have argued, and a few judges have agreed, that private persons possess a non-waivable right to bring to court claims based on the violation of some norms of international law, even in the face of international treaties or domestic laws barring such litigation.
As these examples indicate, increasing the role of private actors in the making of international law has not meant the disappearance of the state. Although private groups may frame the terms of a treaty, states still must ratify the document. Judicial bodies, which wield state power even if they remain independent from political actors, have the ultimate responsibility for enforcing most rules, including those incorporated into contracts and tort law as international law. Just as privatization of, say, an airline company does not mean the end of extensive government regulation, the privatization of international law has not stripped the state of all its influence. Privatization is a process, not an outcome.

In international law, this process proceeds apace.

The tasks of this paper are both positive and normative. Others have noted the growing marginalization of the state in the production and enforcement of international law, but none has offered a systematic analysis of the phenomenon. This paper fills that gap.

11 Some economists distinguish between privatization, which they define as a transfer of responsibility analogous to a property right, and contracting out, something analogous to a relational contract between government and a private service provider. Although useful for some purposes, the distinction does not adequately capture the range of residual governmental control over privatized activity, and I will disregard it here. See Ronald A. Cass, Privatization: Politics, Law, and Theory, 71 Marq. L. Rev. 449, 451 (1988) (“In all of its various uses, privatization signifies a lessening of governmental involvement in some particular enterprise, but the form of ‘disinvolvement’ and the amount and nature of any continuing governmental involvement in the enterprise do not remain constant across uses of the term.”)

It both locates the privatization process within a broader model of law production and uses criteria supplied by that theory to assess its value.

In brief, this paper argues that innovation in the production of international law may achieve considerable benefits. Changes in international economics and politics make experimentation in the production of law imperative. At the same time, some forms of privatization pose considerable risks without corresponding benefits. The question whether international law applies at all to particular conduct is fundamental and has profound consequences. It involves a choice between legal systems, not simply a choice among applicable rules. Moreover, international law as a legal system differs significantly from national law, making a choice between it and national law considerably more consequential than a choice among national laws. Privatization that destabilizes the domain of interna-
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The paper proceeds in four parts. First, it sets out an analytical framework that depicts law as a form of information and links law production to law enforcement. Privatization of enforcement thus becomes a form of private law production. Second, it applies this framework to current international practice to demonstrate the growth of privatization over the last few decades. Third, it explores the political-economy issues that privatization raises. Finally, it applies the insights gleaned from this analysis to contemporary controversies.

In particular, the last portion of the paper traces through a range of areas where the political branches, through statutes, have given different directions as to the application of international law in lawsuits. It argues that courts should follow these directions, not only because of a general obligation to fulfill statutory intent but also because disregard of them will confuse the general issue of when international law applies. Thus, the courts should not expand the domain of international law when statutory law indicates otherwise and should not demur from applying international law where legislation invokes it, no matter what private litigants seek and whether or not courts generally wish to contribute to the development of international law. As simple and straightforward as these propositions may seem, they resolve many important current disputes.

I. LAW PRODUCTION AND ITS PRIVATIZATION: A SIMPLE MODEL

Privatization presupposes production. Within the law and economics tradition, conceiving of law as an output of a production process comes easily, but people with other methodological interests might find the idea strange. Here I describe what an economic perspective suggests about the production of law generally and international law particularly. I first show what it means to think of law as a product. I then explore upstream and downstream law production. Finally, I describe the relationship of law production to law enforcement.
A. Law as a Product

Law can be seen as a form of information about the probabilistic outcomes of contemplated future states. The significance of law, from this perspective, turns on the quality of the information provided. Some forms of law, such as legislation, provide an abstract announcement as to what consequences might attach to anticipated future events. Other forms of law, called precedent, arise from the exemplary effects of law application. A person contemplating a course of action will take into account the information provided by these kinds of law. A hypothetical rational actor will expend resources to acquire this information up to the point where the marginal benefit from the information acquired equals the marginal cost of its acquisition.\textsuperscript{13}

The information that law provides comprises the expected consequences of specified actions. When I learn that the law forbids torture, I am informed that, absent a future repudiation of this rule, a person who engages in some kind of specified conduct may face some sort of sanction. Information about future states is cumulative and necessarily incomplete, and so is knowledge of legal rules. Further inquiry might establish, for example, that there also exist disabilities and immunities that may shelter some people (say, government officials) from legal sanctions, that sanctionable torture involves abuse of official power rather than purely private conduct, and that the prescribed sanction may include government-imposed imprisonment, fines, and private compensation of victims, in any case administered by a court with appropriate jurisdiction. As information accumulates about the kinds of persons subject to sanctions, the range of conduct subject to sanctions, and the scope of sanctions and their administration, one can better assess the

risks associated with either subjecting others—or becoming sub-
icted oneself—to conduct that comes within (or near) the regu-
cated category.  

Like information generally, law can be hidden. Examples in-
clude secret treaty clauses, secret government regulations that tell 
public officials what they can do but provide no notice to affected 
persons, or confidential terms in a contract. This, however, is un-
common, at least in the United States. More often, law is observ-
able but costly to acquire. Even when authorized bodies produce 
law and disseminate their enactments, the resulting information 
can be, and usually is, obscure. Legislation and comparable official 
declarations will be incomplete, and courts may provide inade-
quate explanations for their actions. The very existence of a legal 
profession evinces the costs associated with acquiring information 
about law.

The predictive-information perspective treats as irrelevant the 
 compartmentalization of law into separate categories of primary 
 rules, standing, and remedies. Someone interested in predicting the 
 legal consequences of future action would want to know about all 
 three. The same primary legal rule—for example, do not torture—
 may have a significantly different impact on future behavior if we 
 also knew (a) that any person aggrieved by this behavior could 
 both seek compensation from the actor and bring him to justice 
 anywhere in the world, or alternatively, (b) that only the govern-

\[14\] Further complexity arises from overlap. Torture may comprise behavior subject to 
other sanctions, such as assault and battery. This offense in turn might come bundled 
with different definitions, defenses, sanctions, and domain rules. For more on domain 
 rules, see infra note 20.

\[15\] Economists distinguish between hidden (or private) information, observable in-
formation, and verifiable information. Hidden information is not shared with all par-
ties to a transaction. Observable information is shared. Verifiable information is both 
shared and provable to an independent third party, such as an arbiter, at a reasonable 
cost. See Robert E. Scott & Paul B. Stephan, The Limits of Leviathan: Contract The-
ory and the Enforcement of International Law 218–19, 222, 224 (2006). For a debate 
on the verifiability of one type of law, namely non-forum law applicable under choice-
of-law rules, see Bodum USA, Inc. v. La Cafetiere, 621 F.3d 624 (7th Cir. 2010).

\[16\] For a famous example of a treaty that contained significant secret provisions, see 
(Ger.), translated in 7 Documents on German Foreign Policy, 1918–1945, at 245 (Se-
ries D, 1956); Secret Additional Protocol, F.R.G.-U.S.S.R., Aug. 23, 1939, in 7 Docu-
ments on German Foreign Policy, supra, at 246.
men on whose behalf the torturer acted may seek a sanction and that such a sanction was limited to mild punishment.

As with information generally, the value of law can degrade. More information is not necessarily better, because new data can confound a previous understanding of what likely future states may be. Repudiation of old law, unexpected new rules, or incoherent actions by law enforcement organs can reduce our confidence about the legal consequences of possible future states. Law production, in other words, can be counterproductive in the sense that it destroys value.17

Here a complication arises. Hypothetically, a political or legal act might generate costs by degrading the value of law as information and still have net positive social effects. Retroactive laws, for example, broadly destabilize the reliability of law by signaling that the rules on which an actor relies might change after completion of the act in question. But retroactive laws might produce the disgorgement of a legal but socially wasteful benefit. The risk of disgorgement, in turn, may deter interest groups from appropriating economic rents.18 It follows that maximization of the value of law as information cannot be an overriding social end, much less an exclusive explanatory variable in a positive analysis of law. Rather, the claim is that, all other things being equal, maximization of the value of law as information is both socially desirable and a basis for positive analysis.19

17 Professor William Landes and then-Professor Richard Posner conceptualize the degradation of law resulting from law production as a form of depreciation, as a newer legal rule supplants and therefore reduces the value of an earlier rule. William M. Landes & Richard A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J.L. & Econ. 249, 250–51 (1976). Their analysis, although useful as far as it goes, overlooks the potentially disruptive effect of new rules, which may not only supplant an existing set of rules but also call into question the reliability of a broader range of prior rules.


19 For example, in assessing the value of retroactivity, one might conclude that there are more and less costly ways of achieving disgorgement of indefensible benefits. Adoption of retroactive rules through legislation, the subject of Graetz’s work, may have advantages over retroactive disgorgement achieved by litigation, the subject of
An important source of degradation of the value of law as a product is instability in the second-order rules that assign particular sets of rules to particular domains. I am using the term “domain” in an old, perhaps antiquated sense, tying it to the authority of the lawmaker that produces it. Several lawmakers potentially might address a particular problem, each with its own scope of authority. International law constitutes one domain, as does national (municipal) law. Federal states may have multiple domains, such as federal, state, and local. To know what rules apply to a matter, one first must decide into which domain it falls. Doing this requires both determining which lawmakers, acting within the scope of their authority, have addressed the issue at hand and, if more than one has so acted, what rules set out the order of application of each domain’s rules.

As will be seen, the domain question is especially salient with respect to international law. It may not matter, for example, that international law imposes different liability on a particular course of action than does domestic law if there exists a clear rule that determines whether the contemplated conduct falls into the international or domestic domain. But if the line between international and domestic prescriptive jurisdiction is disrupted, the proliferation of potentially applicable liability rules makes future outcomes more uncertain and thus raises the cost of undertaking conduct.

One might respond that conflicts over prescriptive jurisdiction are inevitable in an interconnected globalized world. Federal systems long have struggled over the line between federal and state law as well as the choices among state rules. Lack of clarity about which nation-state’s laws apply also bedevils international transac-

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Levmore’s articles. I previously have shown that the claim that litigation provides the optimal method for breaking with the past depends on very strong assumptions. Paul B. Stephan, Redistributive Litigation—Judicial Innovation, Private Expectations, and the Shadow of International Law, 88 Va. L. Rev. 789 (2002). For a more general defense of legal uncertainty as a means of overcoming “bad” law, see Symposium, The Limits of Predictability and the Value of Uncertainty: Sixteenth Annual Clifford Symposium on Tort Law and Social Policy, 60 DePaul L. Rev. 271 (2011).

See Philip Hamburger, Beyond Protection, 109 Colum. L. Rev. 1823, 1828–29, 1958–1963 (2009). Thus, I am interested in the lawmaker’s domain, as distinguished from the scope of particular enactments (or bodies of downstream laws) produced by the same lawmaker.
tions. What makes the demarcation of the domain of international law different?

In short, the domain rules for international law matter more because the difference between this legal regime and any other is greater. As Part III of this paper will explain at length, international law has distinct characteristics, especially a tendency toward ambiguity and a preference for standards over rules that reflect the particular methods of its production. It comes bundled with background principles, rules of interpretation, and debates over the authority of sources that have no counterpart in any domestic legal system. The consequences of the choice between international and other law thus are more significant than other domain disputes.

With these preliminary conceptual issues addressed, we now can consider the production of international law. A conventional account would posit that states produce international law either by entering into treaties or by engaging in a consistent practice motivated by a sense of legal obligation that gives rise to customary international law ("CIL"). A closer look suggests that the production process is more complicated. A substantial portion of international law is produced only as it is applied. Moreover, much of the production process can bypass states even if some state involvement may be essential at the time of application. A distinction between upstream and downstream production clarifies these functions.

B. Upstream Production of International Law

Some aspects of law production are fairly straightforward. A legislative body that enjoys widespread recognition as legitimate and authoritative adopts a statute. Several states, following procedures generally recognized as appropriate, enter into a treaty. A trade group publishes a set of uniform terms that private persons can agree to include in contracts. Each of these instances generates a set of rules that provides some information about the consequences of possible future occurrences.

I will call the promulgation of legal rules in the abstract, in advance of specific transactions or disputes to which these rules will apply, *upstream law production*. One might object that this simply describes the legislative function and that a new term is unnecessary. But the traditional division of state functions into legislating, executing, and adjudicating ignores at least two complications:
bodies other than legislatures legislate, and adjudication also entails law production. These complications are ubiquitous in international lawmaking, even if they are not unique to this field.

Moreover, certain aspects of upstream law production are neither straightforward nor legislative. In international law, CIL plays a fundamental role. The basic idea is that states that manifest assent to a custom that they regard as legally binding lose their ability to change their minds absent a superseding treaty. A custom thus can become law, in the sense that those who violate it may face legal sanctions. But fixing a custom as a sanctionable rule may not occur until the enforcement stage. During the interval between the supposed formation of a custom as a binding obligation and its subsequent confirmation through enforcement, considerable uncertainty may exist about its exact legal status.

On reflection, similar uncertainty haunts even clear legislative enactments. The best drafting practices will not address all possible applications of a provision. Moreover, drafters often paper over disagreements to obtain sufficient support for enactment, thus deferring the determination of a provision’s meaning until its application. To generalize, upstream law production necessarily is incomplete in the sense that it does not generate all of the information that a hypothetically rational economic actor would pay to obtain, but products vary in the extent of their incompleteness.

C. Downstream Production of International Law

Here we encounter a paradox: upstream production may proceed and yet have no determinable results. Treaties may embrace ambiguity to defer the resolution of hard questions. International practice and the existence of a sense of legal obligation, the elements of CIL, can be deeply uncertain. These phenomena might crystallize into CIL, in the sense that the rule possesses sufficient reliability to influence behavior, only during the law enforcement

21 For a study of this no-exit rule and a proposal for its modification, see Curtis A. Bradley & Mitu Gulati, Withdrawing from International Custom, 120 Yale L.J. 202, 202, 207 (2010).
process. I will call the creation of legal rules at the time of application downstream law production.\textsuperscript{24}

The actors who engage in the behavior later said to evidence compliance with custom out of a sense of legal obligation may have no sense that they are doing this and may even wish not to establish legal precedents. Think of the strenuously ambiguous and ambivalent pronouncements made by foreign offices to justify particular state action. One reason for this obscurity is to leave open whether such statements produce new CIL. Rarely do official actors behave in the opposite manner, indicating a desire to bind their successors not just to their decisions but also to the principles that underlie them.

Consider that great chestnut of the international law course, \textit{The Paquete Habana}.\textsuperscript{25} The dispute involved civilian fishermen whose boats and cargoes were condemned by the U.S. Navy in the course of the Spanish-American War. The fishermen invoked the admiralty jurisdiction of the U.S. courts to challenge the Navy’s action as violating CIL. The Supreme Court surveyed centuries of state practice and determined, notwithstanding significant counterexamples during the Napoleonic Wars, that a rule of CIL had crystallized to protect coasting fishing vessels from seizure as prizes of war. No treaty or prior authoritative judicial pronouncement had proclaimed this rule, and no foreign office had indicated its intention to hold other states to a legal obligation to leave coastal fishermen alone. Yet the Court, contemplating the sweep of history, saw a rule and applied it.\textsuperscript{26}

For CIL such as the rule announced in \textit{The Paquete Habana}, upstream production is something of a fiction. The product takes no

\begin{itemize}
\item\textsuperscript{24} The early law and economics literature on law enforcement, although powerful in its own terms, missed the point that rule enforcement necessarily entails some degree of rule creation. See Gary S. Becker & George J. Stigler, Law Enforcement, Malfeasance, and Compensation of Enforcers, 3 J. Legal Stud. 1 (1974); William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. Legal Stud. 1 (1975). But cf. Landes & Posner, supra note 17 (recognizing that law enforcement results in rule production). For explicit recognition of the connection, see Pistor & Xu, supra note 13.
\item\textsuperscript{25} 175 U.S. 677 (1900).
\item\textsuperscript{26} For more on the rule and the methodology that led to it, see Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 66–78 (2005).
\end{itemize}
shape and has little or no concrete consequences until someone applies it. The law applier becomes the principal lawmaker.

International agreements also can lead to downstream lawmaking. Upstream lawmakers may deliberately decide to delegate to future law appliers the authority to resolve sticky issues. Modern administrative law, for example, involves widespread delegations of lawmaking authority to agencies. Although these agencies might produce upstream rules such as regulations or directives, often they make law only in the application. To the extent that law application collapses into law creation, we have downstream law production.

At the end of the day, the distinction between upstream and downstream rule production may be one of degree rather than of kind. Even the most precise and advertent treaty cannot dispose of all questions that may arise during application. One might argue, for example, that the treaty has lapsed or been superseded or suspended. Moreover, complete ex ante specification of a rule’s applicability is impossible under realistic conditions. Rule application thus always has the potential for generating more information about the meaning and scope of a rule. The content of all legal rules is to some degree uncertain and may become either more or less so after application.

Yet questions of degree matter. In some instances, the upstream process provides most of the relevant information that actors need to take a rule into account in organizing their behavior; in other instances, the downstream process generates most of the usable information. Thus, we can consider upstream and downstream processes as complements but recognize that the allocation of work between them may vary significantly.

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29 Hendrik Horn, Giovanni Maggi & Robert W. Staiger, Trade Agreements as Endogenously Incomplete Contracts, 100 Am. Econ. Rev. 394, 395 (2010).
The complex relationship between upstream and downstream law production is, of course, not unique to international law. Constitutional law, at least in the United States, is famously (and controversially) about a delegation of ongoing discretionary lawmaking authority to the judiciary. Moreover, my depiction of international law production draws heavily on the account of contract law formation developed by Professors Charles Goetz and Robert Scott and refined by Scott and Professor George Triantis. This model describes contract law as encompassing both specific terms purposely negotiated by the parties at the time of contract formation and processes accepted by the parties that will supply additional terms in light of subsequent information. These functions correspond to upstream and downstream law production.

But important differences do exist between international law, on the one hand, and constitutional and contract law, on the other. The range of potential sources of rules and the problems that produce downstream application of constitutional law differ from those at work in the international arena (although there are those who would like to merge the two fields). In contract law, the focus is largely on party intent rather than the regulatory authority of the state. In addition, contract law typically deals with cooperative behavior where the externalities generated by the parties’ relationship are either insignificant or ignored. International law, in contrast, is riddled with externality problems.

In sum, law production involves both deliberate choices to create legal rules and actions and statements that may lead to legal rules (such as CIL) but may not. Some rule production occurs in advance of concrete controversies (upstream production) but much takes place in the context of adjudicating disputes (downstream production).}


production). States do not have a monopoly on either stage of the production process, a point on which Part II of this paper focuses.

D. Mechanisms of International Law Enforcement

Not all downstream law production is alike, because law enforcement takes multiple forms. The classical formal adjudication of a dispute, complete with a published reasoned opinion, epitomizes downstream production. But other mechanisms of law enforcement exist and often dominate dispute resolution.

International law involves a panoply of informal as well as formal enforcement mechanisms.32 Actors can impose it informally through retaliation, reward, reputational adjustment, and norm internalization, both directly and with the aid of third-party tribunals enlisted to pronounce on the merits of a dispute. International law also can operate formally, through adjudication by organs that can hear disputes brought by non-state actors and that have the capacity to impose sanctions directly.33 Some enforcement, but not all, produces significant information about the law. Parties (state or nonstate) may go into a controversy facing indeterminate international legal rules and emerge with clear, and perhaps even stable and reliable, law. In particular, pronouncements by an independent arbiter, whether lacking in formal enforcement powers (such as the International Court of Justice (“ICJ”) or the WTO Dispute Settlement Body) or fully empowered to enforce its edicts, such as a domestic court or the Luxembourg and Strasbourg courts of

33 The definition of formal enforcement provided above differs from that found in one influential essay, which instead focuses only on the use of third-party arbiters. See Legalization And World Politics 37 (Judith L. Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter eds., 2001); Kenneth W. Abbot, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, The Concept of Legalization, 54 Int’l Org. 401, 401 (2000). Professor Eric Posner also has criticized the definition used in text. Eric A. Posner, Book Review, 101 Am. J. Int’l. L. 509, 511 (2007) (reviewing Robert E. Scott & Paul B. Stephan, The Limits of Leviathan: Contract Theory and the Enforcement of International Law (2006)). At some level the distinction may seem arbitrary. The combination of private standing and direct sanctions, however, endows international law dispute resolution with features that make it very much like formal enforcement of domestic law. The definition thus draws attention to the convergence of enforcement mechanisms in international and domestic law.
Europe, can produce clear and stable law, although they do not always achieve such an outcome.  

At first glance, the production of law in the course of dispute resolution may seem to be nothing more than the conventional common-law process. But what distinguishes the production of international law is the multiplicity of mechanisms for dispute resolution. Domestic courts articulate international law through their decisions, but so do a hodge-podge of international dispute resolution bodies. Some of these international bodies are ad hoc and ephemeral, such as the arbitration tribunals that settle commercial or investment disputes or address certain kinds of interstate controversies. Others are more permanent, including the ICJ, the Luxembourg and Strasbourg courts, the Iran-United States Claims Tribunal, and the WTO Appellate Body. Some fora mimic a conventional disinterested judicial body while others, like the U.N. Security Council, are committees of state representatives that, in addition to their other diplomatic functions, address disputes.

This variety matters. A substantial body of evidence suggests that the structure of a dispute resolution body affects what it produces. State representatives to bodies such as the Security Council behave differently than do independent adjudicators. Disinterested arbiters whose mandate does not extend beyond a particular case, and who therefore remain susceptible to the pressure to drum up future business, act differently from the tenured members of a permanent tribunal. Over and above these structural issues, one must account for the known preferences and commitments of the members of the body, which vary from opaque to transparent.

Augmenting this effect is the possibility of forum shopping. Domestic disputants, of course, can exploit choices over fora in light of predictions about outcomes, but a single sovereign is ultimately responsible for the array of choices on offer to the disputants. With international law, there often exist greater possibilities to play off multiple sovereigns and various international tribunals. The new

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34 For an extensive discussion, see Scott & Stephan, supra note 15, at 140–141 (discussing enforcement of arbitration awards).


and still controversial concept of universal jurisdiction, for example, purports to authorize any state to offer up its law enforcement resources with respect to certain international law claims. Moreover, international tribunals can present overlapping jurisdictional opportunities to aggressive disputants. For example, the softwood lumber controversy, a trade dispute between Canada and the United States over the appropriate rules applicable to lumber imports, played out in the U.S. Court of Appeals for the D.C. Circuit, the U.S. Court of Appeals for the Federal Circuit, special binational panels set up under Chapter 19 of the North American Free Trade Agreement (“NAFTA”), an arbitral tribunal set up under Chapter 11 of that Agreement, and the Dispute Settlement Body of the WTO. After a global agreement between the two countries purported to settle all outstanding claims, later disputes went to the London Court of International Arbitration, a body that normally handles private commercial disputes.

The lack of hierarchy with respect to venues complements the increased opportunities for forum shopping in international law application. In a domestic system, one normally encounters some kind of rank order of authority of tribunals. In the United States, the Supreme Court has the final authoritative say on matters of federal law, while the states’ highest courts have the last word as to the content of state law. Under the Supremacy Clause, any contra-

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dictions between the two result in the federal rule prevailing. In Germany, the Federal Constitutional Court has final authority to pronounce on constitutional issues while other federal supreme courts have ultimate power within their competences, and constitutional law takes precedence over other categories of legal rules. In the international system, however, similar rules of hierarchy are lacking. In Professor Laurence Helfer’s words, we have “a decentralized and largely anarchic international legal system.”

Putting aside the special case of a tribunal that lacks jurisdiction (and even then there are sharp disputes about what constitutes a lack of jurisdiction), there are no widely accepted standards for deciding when a law-applying body should ignore, defer to, or give “due respect” to the law produced by other tribunals. The capacious term “comity” admits all possible outcomes.

The combination of forum shopping and lack of hierarchy has a complex effect on downstream production of international law. On the one hand, it encourages cherrypicking by advocates. Furthermore, if an interest group proposes its issue for application in sufficiently numerous instances, the odds that some law applier will behave consistently with the group’s desires will increase. The group then can exploit the absence of rank ordering among venues to publicize its victories and ignore its defeats. On the other hand, its opponents can do exactly the same thing to reach the opposite outcome. This possibility can impair the clarity and reliability of rules generated by the downstream process.

E. Summary

Law has value as information that can inform decisionmaking about future actions. Producers of this information include both institutions that declare its content ex ante (upstream production) and institutions that apply law in particular disputes (downstream production). Downstream production is especially salient because

40 Laurence R. Helfer, Nonconsensual International Lawmaking, 2008 U. Ill. L. Rev. 71, 73.
of its potential to clarify legal rules as well as to obfuscate them through contradiction and inconsistency.

Choices of enforcement mechanisms also are significant because different mechanisms predictably will produce different outcomes and, therefore, different law. In particular, the multiplicity of mechanisms for applying international law to disputes, both in absolute numbers and in diversity of structures, increases the possibility of downstream production of divergent rules of international law. The lack of an authoritative hierarchy among bodies that apply, and thereby make, international law augments this effect. Persons seeking to imbue a preferred rule with authority thus have discretion as to where to seek that rule and freedom to select among past instances of downstream rule production when promoting further development of that rule.

II. THE PRIVATIZATION OF INTERNATIONAL LAW

As the preceding section suggests, law production often involves collaboration between public and private actors. Even as public a proceeding as a criminal prosecution demands the participation of the defendant, and even as private a matter as a contract dispute involves an arbiter whose decision may enlist the resources of the state for its enforcement. In the typical case, then, the question of privatization is one of degree, not of categorical determination.

Private actors traditionally have played a role in both upstream and downstream international law production. Reaching back in history, much of international law emerged from private litigation. Questions such as the existence of a state of war or the rules of neutrality, for example, determined the outcome of prize disputes as well as other property claims. More generally, in states that depended heavily on maritime commerce, as did the United States

\[42\] See, e.g., Brown v. United States, 12 U.S. (8 Cranch) 110, 115 (1814) (prize denied because declaration of war did not authorize condemnation of civilian property held by enemy subjects). Prize cases should be thought of as substantially private, even though they often involved naval officers as litigants. Under British law, if a commanding officer won in prize, he (and to varying degrees, his shipmates) received the award, not the Navy. The same result applied to U.S. privateers operating under official license. See, e.g., The Star, 16 U.S. (3 Wheat.) 78 (1818).
during its early years, a large portion of litigated cases involved
questions of admiralty. And admiralty looked to CIL for its rules.\footnote{See, e.g., The Paquete Habana, 175 U.S. 677, 686 (1900).}

To put things in perspective, domestic law also entails significant
private participation in its production. Even though we may live in
an age of statutes, common-law subjects such as tort, contract, and
property still rely heavily on downstream production arising out of
private litigation. Some bodies of regulatory law, such as U.S.
competition (antitrust) law, similarly let private lawsuits do much
of the rule-production work, and U.S. constitutional law is domi-
nated by downstream production, much of it through suits initiated
by individuals.

If private actors always have participated in the creation of in-
ternational law (as well as domestic law), how does contemporary
practice represent a break with the past? It is a matter of degree.
Privatization, one should keep in mind, involves a transition. Ac-
tivities previously subject to significant state control, typically
through a command-and-control structure, experience some degree
of liberalization, albeit constrained by ongoing government regula-
tion. This Article focuses on changes in the ratio of private to pub-
lic, not the absolute amount, and on contemporary changes, not the
history of the field.

For reasons that are complex and controversial, the international
legal system over the last three decades has reduced the role of
states in the production of international law. States never had a
complete monopoly on the production of this good (or for that
matter of domestic law), any more than they monopolized the use
of coercive violence. But opportunities for private participation in
international law production have expanded significantly. These
include:

- greater tendency of states to enter into treaties and initiat-
  e international dispute settlement on behalf of private
  interests;

- greater frequency of law-applying organs to regard pri-
  vate opinions as a source of international law;

- proliferation of tribunals authorized by treaties to en-
  force treaty and other international law rights at the be-
  hest of private persons; and
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- increased opportunities for private persons to raise international law claims in domestic litigation.

I briefly describe each.

A. Upstream Privatization

Upstream international law production is privatized whenever nonstate actors create rules for future application. This may take place directly, as when a body articulates rules for other actors to apply, or indirectly, as when a private group captures a public institution (either national, supranational, or international) and uses it to advance its agenda. While some forms of private upstream law production have existed for centuries, the scope and scale have increased over the last few decades.

1. Commandeering of Public Lawmaking by Private Interests

The quintessential upstream international law project is the treaty. That states enter into agreements that benefit their subjects is indisputable. On occasion, a treaty might even meet the needs of a particular industry, whose representatives might counsel the delegates to the drafting conference and even supply the drafts. Just as we have come to expect domestic legislation that protects entrenched firms from competition by erecting barriers to entry into their industry, we can find treaties that serve similar functions.\(^4\)

\(^4\) The concept of privatization requires a distinction between public and private nonstate actors. Cf. Duncan B. Hollis, Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law, 23 Berkeley J. Int’l L. 137, 146–71 (2005) (describing lawmaking by subnational, supranational, and extranational bodies pursuant to delegations from states); Saskia Sassen, Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights, 1 Ethics & Global Pol. 61, 62 (2008) (describing the “process of denationalization” of authority and rights). International, supranational, and subnational actors are public, as they represent collectives or components of states. Lawmaking by public international organizations is what Laurence Helfer calls nonconsensual international lawmaking. Helfer, supra note 40. States do not consent to the particular product of this lawmaking process, but they do consent to the process.

\(^5\) See Stephan, supra note 4, at 762–72, 780–84 (reviewing Hague Rules, the Warsaw Convention, and the International Chamber of Commerce’s Uniform Custom and Practices).
The difficulty lies in determining the degree of private influence on such public acts. Lobbying by private groups in the course of international negotiations and treaty-making has a long history. Many assert, however, that structural changes in the world economy and international relations have magnified this effect. Work by Professor Anne-Marie Slaughter and others depicts transnational networks as political forces that shape the formation of international law. This literature describes the state as a portal for the confirmation of choices reached through international cooperation by both official and unofficial actors. Conventional instances of upstream law production—international agreements and implementing legislation—may look like state lawmaking, but the reality is one of private domination of the agenda. Radical critics of the post-Cold War globalized economy in particular regard the entire WTO structure, including the agreements themselves, as governmental power employed at the bidding of multinational corporations. They also depict recent intellectual property treaties sponsored by the World Intellectual Property Organization (“WIPO”), the proliferating bilateral investment treaty regime and much regional economic cooperation, including NAFTA, the Central American Free Trade Agreement (“CAFTA”), and the European Community (“E.C.”) treaty, as largely the product of private persons wielding power through public officials.

A fundamental challenge for the transnational networks and globalization literatures is developing a metric to assess discrete private influence. The globalization literature in particular, which documents the subversion of the nation-state by ascendant global

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capital, follows in the footsteps of earlier narratives. As critics have observed, influential publicists over a century ago made claims about the epiphenomenal role of states in international relations. The Left had the exporters of capital and war profiteers, the Right the Freemasons and the international Zionist conspiracy. Detecting unofficial influences may be more (or less) easy, but quantification to permit systematic analysis has eluded the field to date.

Nonetheless, there exists substantial indirect evidence that the role of organized private interests in upstream international law-making has grown in recent years. Changes in technology, especially in communications and transportation, plus the unwinding of bipolar superpower competition, have increased the risks and rewards associated with international transactions, both commercial and noncommercial. One would expect that this increase in salience of the international sphere would provoke heightened interest on the part of affected actors and that these actors in turn would invest more in influencing the legal regime that governs their transactions. Casual empiricism readily supports this claim. The emergence of digitalized copying of content (music, films, and software), for example, led directly to the adoption of new intellectual property regimes operating internationally that add new layers of protection for content owners.

Moreover, these structural changes have not had uniform effects. Possessors of human capital and other suppliers of services (managers, bankers, lawyers, and accountants as well as “content providers”) benefit proportionately more from the communications and transportation revolutions than do owners of static inputs, such as laborers and landowners. Ceteris paribus, organized groups re-

50 Scott & Stephan, supra note 15, at 49–50.
51 It is worth recalling that, more than a century ago, the originator of the classic critique of imperialism embellished his analysis of the export of surplus capital with virulent anti-Semitism. J.A. Hobson, Imperialism: A Study 64 (1902). Thus, multiple special-interest-capture narratives offered explanations of a pathology in the international economic system that separately appealed to both Lenin and Hitler.
52 Samuelson, supra note 3, at 370.
53 Profound, if indirect, evidence of this effect comes from the data on international changes in the structure of returns to skills. See, e.g., Matthew J. Slaughter & Phillip Swagel, The Effect of Globalization of Wages in the Advanced Economies, in Staff Studies for the World Economic Outlook 78, 79 (1997); Pinelopi Koujianou Goldberg & Nina Pavcn, Distributional Effects of Globalization in Developing Countries, 45 J.
flecting the interests of economic winners ought to have a greater
impact on collective decisionmaking—including choices made
through international cooperation, as well as national actions—
than those representing the losers. 54

That international legal structures have proliferated to support
and bolster the new global economy is clear. The WTO has super-
seded the General Agreement on Tariffs and Trade (“GATT”),
accompanied by more extensive and elaborate agreements and
more robust dispute settlement. Both the Trade-Related Aspects
of Intellectual Property Rights (“TRIPS”) agreement administered
by the WTO and the WIPO treaties extend the scope of intellec-
tual property protection, to some extent empowering owners over
users. 55 Less formal but extremely salient international cooperation
in financial regulation, such as the several generations of the Basel
accords, or the evolution of the G-7 into the G-20, presumes the
continued existence of contemporary financial institutions in some-
thing like their present form, not their radical transformation. 56 All
of these enterprises, and many others like them, have the effect of
entrenching, rather than reforming, global capitalism as we know
it. This fundamental aspect of international economic regulation
has led some to conclude that private commandeering alone can
explain these structures.

A confounding development, however, is the growing influence
in international lawmaking of private groups that oppose features
of global capitalism, if not its very existence. Take the issue of gov-
ernment corruption. For two decades, the United States struggled
unsuccessfully to persuade other rich countries to mimic its prohi-
bition of bribe paying. Only when a Berlin-based NGO, Transpar-
ency International, got into the mix did the balance shift enough to

54 Econ. Literature 39, 39 (2007); Peter Gottschalk, Inequality, Income Growth, and
Mobility: The Basic Facts, 11 J. Econ. Persp. 21, 21 (1997).
55 A confounding factor is the well-documented tendency of established and rela-
tively homogenous groups facing threats from economic change to exercise a dispro-
portionately large influence on political decisionmaking. See, e.g., Vilfredo Pareto,
Schwier trans., 1971).
56 See Rachel Brewster, The Surprising Benefits to Developing Countries of Linking
57 See Pierre-Hugues Verdier, Mutual Recognition in International Finance, 52
prod states to create an international regime.\footnote{See Daniel K. Tarullo, The Limits of Institutional Design: Implementing the OECD Anti-Corruption Convention, 44 Va. J. Int'l L. 665, 676 (2004).} International environmental cooperation also challenges private interests by making particular production methods more costly. Private environmentalists have enjoyed some success in driving governments toward greater international regulatory cooperation, even if they have not achieved everything they wish in critical areas such as global warming.\footnote{See, e.g., Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 69; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148; United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293; see also Global Climate Change and U.S. Law (Michael B. Gerrard ed., 2007).} The emergence of low-cost communications technologies such as social media has made it easier to organize content consumers as a force opposing the interests of intellectual property owners in international negotiations.\footnote{See Samuelson, supra note 3.} NGOs do much of the heavy lifting in human rights protection, both publicizing misbehavior by states and pressuring official actors for sanctions.\footnote{See Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics 32 (2009).}

What we are left with is evidence that strongly suggests, although it does not prove conclusively, an increase in private influence over upstream international lawmaking. First, the conferences and negotiations that conduct such lawmaking have seen a growth in both formal and informal participation by non-state actors over the last three decades. The U.S. Trade Act of 1974 mandated the inclusion of representatives from private industry and labor in the formulation of U.S. bargaining positions. Over the years, private-interest actors have become a permanent part of U.S. trade negotiations, closely monitoring and critiquing the state of play even when they do not sit in the room. More generally, multilateral negotiations on a wide range of policy issues, from arms control to environmental issues to human rights, invariably take place in fora where NGOs show up en masse.

Complementing these process developments are technological changes that have influenced the environment in which international negotiations take place. The growth of the internet, most re-
cently in the form of social networking, and the proliferation of niche television networks such as CNN enable interested groups to monitor events more closely and to respond faster and more forcefully. It is unclear whether these changes facilitate the mobilization of mass movements, but ample anecdotal evidence indicates that they amplify the impact of discrete private groups.

These processes do not mean that private groups have fully commandeered the treaty-generation process. In many cases, the treaty negotiations instead resemble domestic politics, in which conflicting private interests pull the official representatives in different directions. Rather than outright victories for one side or another, one sees some combination of stalemate, compromise, log-rolling, and deferral of hard choices to delegated agents. The presence of private groups is increasingly easy to detect, but determining their impact on outcomes has become harder to pin down.

Consider as an example the Copenhagen Climate Conference in 2009. According to press accounts, private lobbyists outnumbered the official attendees, requiring special logistical arrangements. But the key negotiations, which produced the decision not to adopt any legal measures, took place between official diplomats representing the great powers China and the United States, to the dismay of European representatives as well as the private groups. Deep structural issues, principally the allocation of the burden of reducing carbon emissions between legacy economies and the newly rising ones, produced an impasse. Pressure from private industry and its private critics operated only in the background.

To summarize, at present the evidence does not support any strong claims about the precise effects of the manifest rise of private participation in important treaty negotiations on the outcome of the process. At most, one might propose conjectures. To illustrate, principles of rational decisionmaking suggest that the growth in private participation, simply by introducing additional actors who may impede consensual agreement, might raise the cost of making international treaties and therefore limit their scope and

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influence, if not necessarily their number. Cultural theories about group dynamics might generate the opposite hypothesis by positing that greater inclusion and more deliberation will build confidence, leading to more and greater agreements.\footnote{A conjecture grounded in positive political economy might suppose that increasing the number of actors with a veto over a course of action makes it less likely that any action will be taken. Thus, opening up treaty making to more private actors may lead to fewer or less useful treaties. Constructivist theories might suggest the opposite, based on the assumption that inclusion and deliberation produce consensus. See Ryan Goodman & Derek Jinks, International Law and State Socialization: Conceptual, Empirical and Normative Challenges, 54 Duke L.J. 983 (2005). I remain skeptical whether empirical evidence shows that inclusion and deliberation prevails in the face of strongly conflicting interests.} Conclusions must await the evidence.

2. Direct Upstream Lawmaking by Private Groups

Private persons and groups might have definite views about what they would like the law to be, but that desire standing alone has no legal effect. Several mechanisms exist, however, to translate claims by private actors into operative legal rules. First, people might opt into privately provided rules through contract. Authoritative agents of the state then might enforce these contracts in accordance with the purposes of the rule provider. Second, agents of public authority might regard the private group as possessing special capacity that obligates the agents to defer to the group’s pronouncements. The first mechanism exists in both domestic and international law, while the second is largely confined to international lawmaking.

a. Standardized Contracts

The provision of standardized rules by private actors to govern international commercial transactions has grown substantially in the past few decades. Undoubtedly, this reflects fundamental changes in communications and transportation technologies as well as the political and social changes that have fueled the globalized economy. As noted above, the International Chamber of Commerce ("ICC"), a Paris-based club of multinational businesses, issues and regularly updates schedules of contractual terms that have enjoyed widespread adoption. These include the Incoterms, con-
tractual provisions that supplement and clarify the default rules for the sale of goods, and the Uniform Customs and Practice for Documentary Credits, which displace or extend the default rules governing letters of credit. The explosion of financial derivatives since the collapse in the 1970s of fixed exchange rates among major currencies led to industry-supplied terms specifying the meaning of these financial instruments.

b. Customary International Law (CIL)

What is distinctive about international law is the concept of CIL, formed by consistent state practice based on a sense of legal obligation (opinio juris). Nothing quite like this operates in domestic law, even though isolated pockets of customary law do exist. CIL, formerly known as the Law of Nations, had sufficient stature to achieve recognition in the U.S. Constitution and can trace its ancestry back to Roman law. Yet today, as at the Founding, it operates without a clear mechanism of either adoption or recognition.

CIL includes rules that important actors believe to exist, even though they have not been formalized in a treaty or comparable legal instrument. Its precise definition remains elusive. One abiding sense of confusion, of particular significance for this paper, involves the problem of sources and particularly the exclusivity of state practice.

On the one hand, standard definitions of CIL focus on state practice. If only state practice counts, then states have a monopoly over the construction of CIL. On the other hand, the concept of state practice is sufficiently loose to include statements of belief unaccompanied by concrete action. Further complicating the matter are issues of evidence about those beliefs. A sufficiently elastic

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64 For more on the International Swaps and Derivatives Association, Inc., the trade association that does this work, see ISDA, http://www.isda.org (last visited Aug. 28, 2011). The Association not only drafts standardized contractual terms but submits amicus briefs to influence their interpretation and application.

65 For a constitutional reference, see U.S. Const. art. I, § 8, cl. 10. The Law of Nations derived ultimately from Rome’s ius gentium.
understanding of what suffices to demonstrate state practice can effectively empower private specialists and advocates as providers of the content of CIL.

A particular problem that illustrates these difficulties involves the status of the law applied by international tribunals. Does application of a rule by such a tribunal elevate it to the status of international law, or does a rule retain its local character regardless? Consider, for example, Article 38(1) of the Statute of the International Court of Justice, which provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations; and

d. subject to the provisions of Article 59 [which stipulates that ICJ decisions have no binding effect except as between the parties], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

A literal reading of this treaty might conclude that the court has the authority to look to various sources of law to resolve a dispute, among them CIL, and that “general principles” and “judicial decisions and the teaching of the most highly qualified publicists” are distinct from CIL. One could assume that just as a domestic court might find itself applying foreign law, an international tribunal might be obligated to apply law that does not fit into the categories of either treaty law or CIL. Yet a tradition has evolved that asserts that whatever law a tribunal embraces becomes CIL.

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67 A recent and highly salient example is Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 132 (2d Cir. 2010), cert. granted, No. 10-1491, 2011 WL 4905479 (U.S. Oct. 17,
The distinction matters because the opinions of private groups may be relevant, even if not definitive, in determining general principles of law or rules of law. Moreover, it opens up an argument about the kinds of private opinions that might count in determining CIL. If CIL involves only state practice, then private groups might serve as observers of state practice. In this spirit, more than a century ago *The Paquete Habana* engaged in an extensive, if perhaps not completely balanced, review of academic literature. Similarly, the U.S. Supreme Court has cited one of the great treatises, Vattel’s *The Law of Nations*, more than one hundred times. The majority of these citations occurred before the Civil War. By and large, Vattel, as well as the other influential treatises of the pre-modern period, produced digests that were meant to provide a comprehensive picture of international practice. The medium of the treatise, with its breadth and comprehensive analytical methodology based ultimately on the Justinian *Institutiones*, constrained the authors’ ability to innovate in the formulation of legal rules. As the Supreme Court, perhaps disingenuously, said, “Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”

Many modern authorities, by contrast, maintain that scholarly commentary can convert immanent, indeed undetectable, state practice into binding custom. Working from this position, some scholars have claimed a sense of ownership over particular issue areas and use their publications to promote the scope and significance of their projects. These writers are not only “highly qualified” but also highly invested in certain outcomes.

Consider the International Committee of the Red Cross ("ICRC"), or more precisely Jean Pictet, a leader of that organization and the principal author of a commentary on the 1949 Geneva Protocols produced under ICRC auspices. Pictet’s expertise in in-

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69. Id. at 700.
70. Id. at 700.
ternational humanitarian law is manifest but so is his interest in having law appliers regard the Protocols as all encompassing. He is, in short, an advocate, not a disinterested expert. The ICRC did not submit Pictet’s work to any formal review or approval process. Yet in *Hamdan v. Rumsfeld*, the majority described Pictet’s commentary as “official” and used it to defend an expansionist interpretation of Common Article 3 of the Protocols.72

The *Hamdan* episode is significant but not unique. More generally, the ICRC has commissioned studies on international humanitarian law that challenge accepted doctrine on the part of major military powers, the U.S. included. The most recent and controversial project promoted a vision of CIL that rests largely on scholarly commentary and manuals, including those of armed forces, but slight operational practice.73 Government lawyers responded by criticizing the study’s methodology regarding CIL.74 The outcome of this debate is uncertain, but at a minimum the ICRC’s initiative shifted diplomatic and political pressures on states, such as the United States, Israel, China, and Russia, that maintain a significant military capacity and face strategic challenges that make resort to force probable in the medium term.75

This example illustrates a larger point. The significance of upstream production of CIL by private persons, whether advocacy groups such as the ICRC or individual scholars seeking both to influence policy and to build a reputation, depends largely on the ex-
tent that downstream decisionmakers regard it as binding. Given the informal nature of the process that generates CIL and the variety of contexts in which it might apply, no actor can have great confidence about how its claims concerning the content of CIL will play out over time. Everything turns on the downstream actor.

When one takes into account changes over the last few decades in the mechanisms for downstream production of international law, the emergence of private voices in the upstream formation of CIL takes on real salience. In a world where states enjoyed a monopoly over the application and enforcement of international law, governments could filter these claims. Because governments are repeat players that have complex but significant reputational investments, they face some constraints on which claims they choose as well as on the manner in which they make their choices. It is at least plausible that many governments will be less likely to endorse rules over which no state has direct authorship, but with the rise of private enforcement over the last few decades, this filter no longer works. At least one major impediment to the proliferation and application of privately generated rules thus has weakened.

### B. Downstream Privatization

The evidence of a marked increase in privatization of downstream international law production is clear. To be sure, there exist very few private law appliers whose decisions have the effect of producing rules of international law. Rather, downstream law production involves the decisions of international tribunals and domestic courts, serving as organs of delegated or direct state power, that act in suits brought by, and sometimes against, private persons. Privatization of this power involves giving private persons freedom to choose how to vindicate the international law interest, not the power directly to enforce international law.

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76 Perhaps the only purely private system of international law enforcement involves the arbitral mechanism that determines ownership of internet domain names. Even the decisions of this body, provided at a modest cost, can be overturned by considerably more expensive domestic litigation. See authorities cited supra note 8.
1. Private Access to International Tribunals

In earlier times, governments espoused the international law claims of their citizens. Sometimes states would negotiate directly with each other to settle these claims, but occasionally they would set up a tribunal with varying degrees of independence to resolve the issue. Thus, for example, the United States and Great Britain created the Alabama Claims Commission, comprising five prominent figures—three from third countries—to consider compensating the victims of Confederate warships built in Great Britain. The United States acted throughout as the representative of the victims and obtained an award on its own behalf, leaving it to subsequent legislation to distribute the award.\textsuperscript{77}

Under the approach exemplified by the Alabama Claims example, persons whose rights were subject to espousal had no power to sue, either in their own courts, the courts of the state that violated their rights, or before any international tribunal. Nor did they have a legally enforceable entitlement with respect to the proceeds of any award paid. Thus, a body of international law designed to protect private interests depended entirely on sovereigns for their vindication.

There still exist today many international tribunals that hear only claims brought by states. For example, the ICJ, the WTO Dispute Settlement Body, and dispute resolution under the U.N. Convention on the Law of the Sea (excepting a small class of deep seabed issues of no contemporary relevance) all limit tribunal jurisdiction to claims brought by and against states. But a recent if still limited practice blurs the exclusively public nature of these bodies. The WTO dispute settlement system has opened its proceedings to amicus briefs from private groups. Commentators see this step as a precedent for a more general expansion of private participation in state-to-state dispute resolution.\textsuperscript{78}

\textsuperscript{77} For the corollary domestic litigation over interests in the award held by the United States and distributed by statute, see Williams v. Heard, 140 U.S. 529 (1891); United States v. Weld, 127 U.S. 51 (1888); Great W. Ins. Co. v. United States, 112 U.S. 193 (1884); Bachman v. Lawson, 109 U.S. 659 (1883).

In addition, within the U.N. system one can find bodies of experts, constituted to monitor treaty compliance, that may entertain private complaints. The U.N. Human Rights Committee considers claims against the 104 states that have joined the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee Against Torture hears private complaints about the sixty parties to the Convention Against Torture that have accepted this procedure, the Committee on the Elimination of Discrimination Against Women has jurisdiction over the eighty-eight parties to the Convention on the Elimination of Discrimination Against Women’s Optional Protocol, and the Committee on the Elimination of Racial Discrimination hears private complaints against forty-eight states that are parties to the Convention on the Elimination of All Forms of Racial Discrimination. These committees can only shame and lobby, but they do provide some degree of influence to individuals seeking to expand the sphere of international law in the face of state opposition.\footnote{Some scholars lump these name-and-shame bodies with more conventional international tribunals, characterizing both as international adjudication. See, e.g., André Nollkaemper, National Courts and the International Rule of Law 246–47 (2011); Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 273, 278 n.12 (1997). A skeptic might assert that the salience of such tribunals turns on a reputation as a disinterested and scrupulous source of information and that reasonable minds may differ as to whether any of the U.N. organs have developed and maintained such a reputation.}

As to claims against states of a sort that conventionally produce money damages, however, the modern trend has been to provide direct access to international tribunals for private persons. In at least two instances over the last three decades, the international system created standing institutions to deal with the aftermath of particular upheavals. The 1981 Algiers Accords set up the Iran-United States Claims Tribunal to resolve disputes arising out of Iran’s revolution. Using frozen Iranian assets located in the United States as its leverage, the tribunal provided a venue for persons with contract, property, and (with important limitations) tort claims to seek compensation.\footnote{See Dames & Moore v. Regan, 453 U.S. 654, 667, 690 (1981) (upholding domestic implementation of Accords); Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 7–9, 26, 59–60 (1998).} Although the Tribunal resolved all of the private claims against Iran some time ago, significant state-
to-state claims between the two parties remain. And in the aftermath of the first Gulf War, the U.N. Security Council established the Compensation Commission to compensate victims of Iraq’s aggression and war crimes.\textsuperscript{81} Both private persons and states had the right to bring claims. In the course of four years, the Commission issued over $50 billion in awards, which it funded primarily through seized Iraqi oil revenues.\textsuperscript{82} In both instances, private victims obtained money damages from states through an international body.

When one looks at regional regimes, rather than the universalist structures tied to the U.N. and the WTO, one can detect an even more pronounced trend toward direct participation by rights holders. An early and important instance is the European Court of Justice ("ECJ", also known as the Luxembourg Court). For more than forty years the ECJ has opened its doors to persons claiming that national laws or practice infringe E.C. law.\textsuperscript{83} Its complement is the European Court of Human Rights ("ECtHR", also known as the Strasbourg Court), which as a result of a treaty revision a decade ago now gives private persons direct access to the tribunal.\textsuperscript{84} For much of Europe, one or the other of these tribunals serves as the court of last resort for protecting economic and human rights that are roughly equivalent to the various liberties considered judicially enforceable constitutional rights in the United States. Moreover, both these courts have the authority to impose direct sanctions on malefactor states, a power that augments the salience of their actions.\textsuperscript{85} Other regional economic and human rights tribunals also


\textsuperscript{83} The groundbreaking cases were Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 593 (law binds member states and their nationals), and Case 26/62, Van Gend & Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 14–15 (holding that the Treaty of Rome has a direct effect in the national legal order and preempts inconsistent national law and that national courts must apply the Treaty in derogation of national law).


exist, although they do not wield their authority as convincingly as those in Luxembourg and Strasbourg.\textsuperscript{86}

Ad hoc tribunals assembled to handle particular economic disputes function alongside regional tribunals. While members of international and regional tribunals typically hold office for a term of years, parties select the persons (or the process for choosing the persons) who serve on ad hoc tribunals. Their jurisdiction rests on an extensive framework of investment protection treaties, mostly bilateral, that permits investors to seek arbitration against host governments that inflict certain kinds of injuries. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”), to which 143 states have acceded, then provides procedural rules for treaty-based investment arbitration.\textsuperscript{87} The incorporation of investment protection into the 1993 NAFTA increased the salience of this kind of regime by allowing private investors to bring treaty-based challenges to the regulatory decisions of wealthy states.\textsuperscript{88} The tribunals issue money awards, which other treaties make directly enforceable in the signatory states.\textsuperscript{89}


\textsuperscript{89} ICSID Convention, supra note 87; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. At least one court has indicated that a party may enforce its rights under an investment treaty through the New York Convention, independent of the ICSID Convention. Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 391 (2d Cir. 2011). The actual money value of these arbitral awards, notwithstanding the treaty system that obligates states to enforce them, turns on the presence of attachable assets in jurisdictions inclined to honor the treaties and the absence of defenses to attachment such as sovereign immunity. See, e.g., Compagnie Noga D’Importation et D’Exportation S.A. v. The Russian Fed’n, 361 F.3d 676, 678–679, 682–83, 690 (2d Cir. 2004) (determining the responsibility of Russian Federation for obligations of the Russian government); Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 75 (2d Cir. 2002) (deter-
Both proponents and critics of private access to international tribunals may exaggerate the importance of these developments. Domestic legal systems still do most of the heavy lifting in the protection of private interests, and people in countries with feckless legal systems do not gain all that much from whatever help international tribunals give them. Yet the emergence of these alternative venues does put some pressure on domestic officials, and the pronouncements of the tribunals provide authority for substantive claims about the content of international law. The variety of these tribunals and a lack of hierarchy among them in turn allow the cherry-picking on which progressive development of legal doctrine depends.

2. Private Dispute Resolution

In addition to tribunals that handle investment conflicts between individuals and states, there exists a robust system for private resolution of international business disputes. This system effectively displaces national courts for a broad range of international commerce. It has its legal basis in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), now more than half a century old, which obligates its 146 parties to give effect to arbitrations of private commercial disputes. Over the last few decades, businesses have increasingly resorted to this mechanism. The range of arbitral matters runs from straightforward contractual disputes to questions of corporate governance to complex innovation joint ventures.

\(^{89}\) Cf. AIG Capital Partners Inc. v. Kazakhstan, [2005] EWHC (Comm) 2239, 2239, 2272–73 (Eng.) (applying sovereign immunity to defeat attempt to attach funds held by state debtor to enforce arbitral award).

\(^{90}\) On the role of commercial arbitration in the privatization of international commercial law, see Saskia Sassen, Losing Control? Sovereignty in an Age of Globalization 14–16 (1996).

\(^{91}\) New York Convention, supra note 89.

\(^{92}\) The New York Convention can apply to commercial disputes with states as well as between private parties. Indeed, it provides the legal basis for the Iran-United States Claims Tribunal. Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc., 887 F.2d 1357, 1358 (9th Cir. 1989).
As with the ICSID regime, arbitration under the New York Convention results in monetary awards, which in turn depend on national courts for their execution. The Convention applies only to commercial disputes. The prevailing party must either use informal sanctions to induce the other side to pay or track down attachable assets in jurisdictions that honor the Convention and possess effective legal institutions capable of executing awards. The Convention allows national courts to review the arbitral proceedings to determine whether they satisfy fundamental standards of fairness and also to refuse to enforce particular awards on public policy grounds. In countries with well-developed legal systems and independent judiciaries, these review powers rarely result in overturning an arbitral award. Accordingly, arbitration may both invoke contractual terms produced by private groups and apply those terms in disputes in a manner that entails only minimal supervision by a national court. It also is possible to combine the upstream function with downstream arbitration services, as the ICC does.

3. Private Access to Domestic Courts

Over the last three decades, the most controversial development in the privatization of international law has been the expansion of opportunities for private persons to make international law relevant to domestic litigation. This expansion rests on changes in domestic law that, for the most part, are reversible in the sense that the legislature can overrule them. Moreover, it largely is confined to the rich world. But, while neither secure nor universal, the development is important and perhaps profound.

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94 For the U.S. approach, see Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l’Industrie du Papier (RAKTA), 508 F.2d 969, 972–73, 978 (2d Cir. 1974). National courts also may consider whether the dispute is “commercial” and therefore within the scope of the Convention. Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 665 (1984) (Stevens, J., dissenting) (arguing that the treaty does not apply to “matters involving the political passions and the fundamental interests of nations”).


In the United States, the rise of international law in domestic courts rests mostly on discrete strategies of appropriating prior laws for new purposes. The most famous is the discovery of the so-called Alien Tort Statute (“ATS”). The Carter Administration persuaded the U.S. Court of Appeals for the Second Circuit to interpret this 1789 provision, which addresses the adjudicatory jurisdiction of federal courts and had gone unused for almost two centuries, as legislative authorization for U.S. courts to compel foreign officials to compensate victims of international law violations. A second case backed by the Clinton Administration, dealing with atrocities carried out by the Serbian pseudo-state in Bosnia, extended liability to private actors. The pace of litigation picked up considerably thereafter. The one Supreme Court decision to address the ATS gave remarkably muddled guidance. Even more litigation ensued. Almost all legally significant issues, such as territorial scope, indirect liability, respondeat superior, and the bodies of CIL covered, remain up for grabs.

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98 Kadić v. Karadžić, 70 F.3d 232, 239–42 (2d Cir. 1995).

99 See Sosa v. Alvarez-Machain, 542 U.S. 692, 731–32 (2004). In Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 432–36 (1989), the Court held that the Foreign Sovereign Immunities Act, a much later enactment, did not recognize an implied exception to immunity for claims brought under the ATS. In this case, the Court did not address the meaning or scope of the ATS as such.

100 See Aziz v. Alcolac, Inc., No. 10-1908, 2011 U.S. App. LEXIS 19227 (4th Cir. Sept. 19, 2011) (requiring purposefulness as the test for aiding and abetting liability); Doe v. Exxon Mobil Corp., No. 09-7125, 2011 U.S. App. LEXIS 13934 (D.C. Cir. July 8, 2011) (accepting respondeat superior liability of corporation and applying ATS to extraterritorial conduct); Flomo v. Firestone Natural Rubber Co., LLC, 643 F.3d 1013 (7th Cir. 2011) (same); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148–49 (2d Cir. 2010), cert. granted, No. 10-1491, 2011 WL 4905479 (U.S. Oct. 17, 2011) (rejecting respondeat superior liability of a corporation for ATS violations by its officers and employees); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 175 (2d Cir. 2009) (finding that norm prohibiting involuntary medical experimentation was part of international law); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (requiring purposefulness as the test for aiding and abetting liability); Sarei v. Rio Tinto, PLC, 550 F.3d 822, 837 (9th Cir. 2008) (Kuta, J., concurring) (arguing that ATS does not apply to a case not involving U.S. territory or citizens); Ingrid Wuerth, The Alien Tort Statute and Federal Common Law: A New Approach, 85
The Uniform Code of Military Justice also provides a parallel instance of statutory incorporation of international law. Persons subject to military justice can invoke international humanitarian law, including the Geneva Conventions, as a constraint on their prosecution. Less important, but still significant, has been the invocation by criminal defendants on trial in the regular courts of particular treaties that seem to provide them procedural or substantive rights. The *Charming Betsy* presumption, an interpretive norm that requires courts to reconcile domestic legislation with the international obligations of the United States, occasionally produces positive results for private litigants. And several statutes adopted in the last few decades, particularly the Anti-Terrorism Act of 1996 and the Torture Victim Protection Act of 1991, expressly authorize, or remove impediments to, civil suits to enforce international law rules.
In Europe, the opening of domestic courts to international claims rests mainly on two bases. First, the foundational treaty of the European Communities contained a commitment to give direct effect to the *acquis communautaire*. Decisions of the ECJ and domestic courts reinforced this commitment. As a result, private litigants can invoke both the common-market principles embraced by the evolving European Community treaties and the specific legislation of the E.C. in both private disputes and challenges to governmental actions. Second, a number of countries have adopted laws, or interpreted preexisting laws, that authorize domestic enforcement of the international obligations embodied in the European Convention on Human Rights. Particularly noteworthy is the United Kingdom’s Human Rights Act, which went into effect in 2000. The U.K. law obligates the national courts that review legislation and government actions to apply the body of law developed under the European Convention on Human Rights by the ECtHR. The British courts have used this authority, inter alia, to overturn the antiterrorist legislation enacted in the wake of the 9/11 attacks.

Although these are the most significant recent developments, private litigants have other avenues to get into domestic courts with their international claims. Many continental European countries allow victims to participate in criminal proceedings, including prosecution for international law violations, both to shape the course of the proceedings and to obtain compensation. Some Commonwealth countries, such as Canada, have enacted laws that allow the judiciary to take account of certain international norms. Others, such as Australia, have a judiciary that uses international
and comparative sources as an interpretive template. Some continental countries, such as Germany, regard CIL as a constraint on the legislature and allow private persons to bring constitutional challenges on this basis. Somewhat controversially, the domestic courts of both Greece and Italy have recognized a right of private victims to sue states guilty of grave war crimes for reparations.

To reiterate arguments made in the previous section, none of these instances involves completely private downstream production because domestic courts provide the ultimate mechanism for guaranteeing enforcement. Moreover, national legislatures have the capacity to repudiate most, although not all, of these lawmak-


ing activities. Nonetheless, the influence of private actors is considerable, from the choice of forum to the framing of arguments to the supplying of evidence. The effect of these private choices is significant. Courts selected and informed by private litigants are more likely to generate rules that threaten substantial and entrenched economic interests than are those that hear only from the government. Private litigants can resist capture by powerful interest groups in circumstances where government cannot. Of course, private litigants also can achieve results that enrich them at the expense of the general welfare.

One might argue that these instances of domestic international law production are almost entirely limited to the rich world. In particular, China, with more than twenty percent of the world’s population and the world’s second largest economy, has done little if anything to open its courts to international claims, and the efficacy of its judiciary is in any event suspect. But flipping this argument is easy. In most of the countries with the strongest domestic legal institutions—many European states plus the United States, Canada, Australia, and New Zealand—the privatization of international law has unfolded. The gains for private production of international law, in other words, have occurred exactly in those countries where legal institutions most matter.

C. Summary

International lawmaking is a complex process, in large part because of the complicated and controversial relationship between upstream and downstream production. Assessing the impact of private decisionmaking on this process is difficult, especially with respect to the upstream stage of production. The growth of private downstream production, however, allows private upstream production to extend its reach. Private downstream producers do not face the same constraints as do public downstream producers in the selection and interpretation of rules. The elimination of a state veto over the provenance of applied norms makes it more likely that a privately generated upstream rule will have some real effect.
III. THE POLITICAL ECONOMY OF PRIVATIZING INTERNATIONAL LAW

Privatization of the production of international law at both the upstream and downstream stage is manifest and, judging by recent trends, expanding. Is this good? This section employs a cost-benefit analysis based on rudimentary welfare economics to answer this normative question. Pinning down the welfare effects of privatization of international law production turns out to be very difficult in many areas. Nonetheless, some definite conclusions can be reached.

A general assessment of the welfare effects of the privatization of international law production is impossible. Discrete choices, such as expanding or shrinking standing to raise particular treaty claims in domestic litigation, might be susceptible to a cost-benefit analysis, but there are no overarching principles that solve most problems. Although one can identify extreme cases where either largely private or largely public production appears optimal, doing much more requires particularizing the issue into a series of small-scale decisions, each of which might be resolved variously and for which reasonable opposing arguments exist.

With domain rules, however, the calculus is different. A domain rule specifies which sovereign’s rules (body of law) apply to a particular course of conduct. The cost of uncertainty about what legal rules apply, and the absence of any gains from deferring specification of domain rules until more information is revealed, argues strongly for precision and stability in the formulation of domain rules regarding international law. Applying a cost-benefit criterion, decisionmakers should avoid privatization of domain rules and thus of those privatization mechanisms that produce informal shifts in the domain of international law, absent some extraordinary justification.

A. General Principles of Privatization

The core principles applicable to privatization decisions enjoy widespread acceptance. Private producers face different incentives than does the state. Private production entails a risk of market fail-
ure, public production of government failure. A private producer can capture some of the social surplus created by its activities, while state-controlled producers typically cannot. Private production may facilitate new entrants into a sector of the economy, thus encouraging innovation, but private actors also can conspire with each other and with the state to create barriers to entry. States face structural impediments to innovation, largely because of the difficulty of aligning properly the incentives of state actors. A private producer is less likely to make a good if it cannot capture a significant portion of its social surplus, and thus will produce less than an optimal level of nonrivalrous, nonexcludable goods (public goods). Structural features of certain markets, such as natural barriers to entry or positive returns to scale, also may result in suboptimal production levels by private actors. The substitution of bureaucratic management for exchange relations, however, may result in less transparency and thus facilitate shirking and asset stripping by state actors. These concepts are well understood and widely accepted, even if their application to particular contexts does not always produce a similar consensus.

The same principles apply to the production of law. As Professor Robert Cooter has pointed out, law generated by a private community for itself may respond more effectively and promptly to technological change and other innovation-forcing developments than do rules provided by the state. From an economic perspective, the key question is the existence of spillovers. If the rules chosen have effects that fall largely on the community generating the rules, general welfare principles support letting the community find its own way in law production. If the community has the capacity to externalize the costs of its law while retaining a disproportionate share of its gains, welfare suffers. The existence of spillovers will

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114 See Anne O. Krueger, Government Failures in Development, 4 J. Econ. Persp. 9, 9–10 (1990).
depend on structural defects in markets, of which cartelization is a paradigmatic example.\textsuperscript{117}

Conversely, economists also recognize that in some contexts law functions as a public good. It may regulate harmful conduct that produces diffuse and general effects beyond the direct consequences to individuals. Violent crime, for example, affects not only the victim, but all vulnerable persons. Its costs include not just the injury suffered directly by the person attacked, but the fear and precautions induced by knowledge of the risk.\textsuperscript{118} Were enforcement limited to individuals who have suffered particularized harm, rather than extended to the state, the level of both enforcement and the specification of interpretations and distinctions that result from law application would be suboptimal.

\textit{B. The Political Economy of Private Lawmaking}

Privatization decisions are not made in a political vacuum. Economic analysis addresses not just the question of whether, in the abstract, private or public production would be optimal but also the predictable outcomes of choices about the mix of public and private production. Selecting among decisionmaking processes thus involves questions of political economy. Prior research provides some tentative observations about the predictable consequences of assigning law production to a private legislature, as well as the impact of private participation on the outcome of litigation.

The political economy of private upstream lawmaking is well studied.\textsuperscript{119} This work builds on the classical economic analysis of

\textsuperscript{117} Id. at 1684. For cautionary responses to Cooter that emphasize the potential externalities in private lawmaking, see Avery Katz, Taking Private Ordering Seriously, 144 U. Pa. L. Rev. 1745, 1750 (1996); Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. Pa. L. Rev. 1697, 1722–23 (1996).


lawmaking developed over the last half century. One of the literature’s most important contributions is specification of the effect on downstream lawmaking of the choice of upstream lawmaker. Economists posit that publicly accountable lawmakers have incentives to respond to groups interested in the concentrated effects of particular laws.120 A public lawmaker also has the capacity to engage in logrolling to provide distinct benefits to discrete groups.121 Under conditions of electoral accountability, lawmakers who fail to use these powers to reach results that satisfy a majority coalition will find themselves replaced by those who can do better.122 Over time and in the absence of exogenous shocks, lawmakers who focus on producing results that satisfy majority coalitions should crowd out lawmakers with other motivations.123 Lawmakers thus have reason to prefer specific, rule-like laws that lock in the effect of legislative bargains and discourage downstream lawmakers from undoing the logrolling that made the product possible.124 Private lawmakers, by contrast, face different incentives. Specialized groups may promote rules that respond specifically to the needs of the limited range of transactions in which they are interested. These groups may or may not have an incentive to optimize the welfare effects of the rules they produce, depending on the presence or absence of competitive pressures on the transactions they address. Private lawmakers chosen by such groups must answer to their principals and might lose their positions if they fail to

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120 See, e.g., Dennis C. Mueller, Public Choice III 329 (2003) (formalizing proposition that voters seek outcomes that provide them the highest benefits).
121 See id. at 104–06 (discussing logrolling).
122 Cf. id. at 329 (arguing that voters will vote for the candidate that offers the greatest benefit).
123 See id. at 255 (analyzing dynamics of elections under competitive conditions).
124 See Richard A. Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 278 (1982); cf. William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875, 876, 882 (1975) (noting the possibility of nullification of legislation by the judiciary). This point does not mean that public legislators have no incentive to enact broad standards that leave concrete problem solving to downstream lawmakers. There still will exist situations where legislators will derive some benefits from being seen to have acted but are unable to bridge differences among interested parties. Under these conditions, they are likely to adopt indefinite standards that put no affected interest immediately at risk or to delegate discretionary lawmaking authority to agencies that the legislators then can lobby on behalf of interested constituents. See id. at 888; Pistor & Xu, supra note 13, at 933.
do so. Generalist groups seeking to produce a consensus across a
broad issue area face powerful incentives to formulate standards
that gloss over differences and postpone consequential lawmaking
to the downstream stage. These groups wish to see their rules
adopted but can neither capture a share of the benefits nor bear a
portion of the costs resulting from the effects of their products.
They thus tend to produce standards that leave most of the heavy
lifting to downstream actors.125

A separate literature exists on law privatization at the down-
stream level. It looks at private enforcement of public law, includ-
ing expansion of forum choices for litigants.126 It identifies tradeoffs
in the privatization decision, including undoing legislative settle-
ments, risk of judicial capture, resisting legislative and executive
capture, and information-forcing. No consensus exists about the
relative merits of private enforcement as such. The best evidence
indicates that the risks depend heavily on context and institutional
design. Some argue that distinctive features of civil litigation in the
United States—flexible choice-of-law and venue rules that permit
forum shopping, jury trials, contingency fees for lawyers, no fee-
shifting, extensive pretrial discovery, class actions, and supercom-
pensatory damages—skew private litigation in favor of persons
seeking to expand regulatory scope.127 But even this proposition is
controversial.128

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125 See Gillette & Scott, supra note 119, at 465–68; Schwartz & Scott, supra note 22;
Scott, supra note 119, at 1824–25; Stephan, supra note 4, at 759.
126 See John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model
of Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 284 (1983); Frank
B. Cross, The Judiciary and Public Choice, 50 Hastings L.J. 355, 355 (1999); Jody
Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 545–546
(2000); Landes & Posner, The Private Enforcement of Law, supra note 24, at 1; Tho-
mas W. Merrill, Capture Theory and the Courts, 72 Chi.-Kent L. Rev. 1039, 1043
(1997); Warren F. Schwartz, An Overview of the Economics of Antitrust Enforce-
ment, 68 Geo. L.J. 1075, 1076 (1980); Paul B. Stephan, A Becoming Modesty: U.S.
Litigation in the Mirror of International Law, 52 DePaul L. Rev. 627, 628 (2002);
Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv.
L. Rev. 1193, 1195 (1982).
127 See infra note 134.
128 See, e.g., Abram Chayes, The Supreme Court, 1981 Term: Foreword: Public Law
class action litigation as a means of involving federal courts in public policy).
C. Privatization and Primary Rules

If we focus on rules that provide standards for regulating primary behavior—negative commands such as “do not kill,” or facilitative ones like “a promise accompanied by bargained for consideration creates a presumption of legal enforcement”—comprehensive analysis of private production becomes impossible. Perhaps one can isolate extreme cases where temperate and provisional conclusions might be drawn. Bodies of law that facilitate socially desirable voluntary transactions in competitive environments might benefit from private upstream lawmaking and downstream dispute settlement, as the international letter-of-credit regime illustrates. Some subjects might demand exclusive state control, such as the determination of national boundaries\(^\text{129}\) or the *jus ad bellum* that determines the legality of going to war.\(^\text{130}\) Between these extremes, pinning down the welfare effects of privatization is difficult absent deep empirical investigation and a highly context-specific assessment.

Take as an example the modern trend that substitutes private investor arbitration for state-to-state dispute resolution with respect to expropriation and other mistreatment of foreign investments. Allowing investors direct access to international dispute resolution solves an agency problem by clarifying the investor’s entitlement. An espousing government might give up the investor’s claim if it receives a compensating concession, such as cooperation against a

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\(^{129}\) But cf. *Leu v. Int’l Boundary Comm’n*, 605 F.3d 693, 694 (9th Cir. 2010) (suit by a private landowner challenging the authority of the international boundary commission).

security threat. By allowing the investor to pursue its claim whether its government approves or not, the modern approach enhances investor security and thus makes realization of optimal levels of investment more likely.\(^\text{131}\) Inevitably, however, this approach also privileges investor security in relation to other legitimate interests, such as environmental protection, industrial policy, and national financial policy. Full protection of investor rights might generate harmful spillover effects.\(^\text{132}\) One cannot determine in the abstract whether the old espousal approach or the modern investor-right-to-sue strategy better optimizes welfare without knowing more about the pressures on states to default on commitments to foreign investors and the range of unforeseeable events that might demand state regulation that impairs the value of foreign investments.

Much the same can be said about increasing indirect private participation in public international lawmaking, whether at the treaty negotiation stage or in state-to-state dispute settlement. In almost every case, one can tell either a capture (private participation bad) or a sunshine (private participation good) story. In the contemporary world economy, which rewards owners of mobile inputs (financial and human capital) more generously than it does owners of static inputs, one might wish to erect high barriers against any private influence so as to avoid an unequal bidding war between the rich and the poor. Alternatively, keeping out the rich might be impossible and only a wide open door might allow the poor to be heard at all. Perhaps, as seems likely, extending a veto power to more participants might result in fewer deals getting made, resulting in less upstream production of international law.\(^\text{133}\) But if this means fewer treaties that promote inequality and marginalize the powerless, so much the better.

The point can be generalized. If international law dealt with only a limited class of problems with core common characteristics, perhaps one could do better. One might, for example, erect a pre-

\(^\text{131}\) Scott & Stephan, supra note 15, at 138.


\(^\text{133}\) See supra note 62.
Privatizing International Law

sumption in favor of or against privatization based on judgments about the nature of the problems that international law generally addresses and its institutional resources. But international law functions in many contexts. Its scope, scale, and institutional complexity make a one-size-fits-all solution impossible.

First, consider scope. The array of issue areas in which international law has a potential role is vast and growing. Changes in the world economy and global society have combined to give almost any regulatory or social issue an international dimension. People transact across borders, move across borders, and send information across borders more frequently than ever, bringing legal issues in their wake. Fifty years ago, international law and international lawyers concentrated their efforts largely on public issues such as use of force, state boundaries, allocation of regulatory jurisdiction, diplomatic privileges, and matters pertaining to the high seas. Today, the field contains detailed regulation of matters as diverse as criminal procedure, family law, contracts, arbitration and litigation, intellectual property, environmental standards, anti-discrimination and other human rights, and health care.

Next, consider scale. Treaties have proliferated and advocates and jurists find CIL in new and remarkable places. For most policy areas, the question is not whether any international law applies at all but rather determining which of the many treaties and claims about CIL that parties invoke to recognize.

Finally, consider institutional heterogeneity. International institutions have become increasingly diverse, especially at the supranational level. Many have lawmaking authority. How well the law they produce matches the needs of those to whom it applies varies enormously.

If one were to look to national practice for evidence about the relative merits of private enforcement and a state monopoly, it does not get any easier. Institutional variations make comparisons difficult. The extensive use of private enforcement of domestic public rights in the United States can be contrasted with the more limited opportunities for private litigants in continental Europe. Isolating the independent and dependent variables to determine which system works best seems impossible.\(^\text{134}\)

\(^{134}\) Complicating comparisons of national practice are the different institutional arrangements for private litigation. The United States employs a number of unique or
Faced with the range of issue areas, the complexity and diversity of existing institutions, and the variety of national approaches, one cannot prescribe, within the confines of a welfare analysis, overarching criteria for privatization of international lawmaking. Privatization, after all, is not a binary choice but rather employs a range of elements such as recognition of upstream actors, allowance of a private right of action, respecting private forum choices, and the like. Assessing the welfare effects of each of these variables across a vast range of discrete policy areas is challenging in the extreme. There exists no general consensus about privatization among scholars studying domestic law, and there is no reason to believe one can do any better in international law.

D. Privatization and Domain Rules

The inability of welfare analysis to provide a universal response to the privatization question is not the same as no response. The growth of international law has meant a growth in its domain. How one goes about privatization can have significant domain effects. Unusual rules that encourage private suits, including contingency fees, broad pretrial discovery, class actions, civil juries and punitive damages. The Supreme Court recently took note of these institutional differences. Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2886 (2010) (“While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”).

To be sure, economists over the last decade have attempted to determine the welfare effects of common-law and civil-law legal systems. Rafael La Porta, Florencio López-de-Silanes, Cristian Pop-Eleches & Andrei Shleifer, Judicial Checks and Balances, 112 J. Pol. Econ. 445, 448–49 (2004); Rafael La Porta, Florencio López-de-Silanes & Andrei Shleifer, The Economic Consequences of Legal Origins, 46 J. Econ. Literature 285, 286 (2008); Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer & Robert Vishny, Law and Finance, 106 J. Pol. Econ. 1113, 1113 (1998); Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer & Robert Vishny, Legal Determinants of External Finance, 52 J. Fin. 1131, 1131 (1997); Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer & Robert W. Vishny, The Quality of Government, 15 J.L. Econ. & Org. 222, 261–62 (1999). To date, however, they have not successfully isolated the features of each system that have clear welfare effects and in particular have not traced differences in economic productivity to differences in the degree of privatization of lawmaking. See Nuno Garoupa & Carlos Gómez Ligüerre, The Syndrome of the Efficiency of the Common Law, 29 B.U. Int’l L.J. 287, 288 (2011); Daniel M. Klerman & Paul G. Mahoney, Legal Origin?, 35 J. Comp. Econ. 278, 290–91 (2007).
Welfare analysis does provide clear and straightforward insights about domain changes.

1. The Production of Domain Rules

A distinctive feature of law is the domain issue.\footnote{On my understanding of the meaning of the term “domain,” see supra note 20. For related but distinct usages of the term, see, for example, Frank H. Easterbrook, Statutes’ Domains, 50 U. Chi. L. Rev. 533 (1983) (discussing when particular statutes apply to a dispute); Joel Trachtman, The Domain of WTO Dispute Resolution, 40 Harv. Int’l L.J. 333 (1999) (discussing the scope of WTO law in relation to general international law); Tim Wu, Treaties’ Domains, 93 Va. L. Rev. 571 (2007) (discussing the factors determining when treaties provide rules of decision for particular adjudicable disputes).} As I use the term, domain issues involve the extent that a particular lawgiver has exercised its legitimate authority and, in the case of overlap, which lawgiver’s pronouncements govern. They do not extend to substantive questions, such as whether a state’s criminal, contract, or tort law might apply to a transaction. First, as a logical matter, substantive decisions are not exclusive: all of the above is a possible answer. By contrast, as to any particular legal issue, only one lawgiver’s pronouncements can have ultimate authority. Second, as a practical matter, different bodies of law produced by the same lawgiver are likely to share many characteristics, including background principles and interpretive rules. Laws produced by different lawgivers, in contrast, are more likely to differ fundamentally.

Domain issues are pervasive. The relevance of a legal rule necessarily implies a prior question, namely its applicability to the problem at hand. A rule adopted by Virginia setting a speed limit of 55 miles per hour presumably would apply only in Virginia and thus would not matter to drivers in New York. To know whether Virginia’s rule applied to particular conduct, we would have to determine if the conduct came within the rule’s domain, that is, whether the driving occurred in Virginia.

The location of conduct is only one factor used to determine domain. Depending on the associated domain rule, one might need to know the actor’s citizenship, the scope of the conduct’s effects, or some other consideration that will determine the scope that the relevant lawgiver assigned to the rule. This inquiry in turn requires ascertaining the capacity of a given lawmaker to apply a rule to
specific conduct. The capacity issue comprises two inquiries—the scope of the lawmaker’s authority and the hierarchy of authority among lawmakers that have overlapping authority to regulate particular conduct.\textsuperscript{136}

An upstream lawmaker may not advert to this issue, but a downstream lawmaker must. Consider, for example, the possible applicability of a rule imposed by a federal statute to conduct taking place outside the United States. The language of a statute may not state whether the rule applies extraterritorially, but a court must decide that issue before it can invoke the rule.\textsuperscript{137} Within a federal system such as the United States, the challenge of determining domain already is complex, given the choice between applying federal and state law as well as determining which state’s law, if any, might apply. Opening up the prospect of applying international law rules compounds the degree of difficulty.\textsuperscript{138}

Determining the scope of a lawmaker’s authority involves two analytically distinct issues: (a) the full extent of the lawmaker’s authority and (b) the scope actually exercised. The extent to which the statutes of the United States may, as a matter of domestic constitutional law, apply to extraterritorial conduct remains controver-

\textsuperscript{136} It is important to distinguish a domain rule—determining the scope of a set of rules—from adjudicatory jurisdiction—the scope of a particular tribunal’s authority to consider particular disputes. Domain rules define a lawmaker’s prescriptive jurisdiction. Adjudicatory jurisdiction defines a tribunal’s power but not necessarily which rules it may or must apply. Persons more familiar with private law might consider the difference between contractual choices of forum (in effect, adjudicatory jurisdiction) and of law (in effect, prescriptive jurisdiction). The distinction is apparently elusive, as evidenced, for example, by the majority opinions in \textit{Hartford Fire Ins. Co. v. California}, 509 U.S. 764, 795–96, 799 (1993) and \textit{Sosa v. Alvarez-Machain}, 542 U.S. 692, 724 (2004), as well as the recent attempt by Congress to modify the Supreme Court’s holding in \textit{Morrison v. National Australia Bank, Ltd.}, 130 S. Ct. 2869, 2883 (2010) (as a matter of prescriptive jurisdiction, the Securities Exchange Act does not apply to non-U.S. transactions), through Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (addressing only adjudicatory jurisdiction).

\textsuperscript{137} See, e.g., \textit{Morrison} 130 S. Ct. at 2883 (invoking the presumption that Congress does not intend to regulate conduct taking place outside the territory of the United States).

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sial. The Supreme Court has held that the Due Process Clause limits the authority of a U.S. state to regulate extraterritorially, but it has not fixed the precise boundaries of this limitation. The domain of international law may depend on a particular tribunal’s capacity to apply it, an issue that can be deeply complex and with regard to which the practice of national courts varies considerably. Downstream decisionmakers such as courts sometimes avoid these questions by imposing narrowing constructions on the scope of laws. Examples include a presumption against extraterritoriality, in the case of domestic law, or against direct effect, in the case of international law.

As indicated above, hierarchy issues further complicate domain rules. Where domains overlap, a downstream lawmaker must decide which prevails. In Westminster-type systems, where international law enters into domestic law only through an act of Parliament, the hierarchy question is easy to answer: only domestic law applies directly, and international law requires implementation by statute. In the United States, by contrast, the matter is less certain. The hierarchical supremacy of federal legislation and common law over state law is clear but not that of international law. In the European Community, the relationship between the Community’s

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139 For a strong statement of the argument that constitutional limits exist, see Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 Harv. L. Rev. 1217, 1262 (1992). For a revision of the argument that distinguishes between legislation that implements international law and other kinds of regulation, see Anthony J. Colangelo, A Unified Approach to Extraterritoriality, 97 Va. L. Rev. 1019, 1103–09 (2011). Judicial practice to date does not support the assertion that due process limits extraterritoriality in legislative prescriptions. See, e.g., Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 578–84 (4th ed. 2007) (noting that only a handful of cases have discussed the issue and none has held a statute unconstitutional for this reason).


141 See generally Nollkaemper, supra note 79, at 6–9 (discussing institutional capacity as a predicate to application of international law).

142 For evidence of the confusion, compare the majority and dissenting opinions in Medellín v. Texas, 552 U.S. 491, 504, 541 (2008). Although a rich scholarly literature exists on the possibility of polyarchic lawmakers in international regulation, I put it aside here as the possibility of complexly interrelated governance only complicates the domain issue further.
supranational law and international treaty law is even more complex.\textsuperscript{143}

From the perspective of legal instability, however, hierarchy questions collapse into the general problem of determining domain rules. The coupling of a clear domain rule with an indeterminate hierarchy rule will produce lower quality, perhaps value-subtracting information, as will the coupling of a vague domain rule with a clear hierarchical ordering. Thus, when discussing domain rules, this Article means both scope and hierarchy.

For a welfare analysis, domain rules raise different considerations than do primary rules governing conduct. The design of primary rules requires tradeoffs between precise rules and vague but accurate standards. Vagueness in primary conduct rules sometimes can have positive welfare effects.\textsuperscript{144} Vagueness in domain rules, however, is far more likely only to reduce social welfare.

Conventional analysis depicts a precise regulatory rule as limiting downstream discretion and for that reason as prone to some mix of overinclusiveness and underinclusiveness. The quotidian example is a 55 mile per hour speed limit, the precision of which reduces the discretion of both the police and the judge but fails to account for safety variables such as driver skill, vehicle capacities, and driving conditions. The more complex and uncertain the envi-


\textsuperscript{144} See generally Scott & Stephan, supra note 15, at 178–79 (discussing the costs of uncertainty about scope of international law enforcement).
ronment subject to regulation, the stronger the argument for allowing the rule-enforcer to consider a broader range of information, as a standard permits. The greater the need for legal certainty in choosing courses of conduct, the more attractive are precise rules. Reasonable people can debate where on the continuum a particular set of transactions might fall, but the existence of the tradeoff as such is uncontroversial.\footnote{145}

With domain rules, however, there are no compensating benefits derived from the uncertainty that standards employ. Domain rules determine which set of rules apply to a course of conduct, not what the content of the set is. A choice of domain normally rests on concerns about legitimacy and certainty, concepts that implicate the principle of legality.\footnote{146} Deferring the determination of domain until more information emerges would not improve the welfare effects of the domain choice but would transgress the legality principle as well as reduce the value of law as information.

As noted above, the core advantage of employing a standard is its exploitation of information that is revealed between the time of a rule’s promulgation and of its application. But postponing the choice of the applicable set of rules until future states of the world are revealed is unlikely to turn up information that will aid the choice of domain. Waiting until more is known about the world may improve decisions about what constitutes “reasonable speed.” If both an international and a domestic rule might apply to a situation, however, further discovery about the state of the world should not improve the decision about which lawgiver has legitimately exercised its authority.

\footnote{145}{See, e.g., Scott & Triantis, supra note 30, at 817–18; David A. Weisbach, An Economic Analysis of Anti-Tax-Avoidance Doctrines, 4 Am. L. & Econ. Rev. 88, 89–91, 106 (2002).}

\footnote{146}{By the principle of legality I mean specifically \textit{nulla poena sine lege} and not the broader concept of rule of law or rechtsstaat. See John C. Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 189–90 (1985). The legality principle is enshrined in international law as well as the fundamental laws of most nations. See, e.g., International Covenant on Civil and Political Rights, art. 15(1), Dec. 16, 1966, 999 U.N.T.S. 177. (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.”).}
Yet, ex post, the choice of lawgiver very well may be outcome
determinative, because the sets of rules may contain different
measures governing the primary conduct at issue. This means that,
if allowed to do so, parties to a dispute will argue opportunistically
over the domain choice to get the best outcome. Thus, a vague
domain rule may induce costly disputes at the end of a course of
conduct without any offsetting benefits.147

Here a clarification is needed. One must not confuse the welfare
effects of the choice of domain with those of the method for mak-
ing that choice. In many contexts a particular domain rule might be
superior to another. The choice of domain might, for example,
solve a collective action problem and thus increase welfare. A con-
ventional explanation for the application of a federal rule in the
United States is to avoid opportunistic state rules that sacrifice
general benefits to reward local interests.148 More generally, rules
given force at a higher-level domain, some argue, suppress regula-
tory races to the bottom that otherwise would proceed. There is, of
course, a counter-argument: the use of lower-level domains is nec-
essary to permit races to the top, and in some contexts such races
are desirable.149 In either instance, one can pick the domain rule

147 The claim that vague domain rules have no benefits is not uncontroversial. Joel
Trachtman, for example, defends obscure (what he calls “muddy”) domain rules on
the grounds that they can provoke authoritative dispute resolution that will bring
about optimal allocations of domain. See Joel P. Trachtman, Economic Analysis of
argument is unconvincing, at least with respect to the choice between international
and domestic domains. First, his focus is on the domain of national actors rather than
the domain of international law. Moreover, he does not maintain that muddy domain
rules are intrinsically desirable but only that they may induce desirable and unmuddy
consequences, namely reassignment of domains to optimal regulators. His argument
about states responding to muddy rules by designing optimal jurisdictional allocation
rests on several strong assumptions, and he does not demonstrate that the response
mechanism that he envisages operates in many contexts. His claims thus might be
bracketed with those of Professor Saul Levmore, supra note 18, as creative theoretical
objections to the argument in text that depend on problematic and possibly implausi-
ble conjectures about institutional responses.

148 See Paul B. Stephan, What Story Got Wrong—Federalism, Localist Opportunism

149 On the dynamics of races to the top, see Roberta Romano, Empowering Inves-
tors: A Market Approach to Securities Regulation, 107 Yale L.J. 2359, 2425 n.216
(1998). For an extension of the argument to other regulatory fields see Paul B.
Stephan, Regulatory Cooperation and Competition: The Search for Virtue in Trans-
atlantic Regulatory Cooperation: Legal Problems and Political Prospects 167 (George
based on empirically backed arguments about likely welfare effects.

Whether evidence suggests that a particular context provides opportunities for a race to the top or a risk of a race to the bottom, the appropriate response is to pick an appropriate domain rule. Postponing the choice by using a vague standard that allows downstream decisionmakers to take post-enactment information into account will allow neither the suppression of perverse regulatory competition nor the facilitation of salutary regulatory competition. Rather, actors simply will not know what law applies. Vague domain rules thus are less than optimal across all contexts.

The point is not that shifts in domain are undesirable. A decision, for example, to federalize the rules governing a range of conduct might both promote uniformity and overcome opportunism or interest-group capture at the state level. A move up from domestic to international law might achieve the same benefits across nation-states, and a move down might promote desirable regulatory competition. But shifts in domain will promote welfare only if the new specification is clear, prospective only, and based on readily observable circumstances that give relevant actors reliable information about the likelihood of future shifts. Conversely, standards that leave substantial residual uncertainty over the applicable domain of a set of rules will be costly. People contemplating a course of conduct will need to take precautions against the legal uncertainty entailed and may forego otherwise desirable conduct altogether.\(^{150}\)

With this point clear, it becomes possible to consider the impact of privatization on the domain rules developed for international


\(^{150}\) The Russian privatization process illustrates this problem. The lack of clarity about the rules governing the process led to suboptimal investments and considerable ex post controversies. See Paul B. Stephan, Towards a Positive Theory of Privatization—Lessons from Soviet-Type Economies, 16 Int’l Rev. L. & Econ. 173, 184–88 (1996). Ongoing difficulties with the principle of legality continue to destabilize the line between public and private ownership, with negative economic consequences. See, e.g., Rosinvest Co. UK Ltd. v. Russian Fed’n, Final Award, SCC Case No. 075/2009, I.I.C. 471 (2010) (expropriation of Yukos oil company). In the spirit of full disclosure, I should note that I have provided legal advice to Yukos and its investors in the course of various challenges to the Russian Federation’s actions, but that I was not involved in the Rosinvest Co. matter.}
law. The issue, one must remember, is the process by which a domain shift occurs, not the wisdom of the shift in the abstract. In international law, one can find both formal and informal mechanisms that produce domain shifts. Formal mechanisms tend to produce definite, nonretroactive, and stable shifts, while informal mechanisms typically rest on broad, general, and therefore vague principles, sometimes apply retroactively, and engender instability. State actors have a monopoly over production of formal rules, while some forms of privatization of international law, such as the invocation of CIL by a domestic court, require informality in domain shifts.

2. The Domain of International Law

As a matter of welfare economics, the significance of a domain rule turns on the degree of difference between the candidate primary-rule systems. Whether clear or unstable, a rule that determines whether, say, Massachusetts or Virginia law applies to a transaction will have little consequence if the underlying issue involves the Uniform Commercial Code, which has identical form in both jurisdictions. Domain matters only to the extent that the legal rules differ.

Even comparable legal systems, such as those of particular U.S. states, can contain significant differences as to particular rules. Disputes over governing law arise when the choice of law determines the outcome.\(^\text{151}\) In the United States, differences between federal and state law, as much as differences among the laws of the several states, have generated much litigation and provide the basis for a large portion of the traditional federal courts course. At the end of the day, however, variations between federal and state law, as well as among the states, are more a matter of degree than of kind. Each rests on fundamentally similar principles, reflects structurally similar lawmaking processes, and expresses a common legal culture.

International law is different. A wide gap separates international law from the domestic law of almost all states, as well as from the

various laws that operate within federal states. In general and with important exceptions, this gap is greater, and the domain rule thus more consequential, than those among as well as within particular domestic legal systems.

The gap results from the distinctive mechanisms that produce international law. Most international law involves cooperation and coordination among multiple sovereigns, each with distinct and often conflicting interests. CIL presumes to represent the considered views of the entire international community, and multilateral treaties make up a substantial share of all treaties. Even plurilateral and bilateral treaties entail more than one sovereign. Achieving agreement thus depends on bridging differences in both material interests and cultural assumptions. The need to bridge in turn creates a demand for indeterminate standards. In many contexts, the resulting international law does delegate greater discretion to downstream decisionmakers than does the corresponding national law.152

The fundamentally anarchic nature of downstream international-law production compounds the indeterminacy that these delegations of discretion produce. The absence of a generally accepted hierarchy of sources or of centralized supervision means that downstream lawmakers have a significant array of rules from which they can choose. There exists little if any pressure on these lawmakers to achieve consistency with their peers.153

Moreover, these lawmakers do not even share a common commitment to fundamental principles or to interpretive methodology. Resort to open-ended standards is commonplace in some parts of domestic law, and some of these standards have an international counterpart. Examples include the commitment to common markets found in, for example, the European Community’s treaties, the Uruguay Round Agreements, and the U.S. Constitution, or the general principle of “fair and equitable treatment” codified in many investor protection treaties that seems to resonate with the

152 See sources cited supra note 145.
153 Cf. Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (criticizing the majority for not seeking to align its result with decisions of other national courts interpreting the same treaty).
The absence of a common historical experience or shared background cultural commitments among the persons charged with applying these standards, however, makes it unlikely that national and international decisionmakers will find common principles leading to common outcomes. Within the domain of international law, the person or institution charged with applying the law generally faces far fewer constraints on permissible outcomes than do comparable actors operating under domestic law.

A dispute now winding its way through the U.S. courts illustrates the degrees of decisionmaker discretion expanded by an extension of the domain of international law. The United States has hosted ATS suits since 1980. The Supreme Court in 2004 endorsed these suits in principle but also cautioned against expansive endorsement of international human rights litigation in light of the scant statutory materials available. Meanwhile, in the last decade, plaintiffs have concentrated on large, deep pocket corporate defendants instead of normally judgment-proof former government officials. The presence of these defendants requires courts to address secondary issues not raised by suits against officials, including the scope of aiding-and-abetting liability and the rules of respondeat superior.

In wrestling with these secondary issues, the lower courts have confronted the domain issue directly. Some judges have argued that, because international law provides the basis for the underlying tort claim, it also ought to govern secondary issues such as theories of accessory liability. Because international law rarely addresses these problems, these judges have inferred a lack of support for any robust rule of accessory liability. Others have argued

that precisely because international law rarely if ever faces issues regarding the accessory liability of private persons, courts should develop federal common law to determine the scope of accessory liability. Those who have applied international law in turn have exercised considerable latitude in choosing the materials that they deem relevant to choosing a rule of decision.

This general portrait of international law as open-ended and indefinite is subject to important exceptions. Some upstream products originate in homogenous groups with a clear and focused interest in particular legal outcomes. The classic example is the Uniform Customs and Practice ("UCP"), a set of model contractual terms for international letters of credit. A committee of bankers operating under the auspices of the International Chamber of Commerce, a private club, has turned out versions of the UCP for the better part of a century. These terms generally reduce the ambiguities found in domestic letter-of-credit law, such as Article 5 of the Uniform Commercial Code. Some bilateral treaties, such as boundary treaties, also reduce legal ambiguity.

These exceptions, however, bolster the general point that domain rules governing international law normally have greater salience, and larger consequences, than do other kinds of domain rules. Both result from upstream lawmaking that occurs in a context where the demand for clear rules overcomes the tendency to postpone hard choices. Moreover, the same dynamics that lead to clear primary rules also generate transparent domain rules. The legal effect of projects such as the UCP does not depend on general principles of international law but rather on the domestic law of contract. The scope of bilateral treaties normally is specific and contextual. In each case, clear substantive international rules and precise domain boundaries come bundled together.

In short, the welfare consequences of instability in the domain of international law usually matter more than does uncertainty in

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157 See, e.g., Kiobel, 621 F.3d at 149–53 (Leval, J., concurring only in the judgment) (liability of corporation for acts of employees); Khulumani, 504 F.3d at 284 (Hall, J., concurring) (aiding and abetting liability). For a defense of this position, see Wuerth, supra note 100.

158 See Paul B. Stephan, supra note 4, at 780–81.
other domain rules. Privatization mechanisms that destabilize international law’s domain thus raise concerns that other forms of privatization do not. How privatization can destabilize domain is discussed below.

3. Private Upstream International Lawmaking and Domain Rules

Consider first the effect of upstream international lawmaking on domain rules. Following the analysis proposed in Part II of this Article, one can distinguish indirect privatization through commandeering of public actors, on the one hand, from direct private lawmaking, such as with the ICC or the articulation of CIL by private actors, on the other. Increased private influence over the treaty process has no impact on domain rules as such. Direct private lawmaking, by contrast, can feed into downstream lawmaking that may destabilize the applicable domain rules.

There are many reasons either to celebrate or bemoan the commandeering of public upstream lawmaking by private interests. One can either tell a capture story or argue that increasing private participation produces more deliberation and democratic accountability. Wherever the truth lies, one thing seems clear: increasing indirect participation of private actors in international law production should have no impact on domain rules as such. Once a treaty comes into effect, it will be subject to the domain rules that typically apply to such instruments. Formal production through treaties is the most stable and well understood way that international law increases or shrinks its domain. Private influence might lead to either more or fewer treaties of greater or lesser scope, but it does

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159 One might also design legal rules to increase the transparency and accountability of international regulators. A burgeoning literature on international administrative law addresses these problems. See, e.g., Sabino Cassese, Administrative Law Without the State? The Challenge of Global Regulation, 37 N.Y.U. J. Int’l L. & Pol. 663 (2005); Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 Yale L.J. 1490 (2006). Those issues are subsequent, however, to the decision whether to apply a rule of international law at all.

160 I do not mean to suggest that the domain rules that apply to treaties are necessarily clear or coherent. Compare Wu, supra note 135 (discussing the factors determining when treaties provide rules of decision for particular judiciable disputes), with Medellín v. Texas, 552 U.S. 491 (2008) (following a different approach in holding various treaties not self-executing). Rather, the extent of private influence over the production of a treaty does not change the accompanying domain rule, whatever it is.
not affect the core domain rules that apply whenever a treaty is adopted.

Direct upstream lawmaking by private groups works differently. The formal domain rules that govern treaties do not apply to private projects. Instead, downstream actors must determine the domain in the course of deciding whether to recognize upstream products. Here the choice of mechanism is critical and results in significantly different welfare effects. Clarity and precision about the rules that determine which lawgiver’s rules apply reduces uncertainty while vague, indeterminate rules governing domain choice increase costly uncertainty exponentially.

In essence, two mechanisms exist for determining when the international-law products of upstream private lawmaking apply to a particular dispute. A contract might incorporate privately generated standardized terms, in which case the domain rules would be provided by the applicable law of contract. Alternatively, a downstream lawmaker might determine that the rules of CIL should apply and that upstream activity, including private commentary, constitutes CIL. The differences in the relevant domain rules are profound.

The domain of contract law is fairly well established and clear. Downstream decisionmakers typically give effect to a contract unless the agreement either is not informed and voluntary or conflicts with some positive legal enactment or strong public policy. Variation in the domain rules among international and national contract regimes is not all that great. While the rules setting the boundary for contract law may engender some indeterminacy, they operate as coherently and clearly as do any domain rules now in use.

The domain of CIL, by contrast, is deeply uncertain. First, the rules that establish the criteria for recognizing CIL are sufficiently abstract and capacious to admit multiple outcomes.\(^{161}\) Second, legal systems vary widely in their acceptance of portals for introducing CIL. The fraught and far from resolved debate in the United States over the status of CIL as federal common law provides just one il-

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\(^{161}\) See Anu Bradford & Eric A. Posner, Universal Exceptionalism in International Law, 52 Harv. Int’l L.J. 1, 12–13 (2011); Roberts, supra note 67, at 61; Stephan, Symmetry and Selectivity, supra note 143, at 102.
illustration. To take another example, many jurisdictions accept in the abstract that CIL may serve as an interpretive device to shape positive law but vary widely in when and how they wield this tool. Both of these mechanisms give the downstream decisionmaker great discretion as to whether to invoke and apply CIL.

This discretion represents the most problematic aspect of CIL. One cannot fix its domain until downstream opportunities arise. An actor contemplating a course of conduct must assess separately the likelihood of a national bureaucracy, an international tribunal, an ad hoc private tribunal, or a national court recognizing and applying a particular claim about CIL. Each may recognize different domain rules, joined only by the most general and abstract principles. I discuss the privatization of these decisions next.

4. Private Downstream International Lawmaking and Domain Rules

Downstream application of international law, which generates new rules in the course of dispute resolution, occurs in numerous contexts. Government actors may apply these rules in the course of their normal business. International tribunals may use them to resolve a dispute, as may ad hoc commercial arbitration bodies. Finally, domestic courts may use international law to decide a case. Each context is different, especially with respect to the impact of its practice on domain rules.


163 Further indeterminacy stems from what I have argued is a general failure to recognize CIL’s multiple functions and the substantive divergences that result. A domestic bureaucracy or an international organization, for example, has good reasons to recognize different bodies of CIL than those recognized by domestic courts. Thus, CIL is not homogenous, but rather its content varies depending on the context. Stephan, supra note 41, at 192–93.
Privatizing International Law

a. Bureaucracy-to-Bureaucracy Interactions

Perhaps the most significant and pervasive work of downstream international lawmaking involves the day-to-day interaction of governmental departments, whether foreign offices, militaries, or various specialized agencies such as competition bureaus, trade negotiators, environmental regulators, and the like. Claims about treaty interpretation and CIL, both explicit and implicit, underlie much of the discourse among these actors. These actions are iterative and open to participation by permanent bureaucracies that provide stability and institutional memory. They are also at the core of the public function and not subject to privatization as such, although private interests on occasion may commandeer a state’s bureaucracy.

Iterative interactions and institutional stability make it more likely that the domain rules applied by national bureaucracies can achieve some clarity and consistency. The ongoing relationship among the national bodies makes it easier for them to agree about the topic of their conversation, even if disagreements about substance persist. The process allows the participants to reach some consensus, if not about what the primary rules mean, at least about where they apply. Disruptive change and breaks in continuity may occur, as when a revolutionary regime repudiates its predecessors across the board. But the need to resume interactions tends to dampen this effect.

b. International Tribunals

Consider next international tribunals. If a tribunal limits participation in its proceedings to state representatives, as does the International Court of Justice, the Law of the Sea Tribunal, and the WTO Dispute Settlement Body, the iterative and stable character of state interactions should dominate. Although the tribunal might introduce its own interests and views into these interactions and thus influence what the parties contend, the state representatives still have an incentive to make claims that they can live with in other contexts and not to throw overboard the arguments of their

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164 See id. at 201–03.
predecessors.\textsuperscript{166} To the extent that states can anticipate appearing before a particular tribunal on a regular basis, they will have reasons to come to a coherent and consistent understanding about the tribunal’s particular domain. These understandings in turn will influence the tribunal, even if the litigating states cannot bind it.

The introduction of private actors into the mix changes this dynamic. If, as seems reasonable to assume, the arguments made to a tribunal affect what the tribunal does, then more private participation would increase the risk of unstable domain rules. Private actors can make new claims about treaty interpretation and CIL. Even if represented by experienced counsel, these actors do not face the same constraints as do government actors. They do not have to stand behind prior claims about international law and may discount the possibility that in the future they may need to make different arguments than those made at the moment. In particular, they do not have the same incentives to honor a consensus about the tribunal’s domain, and may benefit from creative and disruptive domain claims. A private investor proceeding against a state under a bilateral investment treaty, for example, may have good reasons to expand the common understanding of what constitutes an investment or what state action violates the “fair and equitable treatment” standard found in most investment treaties. A government acting on behalf of an investor, knowing that it might find itself responding to such claims in the future, is less likely to make such moves.\textsuperscript{167}

Private participation based on decisions enacted in a treaty presents a different case. When a treaty expressly authorizes private access to an international tribunal, there exist checks on domain-rule instability. Treaty language sets boundaries that do not exist when CIL applies of its own force.

First, the domain of an international tribunal rests on treaties. Typically, one treaty will create the legal interests in dispute, and another will give the tribunal jurisdiction to hear the dispute. Al-

\textsuperscript{166} Cf. Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448, 1457–58 (2010) (analyzing the precedential effect of opinions issued by the Office of Legal Counsel).

\textsuperscript{167} For a recent investment dispute illustrating these two issues, see Glamis Gold Ltd. v. United States, NAFTA/UNCITRAL (June 8, 2009), http://italaw.com/documents/Glamis_Award_001.pdf.
though treaties are hardly free of ambiguity about domain, these issues normally depend on fairly discrete problems of textual interpretation, not on vague and open-ended principles. To be sure, deciding what, for example, constitutes unfair or inequitable treatment under an investment treaty may be no more or less clear than determining what the U.S. Constitution means when it refers to “due process of law.” But at least there is a textual anchor, some residual evidence of intent, and some mechanisms outside of dispute resolution to illuminate the meaning of these terms.\footnote{NAFTA provides an interpretive mechanism in the form of its Free Trade Commission, comprising representatives of all three governments. The Commission, invoking its authority under Article 1131(2) of NAFTA, offered a narrowing construction of the term “fair and equitable treatment” after some tribunals seemed to stretch its scope. See Charles H. Brower II, Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105, 46 Va. J. Int’l L. 347, 347–48 (2006).} None of this applies to propositions resting on CIL.

The same basic arguments extend to private arbitration of commercial disputes, but the checks on domain instability are even greater. For arbitration, the authority to issue legally binding awards rests on two instruments: a private agreement to arbitrate and the New York Convention. The Convention’s fundamental domain issue is the meaning of “commercial.”\footnote{New York Convention, supra note 89, art. I(3).} As with “fair and equitable treatment,” the term has a textual anchor and some evidence of intent. Moreover, unlike international tribunals, private arbitration depends entirely on the law of contract and thus on the voluntary choices of the affected parties. Whatever domain instability might exist in arbitration, valid agreements to arbitrate reflect the parties’ competent ex ante judgment that the benefits of the process exceed its costs.

c. Domestic Courts

Privatization through increased access to domestic courts presents still different issues. The practical consequences of privatization has meant two things: persons facing sanctions administered by the state may have increased opportunities to raise international-law arguments in opposition to the sanction, and persons injured by violations of international law may have greater opportunities to obtain compensation. Each consequence puts pressure on
domain rules. In some contexts, checks on domain instability exist but not always.

Recall that international law has multiple points of entry into domestic litigation. A statute might expressly incorporate international law. Domestic courts might observe a rule obligating them to avoid violations of international law if possible. Or courts might enjoy general lawmaking powers in the absence of a statute and look to international law to supply rules of decision in particular cases. Privatization involves opening these portals to individuals, as opposed to allowing the government to make unreviewable claims about the content of international law. Which portal one opens has direct implications for the applicable domain.

When a statute directs a court to consider issues of international law, two questions follow. First, should the federal government enjoy great deference, if not unreviewable discretion, with respect to its claims about what international law entails? Second, if the court is free to deviate from the government’s proposals, and thus to listen to those of a private party, what should it regard as international law? In the United States, at least, the trend has been toward an increasingly negative answer to the first question, and a liberal and inclusive response to the second.

An unwillingness to give conclusive effect to statements of the government about international law is a natural consequence of privatization. Unless private persons have some hope of persuading the court, they will not make claims about international law. Privatization would be an empty formality. All the same, there exist good reasons not to give equal weight to the arguments of the government and of private persons. As noted above, the government is much more likely to be a repeat player than is a private litigant and thus more readily will internalize the implications and consequences of its pronouncements. In particular, one might expect government lawyers to be more moderate in their claims about the domain of international law than the representatives of private litigants might be.

When deciding what constitutes common law, courts also need to consider the risk of private-actor bootstrapping. Advocates

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might make upstream claims about the content of CIL and then ask a court to accept these views as binding. Public actors also bootstrap, of course, but with an essential difference: because of international bureaucratic interactions, their upstream actions have both immediate and ongoing consequences that do not attach to private pronouncements.

To avoid domain instability, courts might take a cautious approach to CIL and insist on especially persuasive evidence before recognizing a claim. In particular, they might insist on clear proof of state practice accompanied by unambiguous statements from affected states about legal obligation, rather than rely on private aspirational arguments about CIL. Instances where serious sanctions turn on claims about CIL might require an especially strong showing that CIL comprises a particular rule. At the end of the day, however, managing domain instability only through higher evidentiary burdens may not be enough.

The existence of an express statutory assignment to apply international law provides a check on domain problems, much as an express treaty authorization of private participation in an international tribunal does. The statutory language provides a limit on domain to the extent that it sets a boundary. A provision, for example, obligating a military commission to apply the law of war

171 Compare Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 185 (2d Cir. 2010) (Leval, J., concurring only in the judgment), cert. granted, No. 10-1491, 2011 WL 4905479 (U.S. Oct. 17, 2011) (referring to scholarly work as a source of CIL), with id. at 143–44 n.47 (observing that scholars cited by the concurrence had submitted briefs on behalf of plaintiff in the case under review).

172 Arguably the Supreme Court attempted to do just this in Sosa v. Alvarez-Machain, 542 U.S. 692, 725–28, 732 (2004). For evidence that some lower courts have not taken this admonition seriously, see Section infra IV.D. For an earlier attempt to distinguish well-established CIL from more controversial instances, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964). Eventually (and ironically) Sabbatino became authority for the opposite proposition, namely that all CIL qualifies as federal common law. See Bradley & Goldsmith, supra note 162, at 859–60.


sets out a specific body of law that applies. It does not give either a commission, or a court reviewing a commission’s actions, a blank check. While boundary issues exist, the extent of the domain remains reasonably clear. A reference to the law of war, for example, does not include international environmental law or, more to the point, the U.N. Covenant on Civil and Political Rights.\footnote{175}

A consideration of the application of a presumption against violations of international law, known in the United States as the \textit{Charming Betsy} rule, illustrates this point.\footnote{176} Because the presumption on its face applies across all legal disputes, it has the potential to bring about pervasive enforcement of all of types of international law, privately produced CIL included. Taken literally, the presumption would produce significant domain instability by raising the possibility of application of CIL in almost any legal dispute.

Actual use of the \textit{Charming Betsy} presumption in the United States, however, suggests a more modest ambit and hence more constrained domain instability. The Supreme Court has invoked it only eleven times since the end of World War II and never during that period as a basis for its decision.\footnote{177} Lower courts, to the extent

\footnote{175 The United States has consistently maintained that the International Covenant applies only to the relationship between a state and “individuals within its territory and subject to its jurisdiction.” International Covenant on Civil and Political Rights, supra note 146, art. II(1), 999 U.N.T.S. 173. Under this interpretation, the Covenant does not apply to acts taken outside of U.S. territory, where virtually all armed conflict in which the United States participates takes place. The U.N. Human Rights Committee, however, has argued that, in this provision, “and” really means “or” and that anyone under the de facto control of a country, such as persons on occupied territory resulting from an armed conflict, is “subject to the jurisdiction” of the occupier. Accordingly, this position would allow persons subject to occupation to claim rights against the occupier under the International Covenant. U.N. Human Rights Comm., General Comment No. 31[80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). No responsible U.S. decisionmaker has accepted the latter argument. See John B. Bellinger III & Vijay M. Padmanabhan, Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law, 105 Am. J. Int’l L. 201, 211 n.49 (2011).}

\footnote{176 See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).}

\footnote{177 To the extent these cases do invoke CIL, they typically refer to the CIL of prescriptive jurisdiction, not to privately generated CIL developing the rights of persons against the state. Samantar v. Yousuf, 130 S. Ct. 2278, 2290 n.14 (2010) (finding the presumption irrelevant when the statute does not apply); Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 131–32 (2005) (prescriptive jurisdiction); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (prescriptive jurisdiction); Sosa, 542 U.S. at 692, 700–01 (prescriptive jurisdiction); Sale v. Haitian Ctrs. Council, Inc.,}
they give the presumption outcome-determinative effect, typically invoke treaties rather than CIL. The doctrine simply does not do the work that it might and that adherents of extensive domestication of international law might like. The absence of domain limits appears to have discouraged courts from taking literally the *Charming Betsy* presumption.

A third argument that could open up a wide array of international law claims to domestic litigation is one of automatic domestication. In U.S. law, the argument has two parts: courts have general authority to vindicate rights based on federal common law, absent a contrary statute, and federal common law comprises CIL. In other common-law countries, the claim would turn on local doctrines specifying the relationship between CIL and judicial capacity. In civil-law countries, the issue would turn on the specific characteristics of the constitutional and statutory regime. This power, if it exists, can operate both offensively and defensively. A private

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The Court does cite *Charming Betsy* on occasion as authority for the separate proposition that constructions of statutes that render them unconstitutional are to be avoided, but these citations have no bearing on the production of international law and are omitted here.

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179 See Coyle, supra note 174, at 699–716 (discussing the practice of federal courts and demonstrating limits on the use of the *Charming Betsy* presumption).

180 Cf. Nollkaemper, supra note 79, at 28–35 (describing approaches of various national courts).
actor could bring in international law to support claims brought against either public or private actors, and private actors could raise international law arguments in defense against claims asserted by public actors, most obviously in criminal cases.

As a general matter, however, the automatic-domestication move’s potential to bring about widespread domestic adjudication of claims based on either treaties or CIL remains largely unrealized. In the United States, the Supreme Court uses the self-execution doctrine as a means of putting the onus on Congress to determine when a U.S. court may apply treaty rights. It also has indicated, although not definitely declared, that CIL usually requires a statutory portal to become federal law. Each of these propositions is deeply controversial, both on the Court and in the academy. Yet the Court has not changed course. Evidence that courts outside the United States are growing the domain of international law more ambitiously is scant, a few jurisdictions in Europe aside.

The costs of domain instability may explain why domestic courts generally have been cautious about asserting a general authority to apply international treaties and CIL in private litigation. The influence of private actors over downstream production of international law is at its zenith in litigation that they initiate. Private plaintiffs can select the forum and frame the arguments, increasing the odds that courts will produce decisions that will embrace their objec-

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tives. Their arguments in turn can cite upstream products opportunistically and in particular favor private producers such as NGOs and scholars. The result can be episodic and uncoordinated extensions of international-law-based regulation into new areas of conduct. Even cases that do not proceed to a judgment in favor of plaintiffs may have an effect on behavior by inducing settlements and prelitigation precaution and avoidance of behavior that might resemble the regulated conduct.

Instances where private persons bring claims grounded in international law in response to proceedings initiated by public actors also raise some risk of domain instability. Although forum selection drops out, the other factors enabling private actors to shape outcomes and inducing judges to reach surprising and uneven outcomes remain. Private defendants may select their sources opportunistically to open up new areas for regulation by international law. As with privately initiated suits, no statutory anchor serves to limit the range of possible outcomes.

E. Summary

One cannot assess the welfare effects of privatization of the production of international law in the abstract. The range of behaviors affected is too wide, the characteristics of existing institutions too various, and the types and mechanisms of privatization too diverse to permit the articulation of broad principles. Just as a welfare assessment of the privatization of more conventional services such as education, banking, and transportation turns on very context-specific and narrow considerations, so does a cost-benefit analysis of the privatization of international law production.

This general point has one important exception. Legal rules, unlike more conventional services, necessarily carry with them secondary rules defining the scope of applicability of rules governing primary conduct. Domain rules have significant consequences, none more so than those governing the scope of international law.

184 Compare Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 143–44 n.47 (2d Cir. 2010), cert. granted, No. 10-1491, 2011 WL 4905479 (U.S. Oct. 17, 2011) (criticizing views of scholars and advocacy groups as irrelevant to proof of CIL), with id. at 185 (Leval, J., concurring only in the judgment) (citing views of scholars and advocacy groups).
These rules, like all legal products, can take the form of either precise rules or vague standards. With domain rules, unlike rules governing primary conduct, there is no welfare tradeoff between precision and vagueness, because delaying the specification of the rule until more information emerges is highly unlikely to improve a domain rule and very likely to produce costly uncertainty.

Privatization mechanisms that produce instability about the domain of international law, then, are likely to generate disproportionate costs and limited benefits. In practice, this means that international law produced by treaties and contracts, including treaties and contracts that call for private enforcement, are more likely to preserve clear and stable domain rules. Opening up the upstream production of CIL to private actors, and the downstream production of international law through private litigation in the absence of a clear treaty or statutory direction to do so, is likely to destabilize domain rules and thus reduce welfare.

IV. CURRENT CONTROVERSIES

The general concepts developed in the previous section can be illuminated with specific examples. I have chosen four, two drawn from international business regulation and two involving strong moral claims to sanction especially egregious misconduct. I picked these four in part to push against ideological priors, thereby isolating the effect of domain rules from the underlying substantive policy area. They illustrate both the extent of privatization of international law and the choice of mechanisms to privatize further.

A. Private Enforcement of Trade Law

At present, private persons participate in the production of trade law only when they contest a duty (that is, a levy on imports), typically as the subject of an exaction but occasionally as the taxed person’s competitor. Duties rest on national (or in the European

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185 Domestic competitors have direct standing to petition the government to impose antidumping and countervailing duties on importers. In addition, competitors injured by illegal duty-free treatment of imports have some capacity to bring suit, although the scope of standing remains murky. Compare K Mart Corp. v. Cartier, Inc., 485 U.S. 176 (1988) (federal court has jurisdiction over challenge to customs regulation brought by trademark owners), with Int’l Labor Rights, Educ. & Research Fund v.
Community, supranational law, perhaps interpreted with international obligations in mind. Trade agreements, first and foremost the Uruguay Round Agreements and their predecessors, depend exclusively on state-to-state dispute resolution (except the few that contain investor-protection regimes). The old GATT, in effect from 1948 to 1994, contained some residual ambiguity as to its potential domestic effect in the United States. Since 1985, however, Congress always has included in its laws implementing any trade agreement a provision expressly barring private enforcement.\(^{186}\)

Some scholars argue that exclusively public enforcement of international trade agreements leads to under-enforcement. Victims of illegal practices (typically producers in the exporting country and consumers in the importing country) may find their interests outweighed by other considerations. The same political-economy factors that lead to welfare-reducing protection may induce gov-

ernments to overlook trade law violations in return for reciprocal concessions. To ensure full realization of the benefits derived from trade liberalization commitments, these scholars argue, states should provide for private enforcement of trade law through damages suits. 187

Whether private enforcement of trade law would increase or diminish welfare is beyond the scope of this paper. 188 What is interesting about this field is that political decisionmakers fairly consistently have indicated that they do not want it, both at the treaty stage and in national legislation implementing the treaty obligations. To date, downstream lawmakers have not resisted this determination to bar private persons from invoking international law. In the United States, importers seeking to avoid a duty surcharge have enjoyed some success in inducing courts to view the legislation on which a surcharge rests through the lens of the treaties and their interpretation by WTO dispute resolution, but otherwise courts have not shown any openness to further privatization of trade law. 189 Courts in the European Community have been even more vigilant in cabining off international law from domestic litigation. 190

187 See Gregory Shaffer, Defending Interests: Public-Private Partnerships in WTO Litigation 7 (2003); Andrew T. Guzman, The Cost of Credibility: Explaining Resistance to Interstate Dispute Mechanisms, 21 J. Legal Stud. 303, 322 (2002); Ernst-Ulrich Petersmann, Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade, 27 U. Pa. J. Int’l Econ. L. 273, 274 (2006); Joel P. Trachtman & Philip M. Moremen, Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway? 44 Harv. Int’l L.J. 221, 222 (2003). These are not the only proposals for reforming enforcement of WTO commitments—others have discussed allowing non-victim states to impose sanctions in solidarity with the victims or allowing the victim to auction its retaliation rights to the highest bidder—but they are the only ideas that involve privatization.

188 Possible objections include deterrence of future trade agreements, undermining the informal mechanisms that may induce compliance more effectively, possible overenforcement of existing concessions, and increased litigation burden. See Scott & Stephan, supra note 15, at 192–96; Jide Nzelibe, The Case Against Reforming the WTO Enforcement Mechanism, 2008 U. Ill. L. Rev. 319, 343–49.

189 Nor has the Charming Betsy strategy always worked for importers seeking to avoid surcharges. See, e.g., Corus Staal BV v. Dep’t of Commerce, 395 F.3d 1343, 1347–48 (Fed. Cir. 2005).

This paper shows why courts should not change course. The present regime provides for a clear separation between the domains of the treaties (including downstream interpretation by the WTO) and domestic trade law. Under this arrangement, the domain of international law does not extend to disputes in which private persons participate.

Blurring the line between international and domestic law would produce two sources of welfare-reducing instability. First, because of the incremental nature of the common-law method, persons governed by trade law would lack the means to predict confidently whether international law would apply to their conduct. Second, piecemeal introduction of international law into private disputes, in the face of clear treaty and statutory directions not to, would put into question the sufficiency of upstream commands. If a downstream lawmaker assumes the authority to override clear legislative dictates, the overall reliability of upstream rules comes under a cloud. Accordingly, compelling reasons exist for courts to avoid importing either the treaties on which trade law rests or the authoritative interpretations of those treaties by international bodies into the cases that they hear.

B. Private Enforcement of International Environmental Law

Most states have adopted some form of environmental regulation, which a growing body of treaties seeks to coordinate and extend. The treaties deal with discrete issue areas, such as ozone depletion, biodiversity, and global warming. There exists no international institutional architecture comparable to the WTO to manage overall international environmental policy, but individual treaty regimes do have some upstream lawmaking capacity. National practice varies with respect to private enforcement, with the United States a leader, if not an outlier, in terms of the use of private litigation to supplement administrative decisionmaking.

In Natural Resources Defense Council v. Environmental Protection Agency, the Court of Appeals for the District of Columbia considered whether decisions made pursuant to the Montreal Protocol constitute binding law that private lawsuits may invoke in

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191 See sources cited supra note 58.
192 464 F.3d 1 (D.C. Cir. 2006).
U.S. courts. The United States joined the Montreal Protocol, a treaty, in 1988 and implemented its obligations through the Clean Air Act Amendments of 1990.\footnote{Pub. L. No. 101-549, tit. VI, 104 Stat. 2399, 2648.} The Protocol obliges the Environmental Protection Agency (“EPA”) to regulate the use of chemicals that threaten to deplete the earth’s ozone layer. It also provides for ongoing meetings of the state parties, who may take decisions under the Protocol. At a 2004 Extraordinary Meeting of the state parties, the United States obtained consent to produce limited amounts of methyl bromide, a chemical regulated under the Protocol. The EPA then issued a regulation implementing this decision. Arguably, the regulation allowed greater production of methyl bromide than the Extraordinary Meeting had authorized. An environmental NGO sued to enjoin the regulation, arguing that it was not “in accordance with law” within the meaning of the Clean Air Act.\footnote{42 U.S.C. § 7607(d)(9)(A) (2006).} The court thus had to determine whether decisions reached at an Extraordinary Meeting constituted “law” that a private person could enforce against the EPA.

\textit{NRDC v. EPA} determined that the Montreal Protocol did not obligate the parties to give domestic effect to decisions reached by consensus after the treaty went into effect and that the decisions taken did not interpret, but rather extended, the treaty. Accordingly, it ruled that the party decisions did not constitute “law” within the meaning of the Clean Air Act. The majority went on to intimate that if the treaty had purported to obligate its parties to give domestic effect to decisions reached internationally, and if the Clean Air Act had mandated that the EPA implement such decisions automatically, constitutional issues would arise.\footnote{Judge Edwards, in concurrence, refused to join the majority on this last point. See \textit{NRDC}, 464 F.3d at 11 (Edwards, J., concurring).}

Again, I have nothing to offer on the question of whether private enforcement of consensus extensions of the Montreal Protocol would either promote or diminish welfare, much less whether Congress has the constitutional capacity to mandate such a result. For my purposes, what is noteworthy about \textit{NRDC v. EPA} is the interpretive conservatism on display. The Clean Air Act requires that EPA regulations be in accordance with law, and “law” is a capacious term indeed. The court might have argued that nothing in the
Montreal Protocol bars parties from implementing domestically decisions taken according to the Protocol’s procedures and that the decisions reached constitute “law” subject to judicial review at private behest. These moves would have ended the government’s monopoly over the interpretation and application of these international decisions.

Unlike trade law, where statutory commands not to privatize are pervasive and reasonably clear, this privatization move would have had weak statutory support and no clear statutory text to the contrary. The disruption to settled expectations about general domain rules thus would have been less. At the same time, reading a statutory reference to “law” as encompassing an international institution’s ongoing regulatory process would have been disruptive. The Clean Air Act’s “in accordance with law” standard comes directly from the Administrative Procedure Act, which has wide application.\(^{196}\) A ruling in favor of the NRDC thus would have provided a broad opening for international-law-based arguments by private opponents of a wide range of regulatory decisions, not just those dealing with ozone depletion. The boundaries of the opening would be uncertain, however, as actors would have to guess on a case-by-case basis when courts would view international settlements as merely political (the outcome in *NRDC v. EPA*) and when they would see them as having legal force.

On balance, then, the approach taken by the D.C. Circuit should serve as a model for other courts. Interpreting open-ended statutory provisions that plausibly could be construed as embracing international law as inviting privatized downstream international lawmaking creates social costs. The problem is not with privatization as such. Authorizing private litigants to argue about the content of the international rules, under certain conditions, might have greater benefits than costs. But using a vague and generally applicable statute as the mechanism to privatize introduces instability into the domains of international regulatory regimes generally.

C. International Torts and Civil Litigation

Perhaps no development over the last thirty years has contributed more to the privatization of the production of international

law in the United States than the emergence of the ATS as a basis for litigation in federal courts. Since 1789, Congress has provided for federal district court jurisdiction over “any civil action by an alien for a tort only, committed in violation of the Law of Nations or a Treaty of the United States.” Only in 1980 did a federal appellate court find in this provision a basis for a federal suit, a holding that the Supreme Court in *Sosa v. Alvarez-Machain* partially ratified. In spite of voluminous litigation, however, the precise contours of this statute remain unclear. Advocates see the ATS as enabling the vindication of a wide range of international human rights, resting on CIL as much as on particular treaties. Opponents decry the entire process as illegitimate and perverse. The courts seem conflicted and confused.

The first problem is that, as Congress clearly intended and the Court in *Sosa v. Alvarez-Machain* recognized, the ATS itself provides only for adjudicatory jurisdiction and does not in and of itself choose any substantive rules of conduct that courts may apply in these suits. *Sosa* responded by indicating (technically in dicta) that Congress implicitly had authorized courts having jurisdiction

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199 Congress in 1991 did adopt the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350 note (2006), which codified the holding of *Filártiga* by providing victims of torture or extrajudicial killing with a civil action for compensation. This provision has a stable domain based on express statutory language. Interestingly, in drafting this provision Congress provided only one express portal for international law: it defines extrajudicial killing so as to exclude “killing that, under international law, is lawfully carried out under the authority of a foreign nation,” a reference to the law of war. Id. The definition of torture closely resembles, but does not exactly track, 18 U.S.C. § 2340 (2006), the provision that implements U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Although one presumably might have argued that the TVPA superseded the ATS, the Second Circuit, at the urging of the Clinton Administration, held otherwise in *Kadić v. Karadžić*, 70 F.3d 232, 241 (2d Cir. 1995).
200 542 U.S. at 712 (“[W]e agree the statute is in terms only jurisdictional . . . .”). The argument about Congressional intent focuses on Section 9 of the Judiciary Act, which only allocated jurisdiction to the district (as opposed to circuit) courts and did not purport to supply any rules of decision that courts with jurisdiction could apply.
over these suits to develop federal common law to govern them. Yet the Court also acknowledged its modern practice of avoiding implications of judicial lawmaking authority from ambiguous statutes. Accordingly, the Court described the federal courts as “open to a narrow class of international norms today.” In particular, it declared, “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”

The second and deeper problem is that the lower courts have no clear idea what this guidance means. On the one hand, the Court might have meant that federal common law admits only claims where international law clearly recognizes a right of private compensation through domestic litigation. This is an empty set, because international law normally does not deal with means of domestic enforcement at all. On the other hand, the Court might have

\[\text{Id. at } 724\] ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."). The observation was dicta, both because the Court held that the plaintiff had failed to plead a claim sufficient to justify relief under federal common law and because on the facts of the case it was unnecessary to find federal jurisdiction. The claim brought by Alvarez-Machain, a Mexican citizen, against Sosa, another Mexican citizen, came within the district court’s pendant jurisdiction because of the joined claim brought by Alvarez-Machain against the United States. Accordingly, the Court did not need to recognize any federal question jurisdiction under Article III to resolve Alvarez-Machain’s case against Sosa. For the argument that Congress did not contemplate any federal question jurisdiction under the ATS but rather expected these cases to satisfy either the diversity (alien versus U.S. defendant) or “Ambassadors, other public Ministers and Consuls” (alien official versus foreign defendant) prongs of Article III of the U.S. Constitution, see Anthony J. Bellia, Jr. & Bradford J. Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 445, 525–28 (2011); Curtis A. Bradley, The Alien Tort Statute and Article III, 42 Va. J’l Int’l L. 587, 587–88 (2002); Michael G. Collins, The Diversity Theory of the Alien Tort Statute, 42 Va. J’l Int’l L. 649, 650–51 (2002). Sosa, 542 U.S. at 729.

\[\text{id. at } 732.\]

\[\text{The Second Circuit seemed to take this approach in Kiobel v. Royal Dutch Petroleum Co., } 621 \text{ F.3d } 111 \text{ (2d Cir. 2010), cert. granted, No. 10-1491, 2011 WL 4905479 (U.S. Oct. 17, 2011). The majority determined that the extension of ATS liability to corporate defendants required a finding of a definite and widely accepted norm holding corporations liable for violations of international law. Id. at 120–21. Judge Leval, dissenting on this point while concurring in the judgment, observed that international law simply does not address the question of corporate civil liability, instead leaving it}

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meant that the practice of lower courts that had emerged in the previous quarter century was generally satisfactory but that the lower court in *Sosa*, which had recognized an international law norm of freedom from arbitrary detention, simply went too far.

Faced with this mixed message, the courts have responded by separating into two pools: those inclined toward not recognizing any new ATS claims and those that continue in what they see as the progressive development of international human rights law. Since *Sosa*, the federal courts of appeals have considered no less than sixty-four ATS claims on the merits. Three circuits—the D.C., Second, Seventh, Ninth, and Eleventh—have allowed suits to proceed, and the D.C., Second, and Ninth have welcomed new CIL theories as a basis for tort liability. These decisions expand liability in two ways, either by broadening the class of persons who can be held accountable for a third party’s misconduct or by recognizing new obligations under CIL, such as a duty not to support apartheid or not to carry out nonconsensual drug testing.

The analysis developed in this paper indicates that the approach taken by the Second and Ninth Circuits presents greater risks to welfare than does the approach of the other courts of appeals. To repeat myself, the issue is not whether private enforcement of international human rights law has greater costs or benefits: reasonable people can disagree or change the subject entirely by resting the case for liability on deontological considerations. The issue is whether the ATS is an appropriate vehicle for making this choice. On balance, it is not.

Unlike the Clean Air Act, the ATS refers specifically to treaties and the law of nations. One might argue that this reference provides a clear domain extension and thus presents little or no risk to domestic legal systems to decide what rules govern legal (as opposed to physical) persons. Id. at 151.

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from domain instability. But such an argument depends critically on the assumption that Congress intended the ATS to serve as an exercise of its prescriptive jurisdiction. The best available evidence, which the Supreme Court found conclusive, indicates that the provision does no such thing. The Sosa Court’s effort to overcome this obstacle by inferring a judicial power to supply substantive rules illustrates what an unclear domain rule looks like. The response of the lower courts indicates how such a rule works in practice. Unless and until Congress returns to the subject to shed further light on the area, the courts should hesitate before extending ATS liability beyond the core areas recognized by Sosa.

D. CIL and War Crimes

In the contemporary world, legal accountability for violation of the laws of war arises in two forms. First, states (and in limited circumstances, international criminal tribunals) can bring criminal charges against violators. Second, victims of violations can sue for relief, either prospectively by trying to enjoin contemplated action or retrospectively by seeking damages. Both forms entail some private participation, although the second obviously increases the significance of decisions made by private actors.

War crimes prosecutions intersect with international law in at least two ways. First, the domestic statute authorizing criminal punishment might incorporate by reference international law. Second, some have argued that states lack the authority to depart from an international consensus about the content of particular war crimes. In either instance, the accused—a private actor, albeit one appearing in a forum chosen by the state—may assert arguments based on treaties and CIL (including the assertions of the ICRC, a private body) about the power of the government to impose sanctions.206

As originally enacted, the provision of the U.S. Code of Military Conduct constituting military commissions to try war crimes contained an express and blanket reference to the “law of war,”

206 The discussion in the text ignores the separate issue of the jurisdiction and practice of international criminal tribunals. Although this subject has attracted voluminous scholarly attention, these bodies either have been limited in scope (as in the Yugoslav and Rwandan tribunals created by the Security Council) or have accomplished next to nothing (as in the International Criminal Court). See Posner & Yoo, supra note 36, at 67–70. Their future prospects remain uncertain.
thereby bringing both the Geneva Conventions and the CIL of the law of war into play. As noted above, a plurality of the Supreme Court determined that CIL did not treat a conspiracy to commit a war crime as itself a war crime but rather demanded more direct involvement by the accused. Congress responded by adopting the Military Commission Act. It amended the definition of grave crimes to include conspiracies to commit grave breaches of the Geneva Conventions. Collaterally, the Act also provides that:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

The thrust of this provision is that the United States generally will enforce (its understanding of) the four treaties that make up the Geneva Conventions by criminalizing grave breaches but that it also will criminalize conspiracies to commit those breaches, even if authorities such as the ICRC maintain that the Conventions do not extend to such conduct. Persons objecting to the U.S. position do not have the right to challenge it through civil litigation or habeas proceedings.

As an initial matter, Hamdan’s use of the statutory reference to the law of war to allow the accused to make arguments based on treaties and CIL seems unexceptional. The statute specifies that this body of international law applies to military commissions and thus contemplates that the commissions will consider disputes over the meaning of the law of war. That such disputes might encompass claims about CIL derived from private upstream actors, including the ICRC and academic opinions, seems self-evident. One might

210 Id. § 5(a), 120 Stat. at 2632. In addition, Section 6(a)(2) of the Act provided that “No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441 [the provision of the criminal code punishing grave breaches of the Geneva Conventions]."
fault the *Hamdan* plurality for some of its particular conclusions about the content of the law of war, but overreaching cannot be on the charge sheet.

More problematic is the 2006 amendment barring persons subject to criminal trials, courts martial, or military commissions from using the Geneva Conventions “as a source of rights.” As a preliminary issue, it raises a question of interpretation: what does Congress mean when it refers to the Conventions as a source of rights, as distinguished from a basis of the power to punish war crimes? If one can clear this hurdle, one then encounters the question of whether the Geneva Conventions sets a ceiling, as opposed to a floor, on what a state can punish as a war crime. If the answer to this question is yes, may Congress disregard that ceiling?

The analysis presented in this paper suggests that downstream actors—regular courts, courts martial, and military commissions—should find the legislative distinction between rights and power troubling. But assuming no constitutional impediment exists, they should take as their task clarification and specification of the legislative mandate. Because these downstream actors will not have to grapple with this issue unless and until the government decides to proceed against an individual and because the government to some extent must answer to other states for its decisions, the instability risk should be minimal.

The prior discussion considered how the international rules found in the law of war may function as a shield against punishment. In addition, some litigants have sought to use the CIL of warfare as a sword, not a shield. To date, plaintiffs in the United

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States have rested their cases on the ATS, arguing that the federal common law recognized in Sosa extends to the law of war. The suits rest not just on well-established violations such as genocide but on broad claims that, in an armed conflict, CIL requires punishment of a responsible decisionmaker who authorizes a level of force that is disproportionate to any legitimate military aim and that creates excessive risk to noncombatants. Some courts have held that not all violations of the law of war are cognizable under the ATS, and others have avoided the issue by invoking doctrines such as immunity. But no court has held that violations of the law of war categorically fall outside the scope of the ATS, and one court of appeals decision has upheld liability under the ATS for especially serious breaches.

Again, the question is not whether private enforcement of rules against war crimes might enhance welfare or advance other moral goals. Rather, the problem is one of mechanism. The law of war has a fairly stable domain, even if its content has evolved in the face of changing technology and combat contexts. It applies to “armed conflicts,” both international and noninternational.215

This provision might imply that victims of Convention violations who do not fall within the limited class of persons subject to trial by military commissions do have a private right of action for damages. As to the CIL of war, the provision provides no information.

213 See, e.g., Al-Shimari v. CACI Int’l Inc., No. 09-1335, 2011 U.S. App. LEXIS 19347 (4th Cir. Sept. 21, 2011) (suit against U.S. government contractors accused of torturing Iraqi detainees comes under combat activities exception to Federal Tort Claims Act’s waiver of sovereign immunity); Mamani v. Berzain, No. 09-16246, 2011 U.S. App. LEXIS 17999 (11th Cir. Aug. 29, 2011) (holding that ATS does not allow recovery for injuries caused by government suppression of civil unrest); Estate of Amergi ex rel. Amergi v. Palestinian Auth., 611 F.3d 1350, 1353 (11th Cir. 2010) (finding that ATS does not extend to all violations of the law of war); Matar v. Dichter, 563 F.3d 9, 10 (2d Cir. 2009) (finding that the defendant enjoys immunity from suit); Saleh v. Titan Corp. 580 F.3d 1, 2 (D.C. Cir. 2009) (holding that claims against federal contractors are preempted by federal law); Belhas v. Ya’alon, 515 F.3d 1279, 1281 (D.C. Cir. 2008) (finding that the defendant enjoys immunity from suit); Viet. Ass’n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 108 (2d Cir. 2008) (holding that ATS does not extend to claims based on use of Agent Orange during armed combat).

214 Kadić v. Karadžić, 70 F.3d 232 (2d Cir. 1995). Compare Sosa, 542 U.S. at 740 (Scalia, J., concurring) (no federal common law with regard to law of war), with id. at 762 (Breyer, J., concurring) (suggesting that the ATS extends to war crimes for which international law recognizes universal jurisdiction).

States have an international legal obligation under the Geneva Conventions to punish grave breaches of the law of war. States implement this obligation by imposing criminal sanctions on war criminals. Those states that have acceded to the Rome Statute of the International Criminal Court accept a secondary constraint, namely supervision by the Court to ensure that they honor this primary obligation. Imposition of a secondary layer of civil liability at the behest, and to some extent under the control, of private persons, is rare outside the United States.

As argued above, the ATS provides a weak reed on which to rest the privatization of the law of war. The statute provides federal court jurisdiction for certain suits, but it does not constitute an exercise of prescriptive jurisdiction, much less a creation of a cause of action. The Sosa formula for bridging this gap, namely cautious development of federal common law, has no natural limits and has proved difficult to manage. No court of appeals since Sosa has upheld the imposition of civil liability for a war crime. To avoid welfare-reducing domain instability, courts should continue to reject such claims under the ATS.

CONCLUSION

It is a wonderful time to be an international lawyer. Excitement and change are everywhere. Battered and to a degree discredited by the twin blows of World War II and the superpower standoff that followed, the field has emerged with new vigor in the last three decades. Now we understand that it provides a valuable, and perhaps essential, tool for managing an increasingly interconnected


216 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, supra note 215, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, supra note 215, art. 50; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, supra note 215, art. 146; Geneva Convention Relative to the Treatment of Prisoners of War, supra note 215, art. 129.

217 The one recent exception to the statement in text has produced a counter-attack in the International Court of Justice. See cases cited supra note 113.
world. Rare is the interesting legal question today that does not have an international law dimension.

With the transformation in international law’s role have come fundamental changes in the way we think about its sources and methods. The move toward privatization seems logical and in some sense inevitable. As the subject touches on a wider array of activity and plays a greater role in its organization and regulation, more people want to have a piece of the action. International law has become too important to be left exclusively to government, especially to foreign offices. In this sense, the privatization of international law has been a natural complement to its success.

With success, however, may come irrational exuberance. Impatience with public actors may lead to ever greater efforts to produce international law privately. Informal extensions of its domain, achieved by means that elbow aside government actors, run the risk of radical instability. The problem becomes not just changing the rules by which we play but changing the rules for determining what our rules are. This kind of instability—downstream changes in the domain of international law achieved at the behest of private actors—subverts the international law project. It both undermines the principle of legality itself and makes international law more costly without providing corresponding benefits. For the project to thrive, its boundaries must be defended. The alternative is an unfortunate but inevitable backlash.

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