Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations

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The range of possible responses to the problems posed by 'the globalisation of liberalism' is vast and of considerable complexity. However, a crucial characteristic of these problems is the presupposition that two separate, though related, spheres of activity exist: one is private and concerns the economic, the other is public and concerns the political. The globalisation of liberalism is then framed by the attempt to sort out the character of the relationship between these two spheres. It is posited, for example, that forces of global capitalism are related to the homogenisation of political structures in the form of liberal states. The problem then is 'how as a result of international pressures, states are compelled more and more to conform to each other in their internal arrangements'.[1] This approach defines the international system 'as primarily one constituted by economic activity, and the spread of capitalism on a world wide scale'.[2] The genesis of international society is historically and sociologically related to 'how capitalism as a socio-economic system spreads, the role that values and norms, including the concept of sovereignty, play within it, and the changing balance of coercion and consent involved in the reproduction of that society'.[3] Therefore, this focus raises significant concerns regarding the definition and measurement of expanding capitalism, and the definitions of liberal states and the liberal international order.

This article, in contrast, considers the more fundamental distinction between the political and economic spheres. The boundary between public and private authority structures and property rights has shifted over time, in response to changing historical, social, political, and economic forces. The concept of 'historic blocs' or 'configurations of social forces upon which state power ultimately rests' is useful for capturing this complex set of forces that constitutes state/society relations under different historical conditions.[4] The article focuses on the derivation of the public/private distinction in the context of international

1. Fred Halliday, 'International Society as Homogeneity: Burke, Marx, Fukuyama', *Millennium: Journal of International Studies* (Vol. 21, No. 3, 1992), p. 1. 435.
2. *Ibid.*, p. 442.
3. *Ibid.*, p. 443.
4. Robert W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (New York, NY: Columbia University Press, 1987), p. 105.

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trade relations. More specifically, the concern is with the differentiation between private and public international trade law. A review of the historical evolution of private dispute settlement in international trade illustrates how, during different historic blocs, economic and political elites have manipulated the boundary between the two spheres as a means of regulating commerce and, at times, of insulating international commercial transactions from national and democratic controls. This account offers a stark contrast to conventional historical narratives, which focus on the continuity of international trade regulation and often use transaction cost analysis as a key explanatory tool.[5]

The story of the constitution of the sphere of private trade relations is important because it is a significant chapter in the story of the constitution of the capitalist global political economy. The private international trade regime facilitates the mobility and expansion of capital. Private institutions and actors articulate and enforce norms that provide the foundation for contractual exchange, by establishing property rights and standards of liability that minimise barriers to commercial exchange and capital mobility. Moreover, the norms governing private commercial exchange are so foundational that they are both constitutive of the state/society relations of modern capitalism, and are attributes of the capitalist order.[6]

Liberal mythology plays a central role in the construction of these spheres. This article identifies four liberal myths that are critical to the constitution of the private sphere and that serve to differentiate it from the public sphere. These myths concern the natural, neutral, consensual, and efficient nature of private commercial exchange relations. The article argues that these liberal myths form the foundation for the separation of economic and political processes, giving rise to the association of economics with the private sphere and politics with the public sphere, and rationalising their differential treatment. Economics becomes the domain of private activity, and is thus removed from politics and practices of democratic accountability. The analysis suggests that, although global capitalism and liberal mythology may be effecting a homogenisation of political structures, these structures, while capitalist, are only mythically liberal. In other words, forces of global capitalism are contributing to an erosion of societal and democratic controls and facilitating the denationalisation of capital. Understanding these developments is important to the theory and practice of

5. Harold Berman and Colin Kaufman, 'The Law of International Commercial Transactions (*Lex Mercatoria*)', *Harvard International Law Journal* (Vol. 19, No. 1, 1978), pp. 221-22 and 272-73, and Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, CO: Fred B. Rothman and Co., 1983), pp. 9, 13, 23, and 39.

6. The view that the private sphere is constitutive of the capitalist order is clearly evident in the treatment of legal norms or 'juridical and political relations' as primary and not simply as part of the superstructure of capitalism. For the view that juridical forms are 'constituent of productive relations themselves' and 'attributes' of 'particular productive systems', see Ellen Meiksins Wood, 'The Separation of the Economic and Political in Capitalism', *New Left Review* (Vol. 127, 1981), pp. 78-79.

international relations, because they signal the danger posed by globalising forces and hegemonic practices that threaten the demise of liberal democracy.

The article traces the evolution of the public/private distinction over three phases in the development of dispute settlement practices under private international trade law. It illustrates how the boundary between public and private authority in the settlement of commercial disputes has shifted over time, in response to the changing interests of economic and political elites and the development of liberal mythology. The next two sections develop the conceptual foundation for the analysis of the public/private spheres, while the subsequent section introduces the private international trade law regime and places the arbitration norm at the centre of dispute settlement processes. This is followed by a brief history of the arbitration norm which illustrates how the norm evolved in the context of shifting boundaries between public and private authority. The last section addresses the implications of these four liberal myths for the theory and practice of international relations.

Four Liberal Myths

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

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

> [i]n normal situations, governments adopt a passive *laissez-faire* attitude. The regime of 'private international law' sustains trade rules about property and contract, mechanisms to stabilize jurisdictional conflicts while liberating private actors to choose forums, and *ad hoc* mechanisms of dispute resolution. The dominant players are private traders, and to a far greater extent than in even the most *laissez-faire* national system, they legislate the rules that govern their trade through contract. And when governments do participate, they operate 'commercially'—as private actors.[7]

In contrast, public international trade law deals with unnatural activities like dumping, cartels, subsidies, price supports, and the like. The regime in the public sphere is thus regarded as 'supplemental' to the private, in that it deals with the reduction or punishment of interventionist abnormalities.

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7. David Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures', *Harvard International Law Journal* (Vol. 32, No. 2, 1991), p. 380.

The second myth posits the neutral and apolitical nature of the private sphere. Liberalism represents the world as a series of dichotomies: the public/private constitutes one central division of authority, and the domestic/international another.[8] Under liberalism, private relations are associated with the domain of neutral economic processes, while public relations are related to the realm of politics. As a political theory, liberalism 'purports to be neutral, advancing only the goals of liberty and procedural justice.... Liberal ideology provides the mode of governance, based on liberty, and a dispute resolution process, based on the rule of law'.[9] As a legal theory, liberal-inspired contract law embodies and reproduces the separation of the spheres, associating the private sphere with neutral and objective processes of resource allocation and the public sphere with contentious and political processes of resource distribution.[10] Liberalism deems the private sphere to operate according to neutral principles. It does not question the 'rightness or propriety of dividing international life into spheres of sovereign authority', but 'presenting itself as a neutral and objective system, liberal legality provides no awareness of its hidden substantive commitments'.[11] Contract law is endowed with objective foundations and has the 'appearance of being self-contained, apolitical, and inexorable' as it regulates transactions amongst market participants who are presumed to be of equal bargaining power.[12] Its role is to facilitate exchange, ensuring procedural fairness, but it does not inquire into the substantive fairness of a transaction. Thus, the law functions as a 'mechanism of exclusion', reproducing 'the relationship it posited between law and society', in the attempt 'to project a stable relationship between spheres it creates to divide'.[13]

The identification of certain types of activity as 'private', and thus apolitical, removes that activity from public scrutiny and review. This process of transforming public and political activity into private and apolitical activity is a central 'structural separation' of capitalism, and may be 'the most effective defense mechanism available to capital'.[14] It also contributes to the third liberal myth concerning the consensual and noncoercive nature of private exchange

8. For an interesting account of the possible relationship between these two dichotomies, see Justin Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations* (London and New York, NY: Verso, 1994).
9. Nigel Purvis, 'Critical Legal Studies in Public International Law', *Harvard International Law Journal* (Vol. 32, No. 1, 1991), pp. 100-101. See also Will Kymlicka, 'Liberal Neutrality', in James Sterba (ed.), *Justice: Alternative Political Perspectives*, Second Edition (Belmont, CA: Wadsworth Publishing Company, 1992), pp. 252-72.
10. Generally, see Morton J. Horowitz, 'Law and Economics: Science or Politics?', *Hofstra Law Review* (Vol. 8, 1979-80), pp. 905-12.
11. Purvis, *op. cit.*, in note 9, p. 102.
12. Morton J. Horowitz, 'The Rise of Legal Formalism', *American Journal of Legal History* (Vol. 19, 1975), p. 252. Horowitz notes that most of the basic dichotomies in legal thought, including that between law and politics and between distributional and allocational goals, 'arose to establish the objective nature of the market and to neutralize and hence diffuse the political and redistributional potential of law'. *Ibid.*, p. 254.
13. David Kennedy, 'A New Stream of International Law Scholarship', *Wisconsin International Law Journal* (Vol. 7, No. 1, 1988), p. 8.
14. Wood, *op. cit.*, in note 6, p. 67.

relations. Mark Rupert cogently illustrates how the coercive aspects of the exchange relationship are obscured by what appear to be impersonal market forces and natural economic laws. 'To the extent that capitalism is supported by an explicitly coercive power, that power is situated in the putatively communal sphere occupied by the state, and appears as law and order enforced in the public interest'; the private sphere is 'insulated from explicitly communal and political concerns, the "private" powers of capital are ensconced in the sanctuary of civil society....'[15]

The fourth liberal myth posits the inherent efficiency of the private regulation of commercial relations. This myth also draws upon the other myths, since, for liberals, it is not difficult to derive the value of efficiency from allegedly natural, neutral, and consensual processes. Indeed, the proponents of enhanced private regulation of international commerce invoke precisely these attributes to support liberal-inspired functional and transaction cost analysis of private regulation.[16] Private regulation is thus said to produce greater efficiencies by reducing the costs of doing business and by achieving greater economies.

While liberalism provides a rationale for the distinction between the two spheres, it provides no sense of the history and the function of their separation. It is simply unhistoric to posit the distinction as a natural division, for it has not always figured as part of the natural world. Moreover, it is reductionist to attribute the complex public/private and state/society relationships to functional efficiency arguments. Transaction cost and efficiency arguments do not capture the complex character of the historic blocs that give rise to different permutations of the private/public distinction. They conflate the modern and medieval periods, and therefore miss crucial shifts in the boundary between public and private authority. In addition, they fail to grasp the essentially coercive and political nature of private commercial exchange relations. The next section considers very generally how a more careful historicisation of the private/public distinction could be developed. This provides the framework for a more detailed enquiry into the history of private international trade law.

Historicising the Public/Private Distinction

Michael Walzer associates the public/private distinction with the liberal practice of the 'art of separation', wherein 'political community is separated from the sphere of economic competition and free enterprise'.[17] In the private sphere of free economic exchange, there are no restrictions on prices or the quality of

15. Mark Rupert, *Producing Hegemony: The Politics of Mass Production and American Global Power* (Cambridge: Cambridge University Press, 1995), pp. 22-24.
16. Bernado M. Cremades and Steven L. Plehn, 'The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions', *Boston University International Law Journal* (Vol. 2, No. 3, 1984), pp. 317-18, 326-33, and 347, and Trakman, *op. cit.*, in note 5, pp. 97-102.
17. Michael Walzer, 'Liberalism and the Art of Separation', *Political Theory* (Vol. 12, No. 3, 1984), pp. 315-30.

goods bought and sold: *caveat emptor* prevails. However, while Walzer justifies the liberal art of separation on the grounds that it is a 'necessary adaptation to the complexities of modern life', he recognises that critics on the left are suspicious of the practice, regarding it as an ideological rather than a practical enterprise' and 'an elaborate exercise in hypocrisy'.[18] Moreover, the separation obscures significant temporal and geographical differences in the ordering of public/private relations.

The early work of Jürgen Habermas is particularly useful in addressing these concerns and in understanding the historical evolution and the nature of the public/private distinction.[19] Importantly, Habermas shows how the development of capitalism was central to the association of politics with the public sphere and economics with the private sphere. Habermas' illustration of how the spheres historically acquired different meanings is also significant.[20]

While the public/private categories were of Greek origin, they were transmitted to medieval Europe through Roman civilisation and law. However, the categories known to ancient Greek and Roman civilisations did not hold the same meanings that they hold today. In ancient Greece, the public sphere included the *polis*—the Greek city-state composed of free citizens—and public life took place in the *agora*, or market place. In contrast, private life, which included the production of wealth, took place in the home, or *oikos*. The public sphere came to be associated with freedom, while the private was the realm of obscurity and necessity. The Romans inherited the Hellenic view, but reproduced the categories in terms of property rights: *res publicas* referred to public property, and *res privatus* referred to private property. The Roman distinctions were in use in the Middle Ages, but Habermas notes that these were not yet the categories of an 'emancipated society'.[21] It took the liberation of the peasants and the breakdown

18. *Ibid.*, pp. 317 and 319.
19. Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. T. Burger (Cambridge, MA: The MIT Press, 1994).
20. *Ibid.*, pp. 14-26. Habermas provides an account of the origin, transformation, and degeneration of the bourgeois public sphere in the context of the development of capitalism in Germany, France, and Britain. He has been criticised for providing an idealised account that misrepresents history, neglects the gendered and exclusionary nature of the public sphere, and is thus suspect as an emancipatory theory. See the various selections in Craig Calhoun (ed.), *Habermas and the Public Sphere* (Cambridge, MA, and London: The MIT Press, 1992), and R.B.J. Walker, 'Social Movements/World Politics', *Millennium* (Vol. 23, No. 3, 1994), pp. 679-84. Arguably, there are other interpretations of the development of the state and the derivation of the public/private distinction. See Anthony Giddens, *A Contemporary Critique of Historical Materialism, Volume 1: Power, Property and the State* (London: Macmillan, 1981), and *Volume 2: The Nation-State and Violence* (Oxford: Polity Press, 1985); or Ellen Wood, *The Pristine Culture of Capitalism* (London: Verso, 1991). However, Habermas' account of the distinction between the private and public spheres and the changing nature of the distinction in the context of evolving capitalist practice and concepts of private law is useful at an abstract level, to provide a general framework for conceptualising the private/public distinction.
21. Habermas, *op. cit.*, in note 19, p. 76.

of feudal patterns of ownership to furnish the foundation for property rights conceived in terms of the opposing spheres of public and private.

Habermas illustrates how the development of the public/private distinction was inextricably bound up with the evolution of capitalism and the emergence of a bourgeois social order. This order began to take shape in financial and trade exchanges during and after the thirteenth century in northern Italy. Later, it spread to other parts of Europe. The early history of the private sphere was constituted by the activities of merchants engaged in long-distance trade, which gave rise to the growth of private merchant corporations and joint stock companies. Here too we find the beginning of the tension between the private and the public spheres. The former came to be regarded as a domain of unregulated economic exchange. The latter came to be associated with regulation imposed by what was to become the mercantilist state. However, the private sphere had to be freed from mercantilist regulation before it could be private in a 'positive' sense, as opposed to a negative sense of simply not being public. With the expansion and liberation of the market 'the commodity owners gained private autonomy; the positive meaning of "private" emerged precisely in reference to the concept of free power of control over property that functioned in a capitalist fashion'.[22]

Moreover, and of critical importance to this discussion, Habermas illustrates this development by reference to the foundations of private commercial law. These foundations emphasised the natural and consensual nature of economic exchange relations. The conception of a commercial contract founded upon the free will of the parties was 'modelled on the exchange transaction of freely competing owners of commodities'.[23] Private law reduced relationships between private people to private contracts, assuming that the laws of the free market were of a model or natural character. Legal rights ceased to be determined by estate and birth. Instead, they were determined by 'fundamental parity among owners of commodities in the market'.[24] The adage 'from status to contract' encapsulates the evolution from feudal to capitalist conceptions of property rights.[25] Private law 'secured the private sphere in the strict sense, a sense in which private people pursued their affairs with one another free from impositions by estate and state, at least in tendency'.[26]

As mercantilism gradually disappeared, the private sphere came to be regulated by private law and the nation-state.[27] The law was, in theory at least, supposed to operate amongst equals and in a neutral fashion, protecting commercial

22. *Ibid.*, p. 74.
23. *Ibid.*, p. 75.
24. *Ibid.*
25. *Ibid.*, p. 77.
26. *Ibid.*, p. 75.
27. For mercantilism generally, see Eli Heckscher, *Mercantilism* (New York, NY: Macmillan, 1955), and for an historical sociological account of the development of the private sphere, see Giddens, *Power, Property and the State*, *op. cit.*, in note 20, pp. 182-202.

freedoms and markets. State intervention was frowned upon as interfering with the 'natural' operation of the market, which, for merchant law, translated into the ability to predict transaction costs in accordance with rational and calculable expectations.

The discussion of the problems associated with the public/private distinction will be taken up again after consideration of the private international trade law regime. For now, Habermas' account of the emergence of the public/private distinction in post-medieval Europe provides a useful general framework for constructing a new history of international trade law. Within this framework, different historical blocs have created the two spheres and manipulated the boundary between them.

Private International Trade: A Return to 'Medieval Internationalism'?

It is commonly asserted that international commerce is witnessing a revival of 'medieval internationalism' in the growing adoption of international arbitration as the chosen method for resolving international commercial disputes.[28] Today, private international trade disputes are resolved predominantly through international arbitration, as opposed to adjudication in national courts of law. Indeed, arbitration has replaced adjudication as the norm for resolving international commercial disputes.[29] Hundreds of institutions engage in commercial arbitration throughout the world: the International Chamber of Commerce Court of Arbitration (ICC), the American Arbitration Association, and the London Court of Arbitration are among the most significant.[30] The recourse to private arbitration is encouraged by states who are participating in creating uniform and mandatory rules that provide for the recognition and enforcement of foreign arbitral awards. States are adopting legislation that curtails the power of national courts to intervene in private arbitrations and that limits the ability of judicial authorities to set aside arbitration awards.[31]

The use of private means to resolve disputes between commercial actors evokes images of medieval merchants who, travelling from market to market, 'carried their law, as it were, in the same consignment as their goods, and both law and goods remained in the places they traded and became part of the general

28. See Clive M. Schmitthoff, 'International Business Law: A New Law Merchant', *Current Law and Social Problems* (Vol. 2, 1961), pp. 131-32, 144-46, and 152.

29. See Gerald Aksen, 'The Need to Utilize International Arbitration', *Vanderbilt Journal of Transnational Law* (Vol. 17, No. 1, 1984), pp. 11-17; Thomas E. Carbonneau, 'Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce', *Texas International Law Journal* (Vol. 19, No. 1, 1984), pp. 33-114; and Richard J. Graving, 'The International Commercial Arbitration Institutions: How Good a Job are They Doing?', *American University Journal of International Law and Policy* (Vol. 4, No. 2, 1989), pp. 319-76.

30. For a comprehensive list of arbitration institutions, see 'List of Arbitral Institutions', *Yearbook of Commercial Arbitration* (Vol. 13, 1988), pp. 713-37.

31. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, UN Doc. A/Conf. 9/22, curtails the power of national courts to intervene in private arbitrations.

stock of the country'.[32] Medieval commercial disputes were settled by merchant juries who sat in courts of 'pie powder' (*piepoudres*).[33] The law applied was called the law merchant, *lex mercatoria*, and was renowned for the speed, justice, and efficiency with which disputes were settled. The law merchant evolved as a distinct and autonomous body of law regulating the activities of merchants who were granted significant immunities from local laws and regulations.[34] It was considered to be the *jus commune* or common law of the medieval period.[35] It achieved such universality in the European trading world that it even came to be regarded as the *jus gentium*, or the law of nations 'known to merchants throughout Christendom'.[36]

Similarities in dispute settlement in the medieval and modern periods are so striking that they suggest a renaissance of medieval practices. Indeed, trade experts agree that the law merchant courts operated more like modern arbitration tribunals than like courts of law.[37] Symmetry in the norms applied and an emphasis on informal, speedy, and just settlements characterise arbitral proceedings in both periods. Trade experts maintain that, in the absence of protections that stabilise expectations by rendering transaction costs predictable and property rights secure, actors will not engage in commercial transactions.[38] Therefore, these experts invoke classical and neo-classical liberal economic principles to explain both the emergence of the medieval law merchant and its symmetry with modern practices.[39] Moreover, in order to promote private regulation, they reproduce liberal myths about the private sphere's natural, neutral, consensual, and efficient character.[40] The superiority of the system of private regulation and arbitration is thus represented as a natural result of the reasonableness and efficiency of allowing merchants maximum scope for managing their own affairs. The right of freedom of contract becomes the legal

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32. Wyndham Bewes, *The Romance of the Law Merchant* (London: Sweet and Maxwell, 1923), p. vi.
33. The courts of pie powder were named thus because, according to lore, justice was administered 'as speedily as the dust could fall or be removed from the feet of the litigants'. C. Gross (ed.), *Select Cases Concerning the Law Merchant, Volume I* (London: Bernard Quaritch, 1892), p. xiv.
34. See A.T. Carter, 'The Early History of the Law Merchant in England', *The Law Quarterly Review* (Vol. 17, No. 67, 1901), pp. 232-51.
35. See René David, 'The International Unification of Private Law', in *International Encyclopaedia of Comparative Law: The Legal Systems of the World, Their Comparison and Unification, Volume II* (The Hague: Mohr, Tublingen Martinus Nijhoff, 1972), Chapter 5.
36. Frederick Pollock and Frederick W. Maitland, *History of English Law, Volume I* (Cambridge: Cambridge University Press, 1898), p. 467.
37. See Schmitthoff, *op. cit.*, in note 28, p. 134, and Cremades and Plehn, *op. cit.*, in note 16, pp. 332 and 335.
38. See D.M. Day, *The Law of International Trade* (London: Butterworths, 1981), pp. 1-10, and Berman and Kaufman, *op. cit.*, in note 5, pp. 221-23.
39. See Trakman, *op. cit.*, in note 5, pp. 1-6; Cremades and Plehn, *op. cit.*, in note 16, pp. 319 and 347; Carbonneau, *op. cit.*, in note 29, pp. 58-59; and Berman and Kaufman, *op. cit.*, in note 5, pp. 224-25 and 272-77.
40. See Trakman, *op. cit.*, in note 5, pp. 99-105; Cremades and Plehn, *op. cit.*, in note 16, pp. 326-27; and Graving, *op. cit.*, in note 29, p. 324.

equivalent of the liberal principles of freedom of trade, commerce, and markets.[41]

While some legal theorists explicitly engage in transaction cost analysis to explain the origin and continuing influence of law merchant practices,[42] it is students of 'new institutional theory' who develop this approach most fully.[43] The emergence of an institution like the law merchant is explained as a response to the transaction and information costs and insecurity experienced by merchants engaging in trade over wide geographical regions.[44] It is argued that the merchant courts provided an efficacious system for settling merchant disputes and for enforcing transactions.[45] Self-regulation by merchants included the imposition of the sanctions of market exclusion, bankruptcy, and loss of reputation, and provided the foundation for a system of private adjudication suited to the needs of commercial actors. By centralising enforcement in merchant courts, the system provided invaluable information about the credit-worthiness of those with whom a merchant traded, and functioned as a valuable reputation system which enforced honesty. According to this logic, the system of private enforcement made commercial exchange over time and space possible, by lowering the costs of exchange and providing merchants with some security that their agreements would be honoured. However, a review of the history of

41. The influence of liberal economic thought on commercial law is profound. For a brilliant discussion of the liberal foundations of modern contract law, see Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979). Certainly, among Anglo-American scholars the tendency is to assume *a priori* the validity of liberal economic accounts of the efficiency value of the private international trade regime. The presumption is that the reduction of legal uncertainty will generate greater trade. See Elizabeth Hayes Patterson, 'United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension between Compromise and Domination', *Stanford Journal of International Law* (Vol. 22, 1986), p. 266, n. 7. Economic theories of law, like that developed by Richard A. Posner, explicitly develop transaction cost analysis, although it is related to domestic and not international law. Posner's ideas on the evolution of primitive legal orders do, however, provide interesting suggestions for conceptualising international law. See his 'A Theory of Primitive Society, With Special Reference to Law', *Journal of Law and Economics* (Vol. 23, No. 1, 1980), pp. 1-54, and 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication', *Hofstra Law Review* (Vol. 8, 1980), pp. 487-514.

42. See Bruce Benson, 'The Spontaneous Evolution of Commercial Law', *Southern Economic Journal* (Vol. 55, No. 3, 1988/89), pp. 644-61.

43. A pioneering work in this regard is Paul R. Milgrom, Douglas C. North, and Barry R. Weingast, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs', *Economics and Politics* (Vol. 2, No. 1, 1990), pp. 1-23. See also North and Robert P. Thomas, *The Rise of the Western World: A New Economic History* (Cambridge: Cambridge University Press, 1973); North, *Structure and Change in Economic History* (New York, NY: Norton, 1981); North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990); and Hendrick Spruyt, 'Institutional Selection in International Relations: State Anarchy as Order', *International Organization* (Vol. 48, No. 4, 1994), pp. 527-57.

44. Milgrom, North, and Weingast, *op. cit.*, in note 43, pp. 19-21.

45. *Ibid.*, pp. 4-6.

dispute settlement under the law merchant reveals that there are problems in applying liberal transaction cost analysis to the medieval political economy, and then drawing a direct link from this to modern practices. This revelation supports charges that new institutionalism has a 'need for history', and that it effectively reduces the political landscape to efficiency arguments.[46] The supposed symmetry of the medieval and modern law merchant begins to break down when one considers the absence of a clear conceptual distinction between the public and the private spheres in the medieval period, and then the subsequently shifting boundary between public and private authority structures.

Dispute Settlement under the Law Merchant (*Lex Mercatoria*)

Legal historians and trade experts identify three phases in the evolution of the law merchant.[47] They divide the evolution of the regime into a first phase of medieval internationalism in the eleventh to sixteenth centuries, a second phase of nationalisation and localisation in the seventeenth to nineteenth centuries, and a third phase of modern internationalism in the twentieth century. This is presented as evidence of a continuous, albeit rather uneven, existence of merchant law and practice.[48] However, when we concentrate on the separation of the private and public spheres, it becomes clear that the history of international trade law is, in fact, marked by sharp discontinuities and changes.

During the first phase, dispute settlement through private arbitration was the norm. Conceptually, however, the public/private distinction was not yet developed, and, in practice, public authorities exercised local controls with limited impact on international commerce. The arbitration norm weakened in the second phase, as states sought to regulate international commerce and national adjudication became the norm. This period witnessed a clear articulation of the conceptual distinction between the public and private spheres. In practice, the public sphere expanded and the private sphere contracted as state elites increased intervention into international commercial relations. Private arbitration has emerged strongly in the third phase, although now it is conducted with the full support of the state. The boundary between the public and private spheres is shifting, as matters previously regarded as public are today being delegated to private actors. Tensions between political and commercial elites over the extent to which international commercial relations should be subject to state regulation, and conflicts over the nature of that regulation, are reflected in the shifting location of the boundary and the changing content of each sphere. Each of the three phases will be considered briefly below.

46. Spruyt, *op. cit.*, in note 43, pp. 532-33.
47. Berman and Kaufman, *op. cit.*, in note 5, pp. 224-29, and Schmitthoff, *op. cit.*, in note 28, pp. 131-42.
48. Berman and Kaufman, *op. cit.*, in note 5, pp. 272-73.

Phase I: The Medieval Law Merchant

Medieval law merchant practices exhibited widespread acceptance of private arbitration in the settlement of disputes.[49] The courts of pie powder originated in this phase, and sat in fairs, markets, and seaport towns. The right to hold a fair court, for example, formed part of the grant of the right to hold a fair, which was issued by the king or local lord. The grant established the jurisdiction of the fair court and provided for its general administration. The law applied was the law merchant and judgements were rendered by juries of merchants. Fair courts throughout England and the continent applied the law merchant, enforcing transactions which were unenforceable in the local common and civil law courts. The common and civil law courts did not have jurisdiction over contracts entered into or torts committed abroad, and did not recognise or enforce the instruments commonly utilised by merchants. The various financial, insurance, transport, and maritime instruments (*e.g.*, bills of exchange, letters of credit, partnership agreements, general average agreements, charterparties, sea loans, and bare promises) used by merchants could only be enforced under the law merchant and in merchant courts. The merchant courts thus operated independently and at the suit of merchants, evidencing considerable merchant autonomy. They emphasised procedural and evidentiary informality, which contributed further to their unique character.

Merchant autonomy in dispute resolution derived both from the inability of the 'inchoate nation-state system' to regulate the 'geographically dynamic' activities of the medieval merchant, and from a hands-off approach to foreign merchants who were regarded as providing valuable revenues and supplies of foreign goods.[50] Local political, religious, and guild authorities lacked the capacity to regulate international transactions, while the local courts and legal systems did not recognise law merchant transactions, and therefore were powerless to regulate or enforce them.

What is particularly significant about the medieval phase is that merchant autonomy in dispute settlement contrasted rather sharply with the intensity with which local commercial exchanges were regulated to protect consumers. Local traders were subject to strict consumer protections, in the form of the requirements of just prices and liability for defects in the quality of goods.[51] Local markets were strictly controlled for supply or price manipulation by forestalling (purchasing before market), regrating (purchases by middlemen), and

49. Generally, see William C. Jones, 'An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States', *University of Chicago Law Review* (Vol. 25, No. 3, 1958), pp. 445-64.

50. Cremades and Plehn, *op. cit.*, in note 16, p. 318. See also Henri Pirenne, *Economic and Social History of Medieval Europe* (London: Kegan Paul, 1937), and Shepard Clough and Charles Cole, *Economic History of Europe*, Revised Edition (Boston, MA: D.C. Heath and Company, 1946).

51. See Cornelius F. Murphy, 'Medieval Theory and Products Liability', *Boston College Industrial and Commercial Law Review* (Vol. 3, No. 1, 1961-2), pp. 29-37.

engrossing (cornering the market). Sales were limited to the open market (*market ouvert*) and churchmen enforced the prohibition against usury, albeit rather selectively.[52] Foreign merchants were often exempted from local price, quality, and interest restrictions. In return, merchants engaged in international transactions provided a valuable source of foreign exchange and revenue from the payment of customs duties and taxes. This suggests that, in addition to simply being unable to regulate international transactions in any significant way, the local authorities were unwilling to do so. Thus, while '[t]he ability of the merchant class to both generate and enforce its own norms of behaviour allowed it to achieve a large degree of independence from these local sovereigns',[53] one must also consider the reluctance of the local authorities to interfere.

The absence of a clear distinction between the public and private spheres reflects medieval political arrangements. The distinguishing feature of medieval Europe was the decentralisation of political authority, 'overlapping feudal jurisdictions, plural allegiances, and asymmetrical suzerainties'.[54] Ecclesiastical authorities and local political leaders exercised control over local transactions; however, their ability to discipline international commercial transactions was very limited. The 'picture of an authoritarian control is everywhere in evidence; yet the lines of the agencies of supervision are far from clean-cut. The activities of a people passing out of feudalism do not lend themselves to our distinction between public and private'.[55]

Phase II: Nationalising the Law Merchant

During the second phase in the development of the regime the public/private distinction emerged. With the development of a system of territorial-based sovereign states, and with the movement from feudalism to capitalism, the public/private distinction came to be firmly established. State-building projects involved the nationalisation and control of foreign commercial activities (which were increasing in volume). The consolidation of states signalled a change in both the ability and the willingness of political authorities to regulate international commercial transactions. The result was a contraction of the private sphere, as merchant autonomy and private dispute settlement declined. Effective enforcement came to be associated with the state. Indeed, dispute settlement and enforcement became functions of the public sphere, as the geographic expansion of commercial relations rendered the self-enforcement system of merchants less successful and more costly. The collection of information regarding the credit-

52. Clough and Cole, *op. cit.*, in note 50, p. 55.
53. Cremades and Plehn, *op. cit.*, in note 16, p. 319.
54. J.L. Holzgrefe, 'The Origins of Modern International Relations Theory', *Review of International Studies* (Vol. 15, No. 1, 1989), p. 11. See also John Gerard Ruggie, 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis', *World Politics* (Vol. 35, No. 2, 1983), pp. 261-85.
55. Walton H. Hamilton, 'The Ancient Maxim Caveat Emptor', *Yale Law Journal* (Vol. 40, No. 8, 1931), p. 1141.

worthiness and honesty of merchants became more expensive. The sanctions of market exclusion and loss of reputation became difficult to enforce as markets proliferated in number, as commerce extended to far away places, and as the practice of simultaneous exchange in markets was replaced by non-simultaneous exchanges over time and space. The imposition of the sanction of bankruptcy and the enforcement of agreements became the prerogatives of states and thus came to be contingent upon national intervention, as states adopted laws and procedures governing the enforcement and execution of commercial agreements.

During this period, the expansion of trade through colonisation, the development of mercantilist doctrine, and the advent of capitalism brought new insights into the role of commerce in determining national power.[56] Political authorities developed a new understanding of the importance of regulating international commerce for achieving national welfare goals and political autonomy. This understanding, coupled with the development of the institutional and legal machinery capable of disciplining international transactions, rendered states more willing and more able to regulate international trade.

Thus, the balance between public and private authority shifted in favour of the former, as state authority replaced the overlapping authority structures of the medieval period. Moreover, states exercised stronger and more comprehensive control than did the local religious and political authorities of the earlier phase. Notable, however, is the profound change in the nature of public regulation. Medieval paternalistic and religious restraints were replaced by a permissive and facultative approach inspired by liberal political economy, which appeared later in the period. Liberalism sanctioned capitalist business techniques and provided a normative and a theoretical rationale for free market principles. It provided a foundation for assumptions concerning the natural, neutral, consensual, and efficient nature of private regulation. The widespread acceptance and legitimacy of prices established under freedom of contract or by the market, the weakening influence of strict liability standards for defective goods, and the growing legitimacy of interest charges show the increased importance of free market principles and the value of facilitating exchange. While establishing the terms of a contract became a private activity, its enforcement became a public, judicial activity.

The trend towards increasing reliance upon national judicial enforcement was bolstered by the incorporation of the jurisdiction of merchant courts into national judicial systems. States differed in the extent to which national courts assumed jurisdiction over commercial matters. England and the United States adopted unitary systems, wherein the national courts assumed jurisdiction for most commercial matters. In France, special commercial courts and commercial jurisdictions were retained, while the jurisdiction of the merchant courts was assumed by a special commercial division of the national court in Germany.

56. For a discussion of these developments, see Cox, *op. cit.*, in note 4, pp. 111-50.

Despite considerable judicial hostility towards the recognition and enforcement of arbitral awards, reliance on private arbitration still persisted in many states.[57]

Thus, in the second phase, national adjudication and enforcement became the norm, as conflict over the placement of the boundary between public and private authority was resolved in favour of the former. However, as a norm, national regulation was only moderately strong, given the continuing recourse to private arbitration in some jurisdictions.

Phase III: The Modern Law Merchant

The twentieth century is said to be witnessing a revival of the 'medieval internationalism' of the first phase.[58] A decline in the universality of the law merchant, caused by the proliferation of national differences in phase II, has generated a movement for the unification of international commercial law. The unification movement is being advanced by an historic bloc committed to facilitating the expansion of capitalism. The bloc is comprised of an elite group of merchants, trade lawyers, trade associations, and government officials working in combination with intergovernmental efforts to unify commercial law and practice.[59] The unification of commercial law facilitates exchange and the mobility of capital by reducing legal barriers to exchange and thereby reducing the costs of contracting. It is also effecting a relocation of the border between the private and public domains. Curiously, state elites are participating in narrowing the powers of the public sphere and broadening those of the private sphere.

The unification movement seeks to recreate the tradition of *jus commune*, which disappeared as international commercial law was assimilated by national legal systems. It has made such progress in restoring the universality of international commercial norms that some suggest that there is now a basis for a global common law and a universal commercial code.[60] The movement is assisting in the consolidation of capitalism by placing renewed emphasis on the primacy of liberal, capitalist values, which function to free international transactions from state regulation. Proponents of the new law merchant, predominantly representatives of Western industrialised states, stress the self-regulating abilities and capacities of merchants.[61] In asserting either explicitly

57. See Jones, *op. cit.*, in note 49, pp. 461-63. See also Carbonneau, *op. cit.*, in note 29, pp. 40-57, for a review of English, American, and French arbitration practices.
58. See Schmitthoff, *op. cit.*, in note 28, pp. 139-40.
59. For the significance of arbitration institutions and a transnational mercantile community to the unification of commercial law, see Graving, *op. cit.*, in note 29, pp. 321-22, and Berman and Kaufman, *op. cit.*, in note 5, p. 222. These institutions and the transnational mercantile community are constitutent elements of the neoliberal historical bloc analysed by Stephen Gill elsewhere in this issue.
60. Francis A. Gabor, 'Emerging Unification of Conflicts of Laws Rules Applicable to the International Sale of Goods: UNCITRAL and the New Hague Conference on Private International Law', *Northwestern Journal of International Law and Business* (Vol. 7, No. 4, 1986), p. 726.
61. See Carbonneau, *op. cit.*, in note 29, pp. 100-101, and Trakman, *op. cit.*, in note 5, pp. 97-105.

or implicitly that the purpose of commercial regulation is to facilitate international economic exchange, they claim that the best way to achieve efficiency and certainty is to give maximum play to the principles of merchant autonomy, freedom of contract, and private arbitration. Although recognising that states have legitimate interests in regulating international commercial activities, they emphasise that such regulation should be permissive, suppletive, and facultative.[62] While national public policy concerns establish mandatory limits to freedom of contract, such limits should be sensitive to the international dimension of transactions[63] and the furtherance of international comity. Mandatory public policy rules should be recognised as 'exceptions from' the basic principle of freedom of contract. Freedom of contract is 'a delegation by the state to individuals of the power to enter into binding contracts' according to self-determined terms: arbitration is regarded as a logical and necessary corollary of this power.[64]

Part of the rationale for freeing international commercial transactions from national controls is that, as 'private' transactions between contracting parties, international commercial transactions are essentially apolitical and value-neutral in their more general application. However, while liberal neutrality is accepted by most practitioners and academics in the industrialised world,[65] this view is not universal. The primacy accorded to merchant autonomy and private arbitration is challenged by those who posit that private trade relations are not value-neutral, but are inherently 'political'.[66] Asserting the belief that legal rules operate very much in a distributional manner, determining who has access to which markets, goods, and services and on what terms, they posit the overwhelming importance of justice and equitable considerations. They seek to limit the laissez-faire approach, and argue that commercial law should exercise a distributive function by promoting fairness and equality in exchange, and by protecting weaker parties. Critics argue that unrestricted reliance upon merchant autonomy and freedom of contract are unacceptable foundations for the unification of commercial law.

> Many vital questions are at stake, ranging from the reconciliation of common and continental law to the protection of the weaker party and the

62. *Ibid.*
63. Kazuaki Sono, 'Restoration of the Rule of Reason in Contract Formation: Has There Been Civil and Common Law Disparity?', *Cornell International Law Journal* (Vol. 21, No. 3, 1988), p. 485.
64. Cremades and Plehn, *op. cit.*, in note 16, p. 328.
65. See Schmitthoff, *op. cit.*, in note 28, pp. 140-41, 144, and 152-53, and Clive M. Schmitthoff, 'Nature and Evolution of the Transnational Law of Commercial Transactions', in Norbert Horn and Clive M. Schmitthoff (eds.), *The Transnational Law of International Commercial Transactions* (Deventer: Kluwer, 1982), pp. 20-21. Graving, *op. cit.*, in note 29, p. 324, identifies neutrality as the central advantage of arbitration.
66. For the East-West and North-South differences in unifying sales law, see Alejandro M. Garro, 'Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods', *The International Lawyer* (Vol. 23, No. 2, 1989), pp. 443-83.

> satisfactory regulation of transactions between parties from different social and economic systems or from developed and underdeveloped countries, and it would be irrational madness to leave the legal responses to these problems to an uncontrolled laissez-faire in a world in perpetual strife. It is a fact that the economic and political matters involved in international trade transactions considerably exceed the narrow margins of private interests which are often—and mistakenly—understood to be the only concerns in the private law regulation of international commercial issues.[67]

It is argued that merchant autonomy 'tends to annihilate freedom of contract' and does not guarantee a fair result for weaker parties, like the developing countries.[68] Such countries have very limited resources to effect the terms of exchange with multinational enterprises. This is particularly true when contracting occurs under standard form agreements or contracts of adhesion, which are presented on a 'take it or leave it' basis. There have been attempts to revive notions of equity as the foundation for the determination of prices and for the rules governing liability for defective goods, but these attempts have largely failed.[69] Attempts to modify the contract rules governing the sale, transport, financing, and insurance of goods have also been largely unsuccessful in equalising contractual relations between merchants in developed and developing countries.[70]

These attempts are made even more difficult by the re-emergence of arbitration as the preferred method for settling commercial disputes. Freeing international commercial transactions 'from stringent requirements of the domestic law of the forum or foreign law' is regarded as a major role of arbitration and reflects important shifts in public policy.[71] Undoubtedly, the growing trend among states to accept limits on the abilities of national courts to intervene in commercial arbitrations reflects significant pragmatic considerations. The inability of national judicial systems to deal with both the growth in commercial transactions and the expansion in commercial litigation has been significant in reordering domestic attitudes towards arbitration.[72] Domestic courts are simply unable to respond adequately and cost-effectively to the increased volume of commercial cases and to the increasing complexity of commercial transactions. In addition, most states recognise the economic benefits that flow from reducing the transaction costs of enforcement, and from encouraging stability in the enforcement of property rights. However, it is the consolidation of an historic bloc premised upon liberal

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67. Horacio A. Grigera Naon, 'The UN Convention on Contracts for the International Sale of Goods', in Horn and Schmitthoff (eds.), *op. cit.*, in note 65, p. 91.
68. Gyula Eörsi, 'Contracts of Adhesion and the Protection of the Weaker Party in International Trade Relations', in UNIDROIT, *New Directions in International Trade Law, Volume I* (New York, NY: Oceana Publications, 1977), p. 157.
69. See Patterson, *op. cit.*, in note 41.
70. See Garro, *op. cit.*, in note 66.
71. Mark Buchanan, 'Public Policy and International Commercial Arbitration', *American Business Law Journal* (Vol. 26, No. 3, 1988), p. 513.
72. See Carbonneau, *op. cit.*, in note 29.

mythology concerning the natural, 'apolitical', consensual, and efficient nature of private economic regulation that enables arbitration to insulate global capital from national regulation. Economic and political elites draw on liberal mythology concerning the superiority of private regulation to establish national and international private regulatory structures, which effectively delegate enforcement powers to the private sphere. The development of an international institutional context for arbitration, centered around the work of the United Nations Commission on International Trade Law and the many private arbitration institutions, is critical to the strength of the arbitration norm.[73] Liberal mythology has the sanction of states and is reproduced by cooperative governments and corporate elites in their rhetoric and in the law. Merchant autonomy in the medieval period operated largely due to the absence of the state. Today, merchant autonomy exists with the endorsement and support of state elites. Furthermore, states participate in the construction of the myths by according private actors wide scope in both structuring and enforcing their international commercial agreements. Liberal mythology forms the foundation for the public/private distinction and has important implications for the theory and practice of international relations.

'Apolitical' Politics

Clive M. Schmitthoff, a leading scholar of international commercial law, attributes the success of the law merchant in regulating international commercial transactions to the 'apolitical' nature of private trade relations.[74] Law merchant norms, he argues, have attained near universality in application because, irrespective of their level of development and political, economic, or social characteristics, all states have buyers and sellers, investors, lenders, and borrowers engaged in private exchanges.[75] As long as these private actors conduct their transactions within the terms of national law and public policy, it is assumed that no matters of a 'political' nature will arise. The designation of commercial transactions as essentially 'private' removes them from the sphere of the political, which is significant for international relations. When coupled with the belief that the private ordering of exchange relations is natural, the designation obscures significant differentiation in state/society relations over time and space. The public and private spheres have changed as historic blocs vested them with different contents. Moreover, among Western states, the 'image of direct and exceptional public intervention to preserve normal private commerce has become increasingly anachronistic as new forms of property ownership, corporate finance and control, public-private partnerships...and secondary markets have emptied the central categories of private property and public policy

73. See Graving, *op. cit.*, in note 29, p. 325.
74. Schmitthoff, 'Nature and Evolution of the Transnational Law of Commercial Transactions', *op. cit.*, in note 65, pp. 20-21.
75. *Ibid.*

of much of their iconic meaning'.[76] While the public/private distinction is of declining force in Western states, it continues to operate in states with newly acquired market structures. Rather than effecting greater homogenisation of state/society relations throughout the world, the proliferation of market democracy is arguably producing greater heterogeneity.

Furthermore, the private sphere has never operated in the neutral and consensual manner posited by liberalism. The legal presumption of the equal bargaining power of contracting parties is plainly incredible for transactions involving parties from states with asymmetric economic, technical, and legal capabilities. This is precisely the sort of argument directed at the modern law merchant by states with little bargaining power, which face obstacles to market entry.[77] Attempts to modify the laws better to accommodate development and equity concerns have been largely unsuccessful. Some changes in the rules of a marginal nature have been made, but the basic principles inspired by liberal political economy remain the core of the regime. By removing economic activity from the sphere of public scrutiny and accountability, the regime insulates commercial exchange from challenge. The public/private distinction creates what Hoffmann refers to as a 'zone of irresponsibility', wherein the public aspects of private activities are unregulated and unaccountable.[78] State and corporate elites are able to shield their activities from democratic influence, thus enhancing the further consolidation of capitalism.

The posited efficiency of the private sphere reinforces belief in the superiority of private regulation. However, this provides an unhistoric and reductionist account of state/society relations. As rationalist theories premised upon an atomistic ontology and an empirical epistemology, functional theories and transaction cost analysis produce unhistoric conceptions of the state.[79] Janice Thomson shows how state control of the economy was not meant to be 'functional to society', but evolved in the historical context of state-building and different approaches to the state's 'war-making capability'.[80] The unhistoric nature of these approaches collapses the distinction between state and society and obscures potential antagonism between political elites and society. Moreover, efficiency explanations do not capture the shifting balance between public and private authority. They do not explain why political elites found it useful to regulate dispute settlement in the second phase of the regime, but not in the third phase. Furthermore, such analysis is incapable of accounting for the influence of

76. Kennedy, *op. cit.*, in note 7, p. 381.
77. See Patterson, *op. cit.*, in note 41, and Garro, *op. cit.*, in note 66.
78. Stanley Hoffmann, 'The Crisis of Liberalism', *Foreign Policy* (Vol. 98, 1995), p. 175.
79. For a good discussion of this problem in the context of criticisms of neorealism, see Rupert, *op. cit.*, in note 15, Chapter 1.
80. Janice Thomson, 'State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research', *International Studies Quarterly* (Vol. 39, No. 2, 1995), p. 221.

national power and state interests, because all that is of heuristic and analytical value is reduced to efficiency concerns.[81]

The implications of these deficiencies are of particular importance to international relations theory. Conceptually, the notions of private agency and authority in international relations are hard to reconcile with the dominant statist discourse. The significance of private power to the international political economy suggests that some profound transformations are at work and requires more scholarly attention. In addition, the tendency of liberal mythology to conflate the medieval and modern periods, and to reduce politics and history to economic activity, suggests significant analytical limitations to liberal analysis. However, there is another, perhaps more compelling reason for probing the private and public spheres. Normatively, the public/private distinction has a particularly invidious effect. It provides the foundation for legal practices that generate and perpetuate inequalities, while advancing the mythology of their value-neutrality and efficiency. This creates a universe of thought and practice that is resistant to criticism and change.

The institutions of capitalism created, and now perpetuate, a distinction that serves to buttress and reproduce a self-sustaining view of the world. Significant developments suggest that the world has moved beyond modernity into a condition of post-modernity, characterised by globalised capitalism and definitions of political identity that challenge the dominant statist logic. Challenges to the capitalist order posed by simultaneously fragmenting and globalising influences are being met by the attempt of core states to 'bind the core' and further to consolidate capitalism.[82] The law merchant responds by reproducing the myth of the superiority and 'apolitical' nature of private regulation, thereby assisting in insulating the core from challenge. It contributes to the 'disembedding of liberalism', as capital is further denationalised and insulated more securely from government intervention and democratic controls.[83]

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81. Stephen Krasner identifies analytical and heuristic weaknesses in market failure approaches to international regimes in their inability to investigate relative capabilities and the questionable relevance of power concerns to the solution of market failures. See his 'Global Communications and National Power: Life on the Pareto Frontier', in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (New York, NY: Columbia University Press, 1993), p. 243. For what continues to be a good discussion of many deficiencies of functional analysis, see Stephan Haggard and Beth Simmons, 'Theories of International Regimes', *International Organization* (Vol. 41, No. 3, 1987), pp. 491-517.

82. For discussions of the range of globalising forces that are integrating the world, but are simultaneously disintegrating previously embedded institutions and practices, see Fredric Jameson, *Postmodernism, or The Cultural Logic of Late Capitalism* (Durham, NC: Duke University Press, 1991), and Stephen Gill, 'Gramsci and Global Politics: Towards a Post-Hegemonic Research Agenda', in Gill (ed.), *Gramsci, Historical Materialism and International Relations* (Cambridge: Cambridge University Press, 1993), pp. 1-18.

83. For the idea of 'disembedded liberalism', see John Gerard Ruggie, 'Trade, Protectionism and the Future of Welfare Capitalism', *Journal of International Affairs* (Vol. 48, No. 1, 1994), pp. 1-11, as well as his contribution to this issue.

As a discipline, International Relations is not very good at seeing fundamental discontinuity. More specifically, theorists often overlook 'the question of whether the modern system of states may be yielding in some instances to postmodern forms of configuring political space'.[84] It is hoped that this article contributes to the recognition that '[r]epresentations of space are not "merely" epistemic; functions of how one "just happens to think". They are related to the dominant political and material conditions of different eras'.[85] The public/private distinction separates space into political and economic domains. Liberalism then vests the separation with natural, practical, and ideological value. In so doing, the hegemony of capital is rendered more palatable and, ultimately, more secure as the core is insulated from challenge. For those uncomfortable with this picture, it is important to look behind the mythology and to reveal the processes by which hegemony reproduces itself, because, as Robert Cox suggests, '[h]egemony is like a pillow: it absorbs blows and sooner or later the would-be assailant will find it comfortable to rest upon'.[86]

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84. John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', *International Organization* (Vol. 47, No. 1, 1993), pp. 143-44.
85. John Agnew, 'Timeless Space and State-Centrism: The Geographical Assumptions of International Relations Theory', in Stephen J. Rosow, Naeem Inayatullah, and Mark Rupert (eds.), *The Global Economy as Political Space* (London and Boulder, CO: Lynne Reinner Publishers, 1994), p. 102.
86. Robert W. Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method', *Millennium* (Vol. 12, No. 2, 1983), p. 173.