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Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change*

Katharina Pistor

Abstract

It is widely recognized that institutions are embedded in social systems and that institutions as well as social systems change over time. Several implications follow: First, institutions cannot be described and analyzed without referring to the system in which they operate; conversely, a system cannot be described without reference to its core institutions. Second, systems foster institutional change and can breed new institutions. Third, institutional change can have systemic implications and may even engender the formation of new systems. In short, the relation between institutions and systems is characterized by complex interactions. A better understanding of the dynamics of institutional change therefore necessitates a synthesis of social system and institutional theories and a re-direction of attention from institutions or systems to interdependencies between them. This paper seeks to develop the building blocks for an integrated theory of social and institutional change. Thematically it focuses on contested property rights. The paper argues that the scope and limits of property rights are determined by the manner in which contests for control can be resolved within a broader system, which may, but does not have to, be that of a nation state. A comparative analysis of transnational property rights cases shall help shed light on the relation between property rights institutions and the system that determines if and how they are realized. These case studies serve as heuristics for generating insights about the dynamics of institutional and systemic change.

KEYWORDS: institutional change, legal change, property rights

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I. Introduction

Over the past twenty years much progress has been made in analyzing institutions, identifying those that appear to be critical for economic development, and defining reform agendas for less developed countries to improve their ‘institutional infrastructure’. The practical success of these reforms, however, has been mixed, as reform programs either failed to trigger the expected market response, or produced unexpected results. On the theoretical side it is also becoming clear that institutional analyses do not sufficiently account for the *context* in which institutions operate. Depending on the theory that is advanced, this *context* comprises power politics, a country’s legal tradition (legal origin), or simply the accumulated institutional baggage of the past, which creates path dependencies that are not easily reversed. Thus, the strong emphasis on methodological individualism that has characterized rational choice theories and their progeny in the literature on institutionalism has been relaxed over time. First, institutions were added to the analysis of individual actor behavior in order to understand the *constraints* under which they operate – with institutions being identified as such constraints. Next came the insight that institutions are not simply given or static, but that they change either in response to exogenous shocks, or endogenously in a more gradual fashion. Closer inspection of the processes of institutional change finally raised interest in the *context* in which institutions operate, as it became clear that explanations for institutional change cannot fully be accounted for by individual actions and existing institutional constraints. The context metaphor, of course, can also be interpreted as a reference to the broader *social system*, that is, the structures that determine the *collective* reproduction of allocative and authoritative resources in a given system Layder (1989).¹ These structures may differ across time and space, which suggests a need not only for comparative institutional analysis, but for comparative system analysis, and indeed, for a synthesis between the two.

In short, the path from autonomous rational actor theory has led us back to inquiries into systems and the relation between individual choice and social systems – i.e. the old and familiar problem of methodological dualism. The challenge then is to advance our understanding of the relation between actors, institutions, and systems. This is not only a theoretical challenge; it is also critical if we want to improve the effectiveness of institutional reforms both within and across countries. Comparative analysis of institutional reform projects suggests that institutional reforms without consideration of the social and political structures in which institutions are embedded rarely produce the desired results

¹ There are obviously many ways of defining social systems – some of which would disregard any difference between institutions and systems that is the analytical starting point of this paper. These issues are further explored in section 2 below.

Berkowitz, Pistor, and Richard (2003). They may be entirely ineffective; they may be dormant for years and become effective only later on; or they may produce unexpected effects Teubner (2001), some of them useful for the targeted beneficiaries of reforms, but some not. In light of the empirically observable diversity in outcomes of similar institutional reforms, one can hardly avoid the conclusion that knowledge of institutions alone has little predictive power for the effect they might have in different systems.

Adding *context*, however, is not sufficient. Instead, a conceptual leap is required that combines the understanding of individual behavior, institutions, and the processes of collective construction of these institutions within a broader social system. Theories that ordain methodological individualism tend to conflate individual action in response to incentives and constraints on one hand, and the collective reproduction of these institutions and the system of social ordering of which they are a part, on the other. Because these theories assume that all individuals act as if they were autonomous, they over-estimate the impact of specific institutional change – i.e. legal reforms, or the creation of a new regulatory or administrative organization – on collective behavior. A more realistic assessment of the impact of institutional change requires recognition that collective behavior is not simply the sum of all individual responses that were targeted by an institutional reform strategy, but of the collective response to such reforms in light of existing norms, power structures and social relations, i.e. of the system within which the reforms shall be realized. Dualistic theories have their own, equally well-recognized problems. In particular, they tend to err on the side of over-determining individual behavior by social structures.

The goal then is to recognize the importance of individual actions, institutions *and* systems and to develop a theoretical framework that helps explain how they relate to one another. This is a challenging task; this paper, therefore, has the more modest goal of suggesting the building blocks for such a theory and to do this against the background of recent advances in research on institutional change. One important aspect of this effort in re-theorizing is to define and thereby conceptualize the notion of institutions and systems.

In this paper I suggest the following definition of institutions: Institutions are the space for contesting the scope of rights and responsibilities of stakeholders with regards to an asset, entity or relation in an attempt to generate third party support.² This requires that the agreed scope of rights (output) and/or the process by which these rights are defined (input) is deemed legitimate, i.e., that these rights are accepted as binding even by those who might not agree with them.³

² Note that this definition of institutions is borrowed from Streeck and Thelen (2005) discussed *infra*.

³ The term “legitimate” is derived from the Latin *legitimare*, or to make something lawful. While legitimacy can be conceptualized in various ways – both descriptively and normatively – most

Systems comprise multiple institutions that accept as binding the balancing of their status within the broader system, because the balancing act is deemed legitimate for reasons related to the authority in charge, the process followed, or the outcome produced.⁴

The paper is structured as follows. Section II discusses recent developments in the literature on institutionalism, in particular the increasing recognition of the importance of *context* for understanding processes of institutional change and the impact of such change on observable outcomes. Section III develops the building blocks for an integrated theory of institutions and systems. Section IV applies these building blocks to an analysis of contested property rights in a transnational context where the boundaries of systems and institutions are more complex than in a nation state setting. Section V concludes.

II. Contextualizing Institutional Change – A Review of Existing Theories on Institutional Change

This section discusses trends in recent literatures on institutions and institutional change that have (re-) discovered the need to integrate the analysis of institutions into a broader analysis of social, political or legal systems. The overview is meant to be illustrative, not comprehensive. Specifically, we trace this development in two prominent branches of the literatures on institutionalism – economic and historical institutionalism.

The starting point for most discussions on institutionalism in the economics literature remains Douglas North's definition that institutions are the 'rules of the game' that humans devise to constrain their actions North (1990). These rules may be formal or informal. How informal rules are produced is not further explained. The production of formal law is viewed as a function of the state, i.e. of a centralized agent that is explicitly authorized with the task of norm production. To achieve economic development, the state should not project a vision of social goals or aspirations, but act as 'neutral arbiter' North (1990). This essentially eliminates the normative aspect of the legal order; instead, formal law is viewed as a production cost reducing infrastructure for rational economic agents. Only few states, however, have achieved the status of neutral arbiter, a

share the notion that legitimacy justifies the exercise of power and authority. For a comprehensive survey of political legitimacy, see Peter (2010).

⁴ There is an extensive literature in sociology on social system theory. Different theorists identify different factors as foundational for a system. Niklas Luhmann, for example, focuses on communication and largely disregards actors Luhmann (1987); Talcot Parson emphasizes actions as critical elements Parsons (1991); For Max Weber, governance through organizations is constitutive of different social orders, each of which is characterized by distinct modes of social ordering Weber (1980). The definition of systems used here is most closely related to Weber, even though it abstracts from the highly descriptive historical forms of organizational ordering he uses.

fact that North ascribes to the path dependence of institutional change. This insight would seem to call for a deeper inquiry into the collective processes of the reproduction of norms and practices. Such an analysis, however, lies outside the conceptual framework employed, which remains firmly rooted in methodological individualism.

Other institutional economists have departed from North's definition of institutions. Masahiko Aoki has suggested that formal pronouncements of rules are not institutions. Instead, they become institutions only if and when they become part of the relevant actors' collective expectations Aoki (2001). This insight acknowledges that the 'rules of the game' in North's terms are not simply directions (like traffic signs) given to individual actors who then respond to them. Instead, something else is required for most addressees to recognize these directions as binding norms and to internalize them into their behavior. In a similar vein, Avner Greif suggests that institutions *are* observable 'regularized patterns of behavior' Greif (2006). This presupposes the internalization of norms by a collective. Individuals may shape the development of institutions, but not all individuals are equally influential for the behavior of others. Those with authority, Greif suggests, are more likely to trigger change. When they deviate from established patterns of behavior, they encourage others to follow suit. Implied in this reasoning is that some individuals have authority while others don't. But what explains authority? Because in Greif's view institutions are the product of collective behavior (they are regularized patterns of behavior), they can hardly also be the source of authority. Greif does not provide an easy answer to this question and instead makes some broad references to history and culture Greif (2006). The questions about how history shapes culture or culture shapes history remain largely unanswered.

Arguably one of the most radical departures from the individual rational actor framework from within the economics discipline has come from the literature on legal origin La Porta et al. (1998; Glaeser and Shleifer (2002; La Porta, Lopez-de-Silanes, and Andrei (2008). The major discovery of this literature has been that the content of legal rules is shaped largely by a country's legal origin – that is, whether a country belongs to the common or the civil law family.⁵ Legal origin in turn is determined by history, in particular by important junctures in a country's political economy: countries with historical experiences of unrest and political uncertainty are said to favor legal systems that vest central lawmakers with substantial authority Djankov et al. (2003). In contrast, countries that enjoyed greater political stability, according to the authors, have allowed decentralized structures to evolve. They have therefore given greater deference to individual rights and de-centralized control Glaeser and Shleifer (2002).

⁵ The classification of countries into common law and civil law systems is, of course, not their making, but has a long history in comparative law analysis.

While this literature grappled for a while with how to conceptualize ‘legal systems’ or ‘legal origin’, in a review article that summarized its contribution for the preceding ten years the leading proponents define legal origin as “a style of social control over economic life” La Porta, Lopez-de-Silanes, and Andrei (2008). The major difference between common law and civil law systems, they argue, is the common law’s emphasis on markets and the civil law’s bias for “state-desired” allocations of resources. A flow chart in the same paper illustrates that in their view legal origin determines the contents of legal rules, which in turn affect economic outcome. To the extent that legal rules cause economic behavior – which according to their regression analyses and their interpretation of the results is the case – socio-political structures are outcome determinative. The authors seek to avoid the implied fatalism of legal origin for policy makers by suggesting that well designed interventions may bring about change notwithstanding the strong structural impact of legal origin. They suggest, for example, that rules designed to lower entry barriers for firms can stimulate economic development. This not only ignores the possibility that such formal change may be easily countered by informal substitutes Arrunada (2007),⁶ but ultimately defeats their argument. If systems can be changed by changing rules of the game, then legal origin loses much of its explanatory power Pistor (2009).

Differences aside, the approaches discussed so far suggest that institutional change *cannot* be explained without reference to phenomena that lie outside institutions and actors. Aoki and Greif go as far as identifying institutions with observable behavior, or actually formed expectations. This conflates two levels of analysis that for analytical purposes might better be kept apart. The ability to distinguish the normative claim that is embodied in institutions on one hand, and compliance with such claims on the other, is critical especially in the realm of policy, where questions about the effect of interventions on behavioral outcomes arise all the time. But even for purely descriptive purposes it seems useful to distinguish between a norm and the behavior it generates.

Recent developments in historical institutionalism have sought to link institutional change to system change and have thereby highlighted the importance of analyzing the normative and distributional consequences of institutional change. One strategy has been to create an explicit link between institutions and social systems by defining institutions as “building blocks of social order” Streeck and Thelen (2005), i.e. by conceptualizing them as ‘mini social orders’. In this account institutions are “mutually related rights and obligation” that may be enforced by “calling upon a third party”. Thus, an institution is not any bilateral bargain, but rather only those mutually related

⁶ An example Arrunada (2007) cites is Afghanistan, which quickly ascended the ranking scale for business friendliness by formally reducing the time it takes for new businesses to register. Yet, most pre-existing barriers were simply moved to the post-registration phase.

rights and obligations that can generate support by others and therefore become enforceable. The strong normative connotation of this conceptualization of institutions differentiates it from those of Aoki or Greif discussed above. For Streeck and Thelen, legitimacy is the critical ingredient that links institutions to social ordering. They invoke Max Weber, for whom the operation of *Herrschaftsverbände* (translated as *ruling organizations*⁷) is rooted in the legitimacy of authority. In fact, Streeck and Thelen suggest that it is useful to think of “institutions as regimes” (ibid at 13) that are “embedded in societal context of supportive third parties that make for institutional legitimacy” (ibid). Within this framework the impetus for institutional change comes not only from the rule-maker, but also – and in the case of gradual institutional change, primarily – from rule takers. Because institutions are never fully specified and leave room for interpretation and contestation, rule takers can and do alter, morph and transform rules. Indeed, in their view ongoing contestation is critical for rules to retain their legitimacy over time.⁸

A somewhat different strategy for analyzing the relation between institutions and social systems is to link institutional change to a typology of human agency, which is derived from a typology of political systems. The starting point for this analysis, as in the approach just discussed, is that institutions are ambiguous, and “fraught with tensions” because of the distributional issues they inevitably raise, and because of their inherent ambiguity or incompleteness Mahoney and Thelen (2010). Once a rule has been pronounced, it sets in motion multiple processes to establish its meaning and scope of application. Rather than establishing definite rules of the game, institutions become the focal point for contestation. The form this contestation takes, according to this view, depends on the political context and the type of change agent. This agent may be an insurrectionist, a symbiont, a subversive, or an opportunist. This typology builds on the typology for institutional change Streeck and Thelen (2005) developed earlier, in which they distinguished five modes of gradual institutional transformation: displacement, layering, drift, conversion and exhaustion.⁹

⁷ Note that Streeck and Thelen refer to the translation by Gunther Roth (cited ibid at 13).

⁸ In a similar vein, the concept of the “rule of law” has been described as an inherently contested concept. See Waldron (2002).

⁹ According to Mahoney and Thelen, insurrectionists and subversives do not seek to preserve institutions. They are agents who prefer the immediate replacement of existing institutions (displacement), or their gradual phasing out by putting in place alternative institutional arrangements other actors can opt into. In contrast, symbionts and opportunists are more strongly associated with drift and conversion, that is, with strategies of institutional change that preserve existing institutions at least initially. By advocating a new interpretation of these institutions (conversion) or by neglecting their maintenance (drift), these agents trigger change that might ultimately prove as transformative as the more radical strategies of displacement and layering.

The two approaches differ with respect to the relative importance they place on (individual) human agency (Mahoney and Thelen) on one hand, and the space within which collective processes of institutional contestation take place (Streeck and Thelen). Nonetheless, they share a common understanding of the relation between institutions and systems. Systems are made of institutions and institutions set the stage for contests among individuals within that system. Systems thus appear as relatively closed, and change tends to be generated at the micro, or institutional level, rather than at the macro, or system level. In both accounts, the system is more constant than institutions and creates constraints on the process of institutional change – whether by shaping the type of ‘change agent’ and the institutional strategies available to it, or the nature and scope of contestation in an institutional regime. In this respect the theories are not fundamentally different from the theories on economic institutionalism discussed above. They too assume a single, closed system that comprises institutions and actors; and they situate the locus for change at the micro-level of that system, at the intersection of human agency and institutional constraints.

In what follows I will question whether the relation between systems and institutions can be fully captured by this micro-macro relation within a closed system – especially when the system is associated with the boundaries of the nation state, as is typically assumed. That association is problematic as it neglects the possibility that nation states can consist of multiple systems and that both social systems and institutions may extend beyond national borders. The macro-micro relation between institutions and systems also fails to explain how they relate to one another. Moreover, it underestimates the possibility for institutions to generate system change, and for systems to engender institutional change.

I will therefore argue that systems are open, not closed; that institutions can interface with more than one system; and that what holds systems together is not a natural hierarchy between micro-level institutions and the macro-level system, but the legitimacy of the act of balancing the quest for primacy by competing institutions. Note that the source of legitimacy need not be a central authority as is implied by Weber’s notion of ruling organizations. It may also be the process of balancing or the outcome achieved.

This extended notion of legitimacy that is not directly tied to a single authority takes account of the growing importance of modes of social ordering that are not hierarchical but horizontal, and that derive legitimacy either from the process they follow or the outcome they can produce.¹⁰ An institutional regime is part of a system to the extent that its stakeholders accept as binding the balancing act between it and other institutional regimes that the system produces. If and

¹⁰ For an extensive discussion on input vs. output legitimacy, see Scharpf (1999).

when this consensus no longer holds, the effectiveness of the institutional regime, the broader system, or both, is compromised

III. Towards an Integrated Theory of Institutional and System Change

An integrated theory of institutional and system change needs to explain the difference between institutions and systems, how they relate to one another, and by what means. I begin with the institutional-regime-framework developed by Streeck and Thelen. In this framework, institutional regimes are spaces of contestation over allocative and authoritative resources with respect to a particular issue – such as land, labor, firms, family, and so forth. A system comprises multiple institutions or institutional regimes, but not necessarily in a hierarchical fashion. Instead, an institutional regime can develop outside a given system and can interface with more than one. It can have rule makers and rule takers different from other institutional regimes, and from those found in the systems they seek to affect. The metaphor of ‘building blocks’ Streeck and Thelen use for explaining the link between institutions and systems thus appears to be too narrow. An institutional regime is not necessarily a brick that, once installed, cannot be used again for a different house. Instead, an institutional regime can create space for norm contestation in and across multiple systems. The relation between institutional regimes and systems is therefore better captured by a weaving pattern than a pyramid.

This is true even in a world of Westphalian nation states with their universal claim to ordering all aspects of social life. Newly created national laws often overlapped and intersected with historically grown local or trade specific forms of self-ordering. Globalization has amplified the trend towards multiple overlapping governance regimes in which the state plays a helping hand, but over which it does not have ultimate control. Challenger’s to the state’s claim to governance include multinational enterprises that seek to level the playing field across markets and national boundaries, as well as transnational ‘non-governmental organizations’ (NGOs) that seek to call attention to human rights, labor standards, and environmental issues across nation states. These transnational institutional regimes tend to focus on output legitimacy and call into question the credibility of national governments as arbiters across competing institutional regimes. The framework of interfacing institutions within fields of social ordering can also help to illuminate the interface between institutional regimes within a national order. The civil rights movement in the US with its initial focus on achieving equality for black Americans inspired the feminist movement, the assertion of self-determination by native Americans, and eventually the gay and lesbian movements. In all of these cases the mobilization of law and litigation to

achieve greater equality had far reaching and arguably transformative social effects.

The glue that binds institutional regimes to a system is a common source of legitimacy for ordering multiple and frequently competing institutional regimes.¹¹ Streeck and Thelen (2005) argue that legitimacy is foundational for institutional regimes. Extending their argument, I suggest that systems comprise institutional regimes that share a common source of legitimacy. This does not mean that constituencies of a given institutional regime relinquish their claim to self-ordering. It does, however, imply that they accept the terms on which their relation with other institutional regimes will be determined. Put differently, legitimacy assures compliance and third-party support not only for a given regime but for the ordering of institutions within a system. The source of legitimacy varies across systems and so does the priority given to some institutions over others, which explains why what may look like similar institutions take on quite different forms in different systems.

Max Weber distinguished different sources of legitimacy, such as tradition, affect, value, rationality, faith, and legality Weber (1980).¹² More recently, social theorists have advanced the distinction between ‘input’ and ‘output’ sources of legitimacy, where input legitimacy refers to the process of decision-making and output legitimacy to the effectiveness of delivering results Scharpf (1999). Scharpf pointed out that the EU’s emphasis on output legitimacy seeks to dominate input legitimacy as the major source of legitimacy in democratic nation states. In a similar vein, I suggest that transnational institutional regimes also tend to emphasize output legitimacy. Given their narrow focus, they are typically better at delivering on their promises than are complex systems of social ordering. By the same token, they undermine the legitimacy of complex systems of social ordering and the norms that sustain them, including due process and equity.

The modern democratic nation state derives its legitimacy largely from legality, that is, compliance with procedures, respect for constitutionally enshrined rights and jurisdictional boundaries in the production and enforcement of law across many areas of social ordering. Emphasis on procedure is not necessarily empty formalism. Instead, procedures set the stage for contesting the allocation or the enforcement of rights. Norms or institutions that are produced in this fashion are accepted as binding, but can be contested within similar procedural constraints that were observed in their production.

¹¹ Hadfield and Weingast Hadfield and Weingast (2011) use the term “common logic” to describe a similar phenomenon. Specifically, they define a “common logic” as one that is accessible by all actors, is stable over multiple time period, and can help determine a given performance vector.

¹² See p. 36 in the English translation by Roth and Wittich, University of California Press, 1978.

Identifying a common source of legitimacy does not rule out the co-existence of others, or competition among them. As will be further discussed in the next section, transnational property rights regimes frequently emphasize their efficacy in promoting investment and trade, which are equated with economic development prosperity. However, they also assert claims to property “rights” and rule-based systems, suggesting the promotion of a specific regime may employ more than one source of legitimacy: legality (input legitimacy) and effectiveness (output legitimacy). Similarly, a system, even one with a universal claim to legitimacy, such as the nation state, may tolerate multiple sub-systems with independent sources of legitimacy within it. The universal Westphalian nation state has never been quite as encompassing as its claim in the scope of social ordering or the source of legitimacy for sub-systems within it. Institutional regimes that pre-existed the nation state often continued to exist. Consider the autonomy left to guilds, religious organizations, or stock exchanges within the emergent nation state with different claims to legitimacy, such as religious authority, adherence to qualifications as defined by a craft, or membership in a trading club etc. New institutional regimes that derive their legitimacy from sources other than the legality of the state have sprung up within the nation state. Examples of new institutional regimes that challenge the scope of state ordering include non-governmental or civil society organizations that derive their legitimacy from their very status as outside of, and autonomous from, the state.

As long as institutional regimes endorse a system’s common source of legitimacy for determining their relation to other institutional regimes, even when this conflicts with their own preferences, they remain an integral part of that system. If and when this common source of legitimacy is openly challenged, the relation becomes more tenuous; and when they claim that their source of legitimacy is superior to that of legality, frictions occur that may weaken the commonality of legality as a source of legitimacy. Put differently, institutional regimes may weaken the legitimacy of existing systems not only by contesting a particular form of ordering (as suggested by Streeck and Thelen), but by offering alternative sources of legitimacy. This may, but need not, result in an explicit change of existing institutions. The various modes of gradual institutional change identified by Streeck and Thelen apply in this context. Neither does this necessarily result in the demise of the system. It does, however, change the relation between institutional regimes and the systems to which they relate.

Conversely, systems can and frequently do alter institutional regimes. By subscribing to a given system’s source of legitimacy, an institutional regime becomes part of a larger field of contestation in which different institutional regimes (and their stakeholders) compete with one another for primacy and challenge the norms that justify a given prioritization. Compromises need to be made to sustain the system, and this may change the scope and meaning of the

institutional regime that ‘buys into’ that system. Any international institutional regime that needs the support of governments with strong veto powers will have to tolerate modifications to the regime. Those modifications in turn alter the institutional regime. As will be further discussed below, international norms regarding the recognition of customary land use by indigenous people as property rights were transposed into the constitutional framework of Belize by actions of the country’s supreme court. The precise scope of these rights and their relation with competing claims within that country will ultimately shape the realization of these norms within a complex social structure.

This account of institutional/system change emphasizes the ability of actors to contest both the form institutions take and the norms that sustain them. Contestation in this context does not necessarily mean open debates. Actions can speak for themselves. As Hirschman (1970) has pointed out, members of organizations often are unable to voice their preferences. As a result, their options are limited to loyalty – i.e. acquiescence into existing arrangements whatever their view on the legitimacy of such arrangements might be – or exit. Neither of these options, however, is likely to result in changes within the system from which these actors originate (or to which they are bound by loyalty) – lest the exit triggers a response by actors within that system. Within the framework Platteau et al. (2011) propose, a local judge charged with upholding local norms may alter those norms or their enforcement in response to exit pressures.

In sum, in an attempt to develop a new synthesis between institutional and system theories, I am suggesting to expand the Streeck/Thelen framework by recognizing that systems are not closed, but open and malleable to change by institutional regimes from both within and outside. In this conceptualization, system change does not come necessarily from insurrectionists or other change agents within a closed system. Neither does it come primarily or necessarily from continuous contestation within a given institutional regime. Instead, it results from the contestation over the systems’ legitimacy. This framework does not eliminate human agency. Instead, it situates human agency within multiple institutional regimes where contestation takes place. Change agents are both more constrained and more flexible than those envisioned by Mahoney and Thelen. They are more constrained in that the change they seek to accomplish may be limited to a particular institutional regime, which will translate into systemic change only if and when they can challenge the system’s source of legitimacy. That, however, requires more than individual action.

The greater flexibility stems from the fact that in a world in which systems are open, change agents can choose their space of contestation and influence among different institutional regimes and the systems with which they are associated. By exploiting this flexibility they can put pressure on multiple systems and achieve more change than they would within a single closed system.

Multinational corporations, self-regulating transnational organizations, as well as NGOs have begun to exploit these possibilities as cosmopolitan agents of change. Their ability to effect system change is ultimately contingent upon their ability to change the perception of the system's legitimacy. This in turn requires that the goals and means they pursue be open to and become a part of the process of contesting norms, policies, and social goals within that system.

IV. Transnational Property Rights Regimes: Two Case Studies

Property rights were chosen as the field of inquiry because of the paramount importance attributed to them by institutional and social theories alike. Karl Marx developed his theory of social change around the nature of property rights that dominate agrarian, feudal, capitalist or socialist societies. Institutionalists, particularly those of the economic stripe, have long argued that a clear allocation of property rights and effective institutions to enforce property and contractual rights are critical for economic development and growth. Property rights have also taken center stage in economic and institutional reform projects, as evidenced by extensive privatization programs since the 1980s not only in the former socialist world, but in other emerging markets as well. Additionally, international law has sought to strengthen property rights – whether those of indigenous people by way of protecting their property rights as human rights, or by allowing foreign investors to resolve property rights disputes with host countries in arbitration tribunals outside their sphere of influence.

This paper uses contests over transnational property rights as a heuristic device to explore the relation between institutional and system change. As the discussion in the previous section suggests, it is not always easy to differentiate between institutions and systems, between institutional change and system change, or to stipulate how they relate to one another. Occasionally, institutional and system change coincide. Revolutions tend to alter existing property rights regimes while they also upend power relations and other foundations of the social system Carruthers and Ariovich (2004). More frequently, property rights change in a gradual fashion, which involves complex interactions between institutional and system change. By locating property disputes in a transnational setting it is possible to delineate more clearly the interaction between system and institutional regime. Specifically, this section traces the impact of transnational property rights regimes on national legal systems to see whether they create new space for contestation within the receiving system. Admittedly, this particular framing overstates both the importance of law as compared to other institutions and the national system as target of change. However, it does have the advantage that it utilizes processes of contestation can actually be observed as they are written up

in legal opinions. It also facilitates the identification of boundaries between institutional regimes and systems.

In accordance with the analytical framework developed in the previous section, the transnational property rights regime can be defined as the space for contesting norms that determine the allocation of property rights in an international or transnational context. An international or bilateral treaty may announce the norms that call on the state to protect certain property rights. In this setting the state is both rule maker and rule taker, because it endorsed the norm in an international treaty, and as a party to that treaty is also bound by it. Other stakeholders are local and foreign stakeholders that are directly or indirectly affected by the transnational regime. Those whose property rights are protected can frequently contest infringements of these rights by state actors in a forum outside that state. This procedural device tends to strengthen the protected right. Whether or not it will have any impact on the system where the dispute originated, however, will depend on whether the new institutional regime creates a space for contestation within that system.

Many international norms, including those pertaining to property rights, have been on the books for a long time. Several international legal instruments declare the inalienability of property rights and affirm them as human rights.¹³ Similarly, the norm that property should not be expropriated without due compensation has been recognized in multiple international legal instruments. In the absence of a forum in which the scope of these norms could be established and contested, however, they had the effect of mere proclamations. This changed dramatically once an open forum for contesting such rights was established outside the infringing state's boundaries. In the area of human rights, such supranational tribunals are still rare – with the notable exception of the European Court for Human Rights, the Inter-American Commission on Human Rights, and a few other regional human rights tribunals.¹⁴

Private-state disputes have also become much more common in the context of foreign investments. Bilateral investment treaties (BITs) have become the method of choice for foreign investors to charge host country governments with expropriation in international arbitration tribunals. In both cases – human rights and investor protection – the creation of dispute resolution mechanisms has made the contents and scope of these norms contestable. This in turn has mobilized other constituencies, such as lawyers or NGOs, to access this space, to

¹³ Including, but not limited to, the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the Declaration of the Rights and Duties of Man by the Organization of American States, etc. Property rights are given the status of human rights that can be expropriated only against just compensation.

¹⁴ Powerful state interests have prevented similar tribunals from being established at the international level.

identify victims of violations of these transnational regimes and offer them support for bringing suit and advocating a particular interpretation of the relevant norms. In short, open contestability has created much more vibrant transnational property rights regimes. It has also triggered responses by national legal systems and in some cases has resulted in important and potentially system-transformative changes within these systems.

These trends confirm the thesis advanced by Streeck and Thelen that access to a forum for resolving disputes – whether a tribunal, committee or a court – creates an open space for contestation where the interpretation of norms and their application to different fact patterns can be interpreted, amended, and changed over time. Two case studies are presented below to illuminate the interaction between transnational property rights regimes and the domestic legal systems with which they interface, and to investigate how the different manner of contesting property rights has affected the domestic system and/or the international institutional regime.

Human Rights as Enforceable Property Rights: The Case of Belize

The first case is a dispute between the indigenous people and the government of Belize over the right of the government to grant concessions to corporations for oil explorations over land on which the Maya live and which they use to sustain themselves, without compensation. The legal dispute first arose in 1996, when the Maya filed a petition to seek relief in the Belize constitutional court. This petition never resulted in a full legal review, but was allowed in the words of the Supreme Court of Belize to “inexplicably drop[...] out of sight”.¹⁵ By denying contestation (i.e. voice in Hirschman’s (1970) terms) in the judicial system, the government may have tried to pressure the Maya into submission. However, the transnational property rights regime offered an alternative forum for contestation. With the support of NGOs, including a human-rights clinic at the University of Arizona Law School, the Maya filed a complaint with the Inter-American Commission on Human Rights (IACHR). The IACHR allows victims of human rights abuse in any of the member states of the Organization of American States to bring a case to its attention if these actions violate the American Declaration of the Rights and Duties of Man. Before turning to the IACHR, claimants must have attempted to exhaust domestic remedies.¹⁶

In a lengthy report, the IACHR ruled in 2004 that the actions of the Belize government violated the Maya property rights as protected by this Declaration. Specifically, the IACHR stated that the rights protected “are not limited to those

¹⁵ S.Ct. Belize Claim 171/2007 at recital 16.

¹⁶ This requirement applies to human rights tribunals at the international level, but not to investor disputes under NAFTA or most bilateral investment treaties.

property interests that are already recognized by States or that are defined by domestic law, but rather that *the right to property has an autonomous meaning in international human rights law*” (emphasis added).¹⁷ This confirms the autonomy of national law vis-à-vis the international legal system and the institutional regimes it comprises. By implication, institutional regimes that are rooted in international law – such as the protection of property rights – may differ from those at the national level. It is therefore interesting to ask what effect a conflict between international and domestic norms will have, how the conflict can be resolved, and how the conflict resolution may affect the (domestic) system.

From a formal legal point of view the answer to this question depends on whether or not a country accepts rulings of international tribunals or similar bodies as exerting direct effect within its jurisdiction.¹⁸ Thus, it is possible, and quite common, that a sovereign state is condemned by an international tribunal for violating an international treaty, but that within that state plaintiffs are denied the right to enforce norms of international law when they conflict with those of the domestic system. A victory in an international tribunal therefore does not translate immediately into a change in the domestic regime. That change needs to be fought for within the constraints of the national regime. Nonetheless, as the present case demonstrates, a victory in an international forum can shape the debate within the national legal system and, importantly, persuade key actors to switch sides. As a matter of formal law, therefore, the Maya’s victory at the IACHR was not sufficient to make any difference for the Maya in Belize. The government faced moral sanctions for failing to follow the recommendations of the Commission; not, however, legal enforcement.¹⁹ The Maya therefore turned once more to the Supreme Court of Belize. The fact that they had won a legal case in a supranational tribunal ultimately made a difference. This time, their petition was not allowed to fizzle out, but resulted in a landmark ruling.

The Supreme Court ruled that the Maya held ‘an interest’ in the land on which they live and, indeed, had lived long before Belize was colonized and subsequently released into independence; and that interim changes of sovereignty had had no effect on such rights. The Court was influenced in this ruling by the Australian Case “*Mabo v. Queensland*”,²⁰ which had ruled in 1992 on a similar matter with similar results. In a similar vein, the Supreme Court of Belize now

¹⁷ See *Maya Indigenous communities v. Belize* (2004) at recital 171.

¹⁸ Those countries are labeled “monists” in international law parlance, whereas countries that require the transposition of international into domestic law as a prerequisite for its effect within the domestic legal order are called “dualists”.

¹⁹ These are largely absent in international law, and those that exist, such as resolutions of the UN Security Council, have many strings attached to them. A partial exception to this rule is the European Union, where the Commission is explicitly charged with the power to challenge the failure of member states to transpose EU directives into national law.

²⁰ *Mabo v. Queensland* [No. 2] (1992) 175 CLR 1.

held that the extension of the Crown's sovereign power to new territories for the purpose of settlement alone did not and could not deprive indigenous people of their legal rights to the land absent an explicit act of Parliament to that effect. It also argued that communal rights to *usus fructus* constituted property rights even if similar practices may not be recognized as property rights by the common law. And finally, the Supreme Court of Belize argued that these customary land rights fall within the protection of property rights under the Constitution of Belize – i.e. the domestic legal system, the interpretation of which falls within its jurisdiction. The conceptual leap for recognizing customary land use practices as property rights was anticipated by developments in international law, including a UN declaration on the recognition of the rights of indigenous people,²¹ by the ruling of the IACHR in this case, and by several national tribunals in countries such as Australia, New Zealand, and Canada.

The Supreme Court took pains to clarify that its primary task was to interpret the Constitution, not to apply international norms.²² In fact, the government as the defendant in the dispute reminded the Court that it “cannot merely adopt any findings of facts and law made in another case unrelated to any alleged breach of the provision of the Constitution” as such action would be “non-justiciable.”²³ This reminder notwithstanding, the Court asserted its right to find the pronouncements of the IACHR “persuasive” in light of the fact that Belize is a member of the OAS and as such party to the American Declaration of the Rights and Duties of Man. Indeed, on several occasions, the Court referred directly to the Commission's report. After laying out its own argument based on evidence established at trial that the Maya have an “interest” in the land in the form of “customary land tenure” the Court stated that it was “fortified in this conclusion” by the IACHR's report. Similarly, after asserting that this ‘interest’ constitutes a property right that is protected by the Constitution of Belize, the Court once more cited the IACHR's report and expressed satisfaction that it too had come to the same conclusion.²⁴ Specifically, the Court pointed to the similarities in the wording of the Belize Constitution and the Declaration of the Rights and Duties of Man. The Court also made extensive references to decisions of the Privy Council, including ones dating back to the heydays of the British colonial empire. In these cases, the Privy Council had recognized customary law as property rights worthy of protection notwithstanding the fact that the common law had a much more individualist concept of property rights. References to these sources had

²¹ Such a declaration is technically non-binding, but can exert substantial normative appeal.

²² In Belize, as in many other countries, norms of international law are not immediately enforceable as a matter of domestic law but require an active transposition into domestic law, and are then enforceable as domestic, not as international law.

²³ Written submission by the defendants as cited in Claim 171/2007 at para. 20.

²⁴ *Ibid* at para. 100.

important legitimating power for the ruling, as until 2010 the Privy Council was Belize's court of last instance.²⁵

Winning a court case is only the first step in effecting institutional change. In this regard it is interesting to note that in Australia the Mabo case triggered a legislative change – the Natives Title Act – that explicitly recognized customary land use rights of indigenous people as property rights. This did not happen in Belize, which suggests that the authority of the court, and arguably more generally the power of law, differs in the two countries. In fact, the Belize government continued to grant concessions for oil exploration in territories that had not been made explicitly part of the original proceedings. The Maya therefore sued again with many more tribes joining in the proceedings. In June 2010, the Belize Supreme Court confirmed the findings of the 2007 ruling as to facts and law.²⁶ This is unlikely to put the issue to rest – and indeed, the government already announced its intention to appeal the ruling. If confirmed, it would force the government to pay compensation for expropriating the Maya should it wish to nationalize their land.²⁷ Moreover, the ruling has forced the government to pursue legal action in order to preserve its interests – an important contrast to the attempt to simply suppress earlier attempts by the Maya to litigate their interests.

This case illustrates the complex interface between institutional regimes and systems. The development of a transnational property rights regime that recognized customary land rights as property rights under international law was critical for the Maya to advance their case first in the IACHR and subsequently in the Belize legal system. As noted, their first attempt to enforce their rights under the Belize Constitution went nowhere. The political system had not changed dramatically in the meantime. The major impetus for change came from institutional regimes outside Belize, specifically from the increasing recognition of (collective) customary land use practices as enforceable property rights. By appealing to law and legality as the source of legitimacy for resolving the dispute, the plaintiffs and their representatives created an opening for the Supreme Court of Belize to follow international and foreign examples (not precedents in any formal sense) and to embrace similar legal arguments, notwithstanding political pressure to the contrary.

The victory in the Supreme Court of Belize cannot be attributed to a hierarchical relation between international and national law. As explained above,

²⁵ It is unclear whether the timing of this transfer of this authority from the Privy Council to the Caribbean Court of Justice is related to the present case.

²⁶ See Claim No. 366 of 2008 in the Supreme Court of Belize, between THE MAYA LEADERS ALLIANCE and THE TOLEDO ALCALDES ASSOCIATION on behalf of the Maya villages of Toledo District et al., and the Attorney General of Belize and the Minister of Natural Resources and Environment, 28 June 2010, available at http://www.belize-law.org/supreme_court/judgements/.

²⁷ Palacio (2009).

such a relation does not exist. It would therefore have been perfectly legal for the Court to ignore the findings of the IACHR entirely. Instead, it chose to endorse as “persuasive” the arguments advanced by the transnational tribunal and developed parallel arguments using authoritative sources within its own system, including decisions of the Privy Council, to justify them. The Court also reminded the government that it had by its own choice ratified international treaties that made Belize part of an international order with norms and principles (i.e. institutional regimes) which – even if they can’t exert direct effect under domestic law – the government should not willfully ignore.

The government may not have anticipated that these international norms would carry teeth once enforcement procedures were created, and that constituencies beyond its reach, such as international NGOs, or clinics of foreign law schools²⁸ with legal and financial resources, would begin to populate this new space of contestation. The landmark rulings by the Supreme Court of Belize not only fortified legal principles about the property rights of indigenous people that had first been developed outside its jurisdiction. Moreover, because the Court derived its conclusions from an interpretation of the Belize Constitution, i.e. domestic law, it created within the domestic legal system an opening for contesting property rights – and possibly other rights – that did not exist before.

Local Land Use Rules and NAFTA

The second case study addresses the question of local land use rules and their interface with the North American Free Trade Agreement. NAFTA created a free trade zone between Canada, Mexico and the United States. It established state-to-state arbitration, but also allows investors to bring a case against a foreign host state if alleging expropriation without compensation, or unfair or discriminatory treatment. These ‘chapter 11 proceedings’ have been more widely used than anticipated²⁹ and have raised important issues about how this transnational regime and its interpretation affect the domestic legal systems of NAFTA member states. The government of the host country can be held liable even if under domestic law it does not have jurisdiction over the subject matter. In fact, NAFTA cases have done just that – and ironically in cases where the central government was trying to promote the foreign investments, but local governments opposed it.³⁰

²⁸ The University of Arizona Law School’s faculty and students helped prepare the case. See <http://www.uanews.org/node/32579> (last visited 13 December 2010).

²⁹ For a survey of the evolution of BITs and the introduction of state-investor dispute settlement mechanisms, see Elkins, Guzman, and Simmons (2004).

³⁰ For a review of these cases see Olsen (2007).

One of the best-known NAFTA cases is Metalclad.³¹ It involves an American company that acquired a Mexican firm, Coterin, which had earlier received an approval from the federal government to build a hazardous waste landfill in the state of San Luis Potosi. While governmental agents at the federal level reassured Metalclad and its Mexican subsidiary that the investment would go forward, the municipality of Guadalcázar denied approval for operating the venture and ordered the closure of the already completed site. The reason given was that the waste landfill was in violation of local zoning rules and environmental regulations. Metalclad chose not to refer the case to Mexican courts, but directly to a NAFTA tribunal. Unlike many transnational human rights regimes – such as the ECHR – NAFTA does not require that the foreign investor first exhaust domestic remedies before filing with an international tribunal. This design of the procedure for contesting property rights was motivated by fears that local courts would side with local governments and that a requirement to first exhaust local remedies might de facto result in the denial of remedies.³²

The arbitral tribunal in the Metalclad case ruled that the actions of the local government constituted both expropriation and unfair treatment of the foreign investors, and therefore condemned the Mexican government to pay compensation in the amount of US \$16.5 mln – the amount Metalclad had invested in the project. The Supreme Court of British Columbia reversed some findings of the tribunal, but did not fully set aside the case.³³

The tribunal's ruling is remarkable not only for its outcome, but also for its reasoning. The first step the tribunal took was to embed NAFTA, the tribunal and the ruling firmly in general principles of international law. Specifically, the tribunal invoked the Vienna Convention on the Law of Treaties, which stipulates that a party to an international treaty may not invoke provisions of its internal law as justification for its failure to perform the treaty (Art. 27). Based on these general principles derived from the system of international law, the tribunal ruled that the Mexican government is responsible for actions taken by the municipality, should they be deemed in violation of NAFTA. Note that such an interpretation is not inevitable. It is by no means clear that the parties to NAFTA had agreed to set

³¹ Metalclad Corporation v. United Mexican States, CASE No. ARB(AF)/97/1 under the auspices of the International Centre for Settlement of Investment Disputes (Additional Facility) of 30 August 2000.

³² A similar argument could equally be made for human rights, but in this area governments have been far less forthcoming in softening their stance on state sovereignty. Whether they knew what they were doing when they signed off to investor–state arbitration clauses in bilateral investment treaties or NAFTA is not quite clear. However, it is probably fair to say that they did not expect to be subjected to legal challenges to the extent they have been. On the development of disputes under BITs see Peterson (2004).

³³ For details, see The Supreme Court of British Columbia, *The United Mexican States vs. Metalclad Corporation*, 2001 BCSC 664.

aside principles of their internal organization – i.e. federalism – in favor of protecting the rights and interests of foreign investors. It would therefore have been equally opportune to interpret the scope of investor rights in light of the domestic competences of the member states. The tribunal does not even discuss this possibility and instead seeks legitimacy by reference to a general treaty, to which, ironically, the US is not even a party.

The tribunal then proceeded to interpret the two NAFTA provisions at stake, Article 1105 on fair and equitable treatment, and Article 1110 on expropriation.³⁴ Both provisions refer to the protection of investments, but NAFTA itself does not give a precise definition of the term. In interpreting the provisions of the Treaty, the tribunal referred to its general purpose – i.e. the protection of investors. It thus treats NAFTA as an autonomous institutional regime – not as part of a larger domestic or international system where it might compete with equally legitimate, and legally grounded, claims. Given the scope of investor protection and the powerful enforcement apparatus, this interpretation effectively positions the rights of foreign investors over and above competing claims of domestic constituencies, including those of domestic investors.

The tribunal's arguments are perfectly in line with theories that view actors' response to institutions as the major mechanism to achieve social change. By imposing liability on states the regime is expected to deter similar actions in the future. This in turn should enhance the protection of property rights and thereby generate more foreign investment, which is arguably an important determinant of economic development Tobin and Rose-Ackerman (2006). This argument ignores legitimate competing interests within the domestic regime and thereby de-legitimizes the NAFTA property rights regime in its member states. Indeed, some commentators have suggested that NAFTA should adopt a "balancing test" similar to the one employed by US courts, which looks not only into the interest that is violated – which incidentally must reach the level of "distinct investment-backed expectations"³⁵ – but also into the economic impact and character of the regulation. The Treaty itself does not specify what tests tribunals or courts should employ in interpreting its meaning. Neither, of course, do most national constitutions. However, national courts tend to interpret their constitutions within a broader context of legal rights and competing interests. In contrast, NAFTA tribunals are free of such broader concerns.

³⁴ Article 1105 reads in its relevant parts: "... Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection of security." And Art. 1110 provides that "no party shall directly or indirectly.... Expropriate an investmentor take a measure tantamount to ... expropriation ... except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105 (1)."

³⁵ See *Penn Central Transportation Co v. New York City*, 438 U.S. 104 (1978) as cited in Olsen *supra* note 33 at 61.

Indeed, the tribunal condemned the Mexican government for a general failure in administering its internal affairs and explained that the asserted violation of Art. 1105 of NAFTA stemmed from “the absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit”.³⁶ Similarly, the expropriation claim was sustained based on the argument that the Mexican government “permitted or tolerated the conduct of Guadalcazar in relation to Metalclad” and that it effectively “acquiesced in the denial of Metalclad of the right to operate the landfill”.³⁷ In fact, the federal government sided with Metalclad throughout the dispute.

According to the tribunal, NAFTA serves the single purpose of protecting the expectations of investors. The tribunal cannot change domestic law, but it can hold governments liable for the failure by *any* state agent to grant the protection to investors that NAFTA requires. This may, over time, have an effect on the operation of the domestic legal system. Specifically, a federal government faced with liability for millions, if not hundreds of millions, of dollars may want to pass the costs for violation of NAFTA to those it deems responsible for it. This could result in a reconfiguration of rights and responsibilities in a federal system (Olsen, 2007).

Unlike in the Belize case discussed above, a domestic court never got involved in adjudicating whether the actions of the municipality did indeed amount to a violation of property rights under Mexican law. NAFTA gives investors the option to go directly to outside tribunals that have the power to grant them monetary relief against the host state. There is therefore no need to re-litigate them domestically. By the same token, there are no mechanisms by which the normative conclusions of the case are transposed into national law or by which the findings of the tribunal would be contested within the domestic legal system. Instead, by imposing liabilities on sovereign states, it is expected that state agents will eventually comply with these norms in order to avoid future liability. Thus, deterrence shall serve as a substitute for legitimacy,³⁸ and foreign investment flows shall compensate for violating principles of federalism under domestic law. There is little research as of now into the effects of tribunal decisions on domestic legal systems, either in NAFTA or in the context of bilateral investment treaties more generally. I would venture to suggest that we should not expect much change, because it is by no means clear that the mere threat of future liability is sufficient to change domestic attitudes or behavior.

³⁶ Metalclad v. Mexico, *supra* note 34, at recital 88.

³⁷ *Ibid* at recital 104.

³⁸ That, obviously, is the gist of much of the law and economics literature on the design of optimal sanctions going back to Becker’s famous paper on crime and punishment. Becker (1968)

That would require the contestation of the relevant norms within the domestic system with competing interests given a chance to be voiced.

The current framework suggests one of two outcomes: Sovereign states will reign in the scope of investor rights either in substance or with respect to the remedies they can seek in transnational tribunals. This is indeed now widely discussed, including in the US, which has advocated a more narrow reading of investor protection both in NAFTA and in its model BIT. The alternative is to continue to strengthen investor rights in outsourced tribunals and levy domestic governments with liabilities sufficiently large to alter behavior. That could have the unintended effect of accelerating the backlash against the transnational regime. However, it might further weaken the ability of states to mitigate competing claims domestically and thereby accelerate the particularization of institutional regimes.

Comparative Analysis

What lessons can be drawn from comparing these two cases about the interface of institutional regimes and social systems? In both scenarios, a transnational property rights regime provided a new space for contesting the scope of protection that a legal system does or should afford to certain interests. The mere pronouncement of such rules in international law never had the same effect. The establishment of dispute resolution mechanisms outside the sovereign's reach was critical – and so was the discovery of these mechanisms by international NGOs, law firms, and other norm entrepreneurs. However, the nature of the contestation and its repercussions for the legal systems with which this new transnational regime interacts is determined not only by the design of the contestable space, but also by the remedies available to the tribunal. This is apparent when comparing Metalclad with the IACHR's report on the Belize government with respect to the property rights claims of the Maya. The IACHR judiciously focused on violations of international law. It condemned the government of Belize. However, by institutional design it could not offer remedies other than recommending to the government what measures to take to ensure compliance with international law. Specifically, the IACHR asked the government of Belize to

adopt in its domestic law, and through fully informed consultations with the Maya people, the legislative, administrative, and other measures necessary to delimit, demarcate, and title or otherwise clarify and protect the territory in which the Maya people have communal property rights, in

accordance with their customary land use practices, and without detriment to other indigenous communities.³⁹

The IACHR has no means at its disposal to compel a government to take such action. Neither, however, has a domestic court. Being condemned by its own judiciary, however, is more likely to force government to respond. This is so because failure to respond may have the unintended consequence of undermining a critical source of legitimacy – legality – which even a government with a record of human rights violations may find indispensable for preserving its rule. For this reason, the fact that the government considered appealing the 2010 ruling of the Supreme Court amounts to a partial victory of the transnational property rights regime. Even if not upheld, shifting the disputes into the courts has helped legitimize law as a means of social ordering.

In contrast, arbitration tribunals under NAFTA can require that governments fully compensate investors for damages inflicted. While it may be the case that governments that are held liable will try to roll over some of the costs to those within the state apparatus who caused the damage, this is not inevitable. Especially in a federal system, it would require major changes to the prevailing legal and fiscal systems. More importantly, such a move may be deemed illegitimate by constituencies within that country. Studies about the effect of NAFTA rulings, or similar decisions under bilateral investment treaties, on changes in government conduct or formal allocations of responsibility are rare. So far, there is little evidence that outsourcing dispute settlement and establishing a parallel transnational property rights regime has had much impact on domestic regimes.

The major reason appears to be that they lack the legitimacy associated with the domestic legal system, which would require contestation within that system. Tribunals have not been completely oblivious to such requests. While causal connections are difficult to establish, one could make a claim that a recent case that resembled *Metalclad* in many respects not only resulted in the denial of the claim, but in a ruling that the plaintiff had to reimburse the US government for part of its legal expenses.⁴⁰ It remains to be seen whether tribunals can preempt more far-reaching interventions by the affected sovereign states to curtail their powers under NAFTA by taming their rulings and signaling a greater willingness to consider that law and legal systems serve more than one constituency. That, of course, would transform the transnational property rights regime from an autonomous external regime into one that situates itself more closely within competing institutional regimes. This would inevitably weaken the scope of the

³⁹ IACHR Report no. 40/04. Case 12/053 at recital 197.1.

⁴⁰ *Glamis Gold Ltd. v. United States of America*, ICSID, June 8 2009.

property rights protection currently afforded investors, but might enhance its legitimacy – and thus its sustainability.

V. Concluding Comments

This paper has advanced the argument that absent a better understanding of how institutions relate to systems, it is difficult to make predictions about the impact of specific institutional change. The importance of the ‘context’ of institutions, which many literatures on institutionalism have begun to stress, is based on similar premises. Context can be defined more broadly as the system in which institutions are situated or with which they interact. A system in turn comprises those institutional regimes that share a common source of legitimacy. An institutional regime can develop outside a given system – but its impact on a system, i.e. its relation to other spaces of contestation within that system, depends on the nature of the interface between institutional regimes and systems.

This paper discussed two case studies to illustrate different ways in which institutional regimes that are rooted in international law interface with domestic legal systems. In one case, emergent international norms were transposed into the domestic legal system by contesting the scope of domestic property rights against the backdrop of an emergent global regime. In the other case, a regime was created that operates quasi autonomously from the domestic systems that are affected by it. In neither case did the transnational regime create swift change. However, in the first scenario it set into motion a process of potentially transformative institutional change, as domestic courts began to embrace norms that first emerged in the transnational context and lent them legitimacy by rooting them in the domestic legal order. In contrast, the transnational investor rights regime operates outside domestic legal orders. This has great advantages for resolving individual property rights disputes swiftly. However, it can also delegitimize both the transnational institutional regime and the domestic legal system: the transnational regime because it lacks a common source of legitimacy; the domestic system because its authority for social ordering is undermined. This argument has potentially far reaching implications for strategies that advocate the outsourcing of dispute settlement in order to enhance “efficiency” Dammann and Hansmann (2008). Such a trend is noticeable not only in the transnational arena, but also in domestic legal systems in the form of arbitration and other “alternative” forms of dispute resolution. To the extent these become exclusive legal orders for particularized interests, they may erode common sources of legitimacy on which a broader legal system rests. Such a system, however, is needed to provide a space for contesting priorities among competing regimes.

References

- Aoki, Masahiko. 2001. *Toward a Comparative Institutional Analysis*. Cambridge, MA: Cambridge University Press.
- Arrunada, Benito. 2007. Pitfalls to Avoid when Measuring the Institutional Environment: Is 'Doing Business' Damaging Business". *Journal of Comparative Economics* 35 (4):729-47.
- Becker, Gary S. 1968. Crime and Punishment: An Economic Approach. *Journal of Political Economy* 76:169-217.
- Berkowitz, Dan, Katharina Pistor, and Jean-Francois Richard. 2003. Economic Development, Legality, and the Transplant Effect. *European Economic Review* 47:165-195.
- Carruthers, Bruce G., and Laura Ariovich. 2004. The Sociology of Property Rights. *Annual Review of Sociology* 30:23-46.
- Dammann, Jens, and Henry Hansmann. 2008. Globalizing Commercial Litigation. *Cornell L. Rev* 94:1-85.
- Djankov, Simeon, Edward Glaeser, Rafael La Porta, Florencio Lopez - de - Silanes, and Andrei Shleifer. 2003. The New Comparative Economics. *Journal of Comparative Economics* 31 (4):595-619.
- Elkins, Zachary, Andrew T. Guzman, and Beth Simmons. 2004. Competing for Capital: The Diffusion of Bilateral Investment Treaties: 1960-2000.
- Glaeser, Edward L., and Andrei Shleifer. 2002. Legal Origins. *Quarterly Journal of Economics* 117 (4):1193-1229.
- Greif, Avner. 2006. *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade (Political Economy of Institutions and Decisions)*. Cambridge: Cambridge University Press.
- Hadfield, Gillian, and Barry R. Weingast. 2011. What is Law? A Coordinatoin Model of the Characteristics of Legal Order. *unpublished MS on file with author*.
- Hirschman, Albert O. 1970. *Exit, Voice, and Loyalty; Responses to Decline in Firms, Organizations, and States*.
- La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny. 1998. Law and Finance. *Journal of Political Economy* 106 (6):1113-1155.
- La Porta, Rafael, Francesco Lopez-de-Silanes, and Shleifer Andrei. 2008. The Economic Consequences of Legal Origin. *Journal of Economic Literature* 46 (2):285.
- Layder, Derek. 1989. The Macro/Mcuro Distinction, Social Relations and Methodological Bracketing: Unresolved Issues in Structuration Theory. *Current Perspectives in Social Theory* 9:123-141.

- Luhmann, Niklas. 1987. *Soziale Systeme: Grundriss einer allgemeinen Theorie*. Frankfurt a.M: Suhrkamp Verlag.
- Mahoney, James, and Kathleen Thelen. 2010. A Theory of Gradual Institutional Change. In *Explaining Institutional Change*, edited by J. Mahoney and K. Thelen. Cambridge: Cambridge University Press.
- North, Douglass Cecil. 1990. *Institutions, Institutional Change, and Economic Performance*. Cambridge; New York: Cambridge University Press.
- Olsen, Brynn. 2007. International Local Government Law: The Effect of NAFTA Chapter 11 on Land Use Planning. *International Law and Management Review* 4 (1):53-86.
- Palacio, Philips. 2009. A Legal Analysis of the Mayan Land Victory. *Caribbean Rights and IACHR Review*.
- Parsons, Talcott. 1991. *Social System Theory*: Routledge.
- Peter, Fabienne. 2010. Political Legitimacy. In *Stanford Encyclopedia of Philosophy*. Stanford.
- Peterson, Luke Eric. 2004. The Global Governance of Foreign Direct Investors: Madly Off in All Directions: Friedrich Ebert Stiftung.
- Pistor, Katharina. 2009. Rethinking the Law and Finance Paradigm. *BYU Law Review* 2009 (6):1647-1670.
- Scharpf, Fritz W. 1999. *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press.
- Streeck, Wolfgang, and Kathleen Thelen. 2005. Introduction: Institutional Change in Advanced Political Economies. In *Beyond Continuity: Institutional Change in Advanced Political Economies*, edited by W. Streeck and K. Thelen. Oxford: Oxford University Press.
- Teubner, Gunther. 2001. Legal Irritants: How Unifying Law Ends up in New Divergences. In *Varieties of Capitalism*, edited by P. A. Hall and D. Soskice. Oxford: Oxford University Press.
- Tobin, Jennifer, and Susan Rose-Ackerman. 2006. Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties. In *Yale Law and Economics Research Paper*: Yale Law School.
- Waldron, Jeremy. 2002. Is the Rule of Law essentially a Contested Concept (in Florida)? *Law and Philosophy* 21:137-164.
- Weber, Max. 1980. *Wirtschaft und Gesellschaft*. 5 ed. Tuebingen: J.C.B. Mohr (Paul Siebeck).