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**Piercing the Legal Veil:
Commercial Arbitration and Transnational Law**

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I. INTRODUCTION

Literature on the law of commercial arbitration regularly reflects the difficulty to adequately assess the myriad reality of cross border commercial transactions in relationship to traditional conceptions of legal enforcement. While empirical evidence of arbitration regimes and the seemingly eternal dispute over the legal quality of the law merchant or *lex mercatoria*¹ as such set the stage for any inquiry into the subject, this particular background makes it an ever more difficult task for lawyers to understand and to master the challenges posed by the self-regulatory mechanisms in international commerce. The dynamics of transnational networks of production and distribution² implies the need for flexible legal instruments to meet the demands of economic actors.³ Yet, the fundamentally intricate question put to the law remains what these demands are in fact. In the attempt to translate phenomena of transnational contracting, international infrastructure building and border crossing service delivery into a legal form, lawyers are tempted to mobilize the very assumptions that have historically accompanied private law regulation in the nation states, risking, thus, to forego the particular nature of transnational commercial self-regulation. The claim to legal security as a base-necessity for efficient contracting is being extended to an area of „regulation by consensus“⁴ where legal enforcement, involving plaintiffs, defendants, a judiciary and a sophisticated system of enforcing the court's judgement is, at least to some degree, replaced by *softer* means of private ordering. While, on the one hand, the particular dynamic

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- 1 See the discussion in K.-P. Berger, *Formalisierte oder schleichende Kodifizierung des transnationalen Wirtschaftsrechts* (Berlin/New York: Walter de Gruyter 1996), 29 ff. with further references [Engl. Edition: *The Creeping Codification of the Lex Mercatoria* (The Hague Kluwer Law International: 1999); see also the very well organized sites <http://www.asser.nl/ica/indica.htm>, <http://www.lexmercatoria.org>, and <http://www.iccwbo.org>.
 - 2 Whether these networks are 'global', as suggested by a number of authors, or more regional and embedded in various national frameworks of market organization, is subject to an intensive debate: see, e.g., R. Boyer/J.R. Hollingsworth, *From National Embeddedness to Spatial and Institutional Nestedness*, in: *id.* (eds.), *Contemporary Capitalism. The Embeddedness of Institutions* (Cambridge: C.U.P. 1996), 433-484; P.A. Hall/D. Soskice, *An Introduction to Varieties of Capitalism*, in: *Varieties of Capitalism* (P.A. Hall & D. Soskice eds., Oxford: O.U.P. 2001) 1-68, 8; M. Wortmann, *What is new about „global“ corporations?*, WZB (*Wissenschaftszentrum - Social Science Research Center*) Berlin, Discussion Paper FS I 00-102, December 2000; L.W. Pauly/S. Reich, *National structures and multinational corporate behavior: enduring differences in the age of globalization*, in: *51 International Organization* 1-30 (1997); see also references infra note 3).
 - 3 See E. Schanze, *Investitionsverträge im internationalen Wirtschaftsrecht* (Frankfurt: Metzner 1986); Fr. Snyder, *Global Economic Networks and Global Legal Pluralism*, EUI Working Paper Law No. 99/6; G. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in: *id.* (ed.), *Global Law Without a State* (Aldershot: Dartmouth 1997), 3-28; R. Whitley, *The Institutional Structuring of Business Transactions*, in: R. Appelbaum/W. Felstiner/V. Gessner (eds.), *Rules and Networks. The Legal Culture of Global Business Transactions* (Oxford: Hart 2001), 73-99; G.-P. Callies, *Lex Mercatoria: A Reflexive Law Guide to an Autonomous Legal System*, in: *2 German Law Journal* No. 17 (1 November 2001), available at: <http://www.germanlawjournal.com> (search: *lex mercatoria*), or go to: http://www.germanlawjournal.com/past_issues.php?id=109.
 - 4 See E. Schanze, *Regulation by Consensus: The Practice of International Investment Agreements*, *JITE* 144 (1988), 152-171, 152: '(...) „legislation“ (...) is mainly carried out by consensus and formalized in extensive contracts which usually have the force of law.'

nature of transnational commercial transactions is seen as prompting a different legal take on regulation, the intuitive answers, on the other, are still strongly connected with a nation state's provision of a statutory system of legal enforcement, granting stability and regularity to commercial players. It still remains questionable whether this commercial practice renders law based in the nation State futile as is sometimes suggested with reference to the merchants' need for different legal yard sticks than those provided by traditional commercial legal rules and private international law.⁵ What emerges, however, from the work on *lex mercatoria* is the clear and convincing message that the application of traditional assumptions regarding litigation and enforcement of legal rules may prove inadequate with regard to commercial practice where actors often agree *ex ante* not to bring a future case „home“ before a national court but, instead, arrange an arbitration procedure for the settlement of eventual disputes or the modification of contractual provisions. These agreements are concluded with an often quite implicit and tacit understanding of the governing body of law. What parties to an arbitration agreement seem to be primarily concerned with is the availability of a workable and reliable conflict resolution mechanism. While this „privatization“ of legal conflict resolution appears to many as reflective of the traditional law's alleged uselessness for their needs, the rules that govern commercial arbitration are to some degree provided for by statutory law makers, because national legislatures competitively try to invite arbitrators and their connected business to their territory. And where the law merchant itself is portrayed as ultimately „autonomous“, this indeed rather ambivalent claim cannot cover up the fact that the law of the *lex mercatoria* has also grown out of long experiences with both commercial practice and material/procedural law formed within the nation State.

The following article inevitably partakes in the already abundant and unceasing *lex mercatoria* debate but attempts to resituate the various claims made by practitioners and academics in the context of the broader question of how exactly the law ought to react to transnational commerce and the emergence of diverse forms of self-regulation. After a reconstruction of *lex mercatoria* against the background of traditional understandings of legal enforcement clashing with contemporary assessments of a „de-nationalized world“, drastically changing the ways of governments to intervene (II), the next step will be to revisit the structural changes that long have altered governance possibilities within the nation states themselves (III). The gradual shift from public ordering to processes of self-regulation which characterizes today's most developed states tells a story of changed, not of lost statehood. In this light, the often sold description of a commerce's law of its own right appears less progressive than we would assume (IV).

5 Siehe again Berger *supra* note 1, 85 ff.

Instead, the defence of an autonomous law merchant can be seen as merely replicating what have been pressing issues of democratic governance in a heterarchic polity all along. While globalisation rightly suggests the outdatedness of conceptions of „state and society“ to define competences and the demarcation of politics and market, the critique of this bi-polar juridical world view started a long time ago. The contemporary search for new forms of governance, of which the debate around *lex mercatoria* is but an example⁶, should not make us blind to the lessons on public and private ordering learned in the nation state. If a conception of rights is to be rescued from the deathbed of the traditional nation state, then the learning experiences made within its confines are well worth considering in light of the pressing legitimacy needs of emerging institutions and polities.⁷

II. THE MYSTERY OF COMMERCIAL ARBITRATION

‘Perhaps (...) the three arbitrators, like hundreds of international arbitrators before them, did not realize that they were applying *lex mercatoria*. But I believe the decision was correct – legally and mercantilely – as was confirmed by its acceptance by both parties.’⁸

The law of international - or, focusing on the fact of border crossing in the legal practice to be considered here, transnational - arbitration⁹ presents itself in many respects as a myth¹⁰, an undeniable and promising, but also

6 See, e.g., Chr. Knill/D. Lehmkuhl, Private Actors and the State: Internationalization and Changing Patterns of Governance, in: 15 *Governance: An International Journal of Policy, Administration and Institutions* 41-63 (2002).

7 See, e.g., M. Zürn/D. Wolf, European Law and International Regimes: The Features of Law Beyond the Nation State, in: 5 *European Law Journal* 272 (1999); E. Grande, The State and Interest Groups in a Framework of Multi-level Decision-making: the Case of the European Union, in: 3 *Journal of European Public Policy*, 313 (1996); M. Jachtenfuchs/B. Kohler-Koch, Einleitung: Regieren im dynamischen Mehrebenensystem in: *Europäische Integration* (M. Jachtenfuchs & B. Kohler-Koch eds., Darmstadt: UTB 1996) 15-44.

8 Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, in: Thomas Carbonneau (ed.), *Lex Mercatoria and Arbitration*, Rev. Ed., 1998, 71-91, 83.

9 On this see Dirk Lehmkuhl, *Transnational Commercial Arbitration: Conflict-Resolution Denationalized or in the Shadow of Law?*, Manuscript, Max-Planck Projekt-Gruppe Recht der Gemeinschaftsgüter, Bonn 2000, who points out that the WTO Dispute Settlement System allows for settlement of disputes only between States. Though this institution is accordingly *internationally* oriented, what we are concerned with below is to characterize and look closer at the kind of border-crossing relationships that unfold between private parties, justifying the requirement for a dispute settlement mechanism; see also *idem*, *Commercial Arbitration: A Case of Private Transnational Self-Governance*, Manuscript, MP-PG RdG, Bonn 2000; Berger, *supra* note 1, 27: ‘The failure to incorporate national legislators threatens the foundations of legal theoretical concepts of law as social control decreed by sovereign States...’. Cf. *ibid.*, 35 ff., on the conceptual confusion in relation to the term *lex mercatoria*.

10 See e.g. Georges R. Delaume, *The Myth of the Lex Mercatoria and State Contracts*, in: Thomas E. Carbonneau (ed.), *Lex Mercatoria and Arbitration*, Rev. Ed., Kluwer Law International 1998, 111; s.a. Keith Highet, *The Enigma of the Lex Mercatoria*, *ibid.*, 133.

heavily controversial, mystery and riddle which, though it already belongs to tomorrow, must unremittingly be resolved using today's means. The unbureaucratic, efficient settlement of disputes outside of a grey courtroom, and in principle without costly, time-consuming paper wars, seems to argue in favour of arbitration law, as does the fact that many of the great legal disputes involve such a large number of varied parties that concentrating the object of dispute before a single national court seems impractical to many internationally active lawyers and enterprises.

At the same time, arbitration law is still associated with the notion that here, as it were without external influence, all those involved can find satisfactory solutions.¹¹ There is an associated awe-inspiring aura surrounding those arbitrators whom the economic titans trust more than they do professional judges in the States of this world.¹² But how do things stand with the legal nature of this arbitration law? What does its practice mean for the self-perception of national legal and procedural systems? And a yet more important question: what does it mean for the mode of institutionalising a transnational system of protection of rights as one of the central pillars of an economic society becoming established beyond the nation State, internationally and supranationally? The example taken here of transnational arbitration is intended to enable phenomena of transnational production of law to be studied against the background of traditional national and legal cultures, in two ways: first, by empirically noting and describing the phenomena and contrasting them with procedures and institutions familiar from the nation State; second, by studying learning experiences in the area of justice and dispute settlement accumulated in the context of national legal and social systems, which authoritatively stamp our perception and evaluation of transnational legal institutions and actors.

It is questionable whether the nation State can be understood as the sole possible and presumably solely desirable framework for conceptualizing law and governance, autonomy and control. But, does the rise of transnational and supranational institutions mean the end of the (nation) State and the regulatory forms associated with it, or ought we, instead, start by assuming a fundamental change in *statehood* itself? An understanding of these changes¹³

11 Berger *supra* note 1, 24 like Ernst Kramer, sees the 'privatization of the formation of law' as a 'paradigm shift in international law'; for further observations on these privatizations, see the references in Berger *op. cit.*, 25 note 101.

12 For an impressive legal sociological description of these circles, see Yves Dezalay and Bryant G. Garth., *Dealing in Virtue*, Chicago U. Press: Chicago 1996; see also the critique of Dezalay/Garth in Berger, *The New Law Merchant and the Global Market Place*, in: *ibid.* (ed.), *The Practice of International Law* (Kluwer 2001), 9-11 (distorting north/south perspectives) [reprinted from *Int. A.L.R.* 2000, 91-102], and further Amr Shalakany, *Arbitration and the Third World: Reassessing Bias Under the Specter of Neoliberalism*, 41 *Harv. Int'l. L.J.* 419-468 (2000).

13 For administrative law, see most recently Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, in: 8 *Ind. J. Global Leg. Studies* 369 (2001); Karl-Heinz Ladeur, *Conflict and Co-Operation between European Law and the General Administrative Law of the Member States*, in: *The Europeanisation of Administrative Law. Transforming national*

and their effects on the attitude to be adopted towards the globalization of law requires a critical recognition of the historical and political heritages of the nation State and its law. The point is, accordingly, first to look attentively for established structures, in order to discuss and criticize the demands arising in normative respects in relation to the institutions and actors of transnational law against this background of awareness.¹⁴

1. Senses of Hierarchy in a Heterarchical Order

The difficulty at this point results, however, from the fact that there is great disagreement about what is and what isn't to be considered an appropriate legal source in commercial arbitration. The contractual inclusion of arbitration clauses into international economic agreements takes place against a background of a remarkable structuring, indeed constituting, of transnational law by its private legal subjects.¹⁵ A study carried out by CENTRAL in Münster, Germany, has shown that these actors, in the event

decision-making procedures (K.-H. Ladeur ed., Aldershot, Dartmouth 2001), 1-13; Chr. Möllers, Reform des Verwaltungsrechts – Möglichkeiten und Grenzen eines wissenschaftlichen Diskurses in Deutschland, EUI Working Paper Law No. 2001/10, European University Institute, Florence 2001.

- 14 For research in this connection in the area of European law, see most recently e.g. C. Joerges, „Good Governance“ im Europäischen Binnenmarkt: Über die Spannungen zwischen zwei rechtswissenschaftlichen Integrationskonzepten und deren Aufhebung, RSC Working Paper No. 2001/29 (Robert Schuman Centre for Advanced Studies, European University Institute, Florence), September 2001, 3-29, 22 ff. cf. *ibid.*, 5 ff., on how to *preserve the traces* of European integration concepts vis-à-vis national, especially federal German, legal and economic backgrounds. The decipherment of the economic policy basis of the EEC and its successors done here allows the question of the 'economic constitution', i.e. the political constitution of the economy in law, to be reformulated effectively, as well as the critique, in the meantime somewhat on the retreat, of the EU's 'democratic deficit': cf. also Joerges, Das Recht im Prozeß der Konstitutionalisierung Europas, EUI Working Paper (Law) No. 2001/6; *idem*, Vorüberlegungen zu einer Theorie des internationalen Wirtschaftsrechts, in: RabelsZ 43 (1979), 6-79, 20 f., 75. On the significance of the economic constitution cf. earlier R. Wiethölter, Art. Bürgerliches Recht, Art. Wirtschaftsrecht, in: A. Görlitz (ed.), Handwörterbuch zur Rechtswissenschaft (Darmstadt: WBG 1972), 47-55, 531-539; *idem*, Franz Böhm (1895-1977), in: B. Diestelkamp/M. Stolleis (ed.), Juristen an der Universität Frankfurt am Main (Baden-Baden: Nomos 1989), 208 ff.; Zumbansen, Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag (Baden-Baden: Nomos 2000), 254 ff.; D. Wielsch, Freiheit und Funktion. Zur Struktur- und Theoriegeschichte des Rechts der Wirtschaftsgesellschaft (Baden-Baden: Nomos 2001), 82 ff.

- 15 See e.g. E. Schanze, Regulation by Consensus (*supra* note 4); most recently Günther/Randeria, Recht, Recht, Kultur und Gesellschaft im Prozeß der Globalisierung, Werner Reimers Stiftung, Schriftenreihe: Suchprozesse für innovative Fragestellungen in der Wissenschaft, Heft Nr. 4 (2001), 52 ff.; G. Teubner, Privatregimes: Neo-Spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft?, in: D. Simon/M. Weiss (eds.), Zur Autonomie des Individuums – Liber Amicorum für Spiros Simitis, Baden-Baden 2001, 437-453 [Engl. Hybrid Laws: Constitutionalizing Private Governance Networks. In: Robert Kagan and Kenneth Winston (Hg.) *Legality and Community* (Berkeley: California University Press 2001)]; K.-P. Berger, The New Law Merchant *supra* note 12, 13: 'The making of transnational law is 'privatized'. In this transnational context, however, 'codification' does not mean production, but 'reproduction' of the law. Private Working Groups, even when they are acting under the umbrella of a formulating agency, are not the lawmakers of the *lex mercatoria*. The new *lex mercatoria* is created by the parties to international commercial transactions and their arbitral tribunals.' Joerges, Vorüberlegungen (*supra* note 14), 40: 'legal science has been involved in these developments mostly to promote them, only rarely critically.'

of a reference to transnational law, largely point successively to a whole range of sources, including 'general principles of law', the '*lex mercatoria*', the 'UNIDROIT principles of international economic agreements', and finally 'transnational principles of law'.¹⁶ At the same time, there remains great uncertainty as to the outlines and the precise regulatory content of this many-faceted body of law.¹⁷ There is a noteworthy gap here between continental lawyers and English lawyers: '*...this attitude reflects the deep-rooted orientation towards formal reasoning and bright-line rule in English law.*'¹⁸ Among others, the reticence of many lawyers from the English-speaking world vis-à-vis the *lex mercatoria*, felt to be too vague and uncertain, fueled attempts in the 1980's to reach a clearer formalization of international arbitration law, while more recent developments seem to reflect a counter-movement.¹⁹ The importance of transnational arbitration law for economic transactions²⁰ at least suggests taking a methodological approach to this complex melange of differently situated sources of law. As Emmanuel Gaillard recently proposed, attention should go not so much to the content of the *lex mercatoria* as to its sources.²¹ Gaillard wishes in so doing to slice through the knot in the debate on *lex mercatoria*. The focus on the legal quality of the *lex mercatoria* regularly leads to disputes of principle as to the possibility of law existing outside the norms set by nation States, thereby shifting the view to the norm-setting activities undertaken by transnational actors. At the same

16 See Berger/Dubberstein/Lehmann/Petzold, The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration, in: Berger (ed.), The Practice of Transnational Law (*supra* note 12), 91-113, 105; on this cf. also the comments by Luke Nottage, in: Journal of International Arbitration (forthcoming Autumn 2002).

17 Ibid., 194; cf. Berger, *supra* note 12), with references to a world-wide survey done in 1995.

18 Nottage (*supra* note 16) on this see also Lowenfeld, Lex Mercatoria (*supra* note 8), 71 f.; on transatlantic differences in the main instruments of *lex mercatoria*, namely contracts, see J. Langbein, Comparative Civil Procedure and the Style of Complex Contracts, American Journal of Comparative Law 35 (1987), 381-394.

19 Nottage (*supra* note 16), 2; idem, Is (International Commercial) Arbitration ADR?, in: Bar News (2002), forthcoming, Ms. p. 4: "International arbitrators will often sit in neutral countries and have to apply substantive law which they are not qualified in or are less familiar with. They also have considerable leeway in selecting the applicable law, under conflict of laws rules or the like. Taken to an extreme, the arbitrators may choose to apply the "new *lex mercatoria*". A recent empirical study demonstrates that this practice is pervasive, albeit usually to supplement international instruments or domestic law rather than to supplant those rules, and despite the "new, new *lex mercatoria*" – in the guise, for example, of quite precise UNIDROIT Principles of International Commercial Contracts – arguably representing a partial formalisation of the still evolving norms of trans-border transactions." See also Berger, The New Law Merchant (*supra* note 12); idem, *supra* note 1, 111 ff.

20 Nottage (*supra* note 16), 1, criticising Sir Roy Goode, who states in the Festschrift for Francis Reynolds (London 2000, 245): 'the attention given to these new doctrines [of an autonomous *lex mercatoria* enforced by an anational arbitration procedure leading to a stateless award] has been in inverse proportion to their practical impact.' See also Nottage, The Vicissitudes of Transnational Commercial Arbitration and the *Lex mercatoria*: A View from the Periphery, 16 Arbitration International 53 (2000); see the contributions to Berger (ed.), The Practice of International Law (*supra* note 12), the authors of which all unreservedly acknowledge the great importance of the *lex mercatoria* and – only against this background – seek appropriate forms for assessing it.

21 E. Gaillard, Transnational Law: A Legal System of a Method of Decision-Making?, in: Berger (ed.), The Practice of Transnational Law (*supra* note 12), 53-66, 55; similarly Lowenfeld, Lex Mercatoria (*supra* note 8), 85 f.

time, however, the danger threatens here of seeing 'law' in every economic agreement, thus attributing to the economic transaction a legitimacy that could as a consequence immunize it against all legal and political criticism. Whether we should, however, reject the stress on this *autonomous* legal system, on the ground that it is indeed heavily oriented to the regulatory pattern of the 'market', thereby inviting an ultimately rather too wholesale reproach of 'laissez-faire liberalism,' has to be doubted. For it is the undeniable experience of arbitrators that the legal treatment of a matter involving a complex multilateral consortium agreement among international actors has to be approached with much finer machinery in terms of legal facts and legal theory than a local car-sale contract - quite irrespective of laissez-faire.²² And still, *lex mercatoria* appears more like a myriad mixture of legal sources than as a clearly constructed legal pyramid. Rightly, Gaillard points to the peculiar choice of law taken by the parties to the arbitration agreement. This choice characterizes to a great degree the *lex mercatoria*, as actors continually take over elements of various legal systems into their agreement, in a constant search for the most appropriate regulation, which is itself often enough a reflection of national legal adjustments to these special requirements.²³ Seen in this light, the autonomy of *lex mercatoria* consists less in the alleged free-floating of legal rules and principles but, instead in the parties' autonomous selection of the law.

1.1 Codification or Application

One of the important questions behind this is how this selection process actually takes place. In other words, the question is whether the sources which eventually fuse into the law governing the arbitration agreement – whether or not we wish to call this *lex mercatoria* - is found in texts such as collections and 'lists' of norms for transnational economic transactions, or in a specific mode of application of law itself, i.e. in its practice?

While the reference to individual, confined lists drew criticism for being unsatisfactory in view of the many-faceted, extremely mobile legal practice of the *lex mercatoria*, differentiated, lengthy lists might have brought a turnaround. But, now the ensuing question is whether there can still at all be any as it were 'free-floating' law of the *lex mercatoria*,²⁴ say outside of the UNIDROIT principles finally adopted in 1994.²⁵ The focus on codified law

22 See, e.g. Lowenfeld, *Lex Mercatoria* (*supra* note 8), 76 ff., 80: 'Note that as I (...) view it, *lex mercatoria* is not some arcane mystery, open only to anointed guardians of an ambiguous flame. It is perfectly appropriate, in my view, for counsel to submit argument to the tribunal about the content of the *lex mercatoria*, as well as about the usages of the particular trade and the circumstances on which the parties had or fairly could have relied.'

23 Gaillard, *Transnational Law* (*supra* note 21), 55.

24 Gaillard, *Transnational Law* (*supra* note 21), 56.

25 On this see in detail Berger (*supra* note 1), 136 ff.

thus leads to tricky questions related to the inevitably historical and contextual character of law that is collected and laid down in lists. At the same time, lists will never realistically claim to include *all* of the governing law. Thereby, not only do lists create tremendous difficulties as to their appropriate interpretation, but the fundamental problem remains the incompleteness of codifications with regard to legal developments outside of the text.

The practice-oriented, methodological approach on the other hand, is oriented towards interpretation and application, building upon classic ways of finding the law, with ‘precedent’, ‘interpretation’, and ‘commentary’ as the central instruments.²⁶ Even though a clear gain in flexibility cannot be denied, the anti-codificatory approach seems fairly defenseless against the danger of the power of arbitral judges who face little or no review and may develop the governing rules through recourse to the ‘furthest possible’ dissemination of a favoured legal principle, meanwhile rejecting allegedly national ‘idiosyncrasies’.²⁷ It may be attractive in this connection to believe that ‘(customary) law has after all to start somewhere’. Yet it remains doubtful whether this sort of foundation of law can be justified in light of the existing nationally set framework conditions, which provide for a certain, albeit limited correction of the arbitration ruling.²⁸ On the other hand, there may be no salvation in the law of the lists either, given that the hermeneutic circle starts anew again every time these lists appear as contradictory.²⁹ In contrast, a constant ‘updating’³⁰ of the lists, or else the ‘extension’ of their applicatory reach through so-called ‘opening-up clauses’, may lead to an incorporation of new regulatory principles building, e.g., on comparative law and sociology of law findings.³¹ But, in the end, this would involve the law of commercial arbitration much more in a struggle over methods of interpretation than might be desired.

1.2 The Return of Thibaut and Savigny

This debate could be continued. But for the question raised it at any rate suffices once more to point out that we are dealing here, as if under a

26 In this sense, Gaillard, Transnational Law (*supra* note 21), 56 ff.; Berger (*supra* note 1), 71 f., points to the internal reference to arbitration case law by contrast with the adducing of decisions of national courts.

27 Gaillard, Transnational Law (*supra* note 21), 57.

28 Which is why, for instance, the UNCITRAL model law, with its obligation on the arbitrator to link up with national law, while retaining the possibility to refer to the *lex mercatoria*, is aimed at avoiding arbitrary decisions. Cf. Berger (*supra* note 1), 77 f.

29 To be sure, another possibility is the one chosen by Lowenfeld, Lex Mercatoria (*supra* note 8), 89, a quasi-personal list of ten principles which, criticized for its brevity, brought the answer that the Ten Commandments and the Bill of Rights were no longer.

30 Gaillard, Transnational Law (*supra* note 21), 62 f.

31 Berger (*supra* note 1), 207 ff.

magnifying glass, with the same questions regularly bound up with the foundation and legitimization of law. And here it seems as if the debate just pointed to shares a lot of those questions that fueled the Thibaut-Savigny controversy in the 19th Century.³² At any rate, the opposition set up between codification and method can scarcely be satisfactory today.³³ For the attempt of setting codification upon a broader, qualitatively better foundation of legitimation in recourse on general principles (of law), has lost much trust. The theory, embraced by Jürgen Habermas, of a deliberative foundation of democratic practice, with the aim of transcending the interest conflicts of a heterogeneous pluralistic society into deliberative practices of a civil society,³⁴ in turn builds upon the existence of a ‘culture of conflict’,³⁵ the structural features of which can no longer be found on the Thibaut-Savigny map. In practice, admittedly, this justificatory discourse today takes the shape of autonomous norm-setting contexts in which the standards are experimentally developed in continually refined procedures of law-finding as a discovery procedure, while - at the same time - in turn being questioned and reviewed.³⁶ *‘So we beat on, boats against the current, borne back ceaselessly into the past’.*³⁷

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- 32 The debate between the German lawyers Thibaut (1772-1840) and Savigny (1779-1861) at the beginning of the 19th Century carried over the question whether or not to codify (private) law and was representative of the post-revolutionary, pre-restaurative turmoil: see A. Fr. J. Thibaut, *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (1814); Fr. C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814). See both texts reprinted in: H. Hattenhauer (ed.), *Thibaut und Savigny: Ihre programmatischen Schriften* (Munich: Vahlen 1973); see J. Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny*, Ebelsbach 1984, 51-57 (critically discussing the ‘codification dispute’ against the background of recent studies on the political positions and contexts of the opponents); *idem*, *Savignys Einfluß auf die Jurisprudenz in Deutschland nach 1900*, in: *JuS* 1991, 624; for an assessment of the political context, see H. Wrobel, *Rechtsgeschichte, Wirtschaftsgeschichte, Sozialgeschichte: die Thibaut-Savigny-Kontroverse*, 6 *Kritische Justiz* (KJ) 149 (1973), 149; cf. H.P. Benöhr, *Politik und Rechtstheorie: Die Kontroverse Thibaut-Savigny vor 160 Jahren*, in: *Juristische Schulung* (JuS) 1974, 681.
- 33 See the work related to the making of a European Private Code: e.g., *The Europeanisation of Private Law. The Legal Effects of European Integration* (Francis Snyder ed., Oxford 2000); Chr. Joerges, *Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example*, in: 8 *European Review of Private Law* 1-16 (2000); Luke Nottage, *Convergence, Divergence, and the Middleway in Harmonising or Unifying Private Law*, in: *The Annual of German & European Law* (R. Miller/P. Zumbansen eds., Oxford/New York, 2003, forthcoming); Christoph Schmid, *Legitimacy Conditions for a European Civil Code*. EUI Working Papers, RSC No. 2001/14, Fiesole, Italy June 2001; Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law* 107-185 (2001); *The Harmonisation of European Private Law* (Mark Van Hoecke/Francois Ost eds., Oxford 2000).
- 34 J. Habermas, *Wie ist Legitimität durch Legalität möglich?*, in: 19 *Kritische Justiz* (KJ) 1-16 (1987); *idem*, *Faktizität und Geltung* (Frankfurt: Suhrkamp 1992) [Engl. Edition: *Between Facts and Norms* (MIT Press 1996)].
- 35 R. Wiethölter, *Rechtsstaatliche Kultur und Streitkultur*, in: 20 *Kritische Justiz* (KJ) 403 (1988); G. Frankenberg, *Why care? - The trouble with social rights*, 17 *Cardozo L. Rev.* 1365-1390 (1996).
- 36 On this theme most recently Ladeur, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation* (Tübingen: Mohr 2000), 106-110; *idem*, *Towards a Legal Concept of the Network in European Standard-Setting*, in: Joerges/Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart 1999), 151-170, 158; on the debate with Habermas, see Ladeur, *Postmoderne Rechtstheorie* (Berlin: Duncker & Humblot 1992), 9 ff.; *idem*, *Can Habermas’ Discourse ethics Support a Theory of the Constitution?*, EUI Working Paper, Law No. 99/4; and most recently

2. Arbitration Law and National Law

*‘Considering the arbitration procedure from the viewpoint of the arbitration tribunal, the State is only an observer.’*³⁸ In the light of the far-reaching regulatory empowerments to incorporate an arbitration agreement into a contract, here it would seem that private autonomy and self-determination are alone to the fore. If the arbitration agreement is regarded as bindingly committing the parties to the procedural form and the legal recourses, then the conclusion of an arbitration agreement is, however, also associated with considerable regulatory obligations. From this viewpoint, the classification of arbitration as part of the regulatory sphere of private autonomy, which might otherwise seem obvious, again becomes doubtful.³⁹ For the choice of procedural law, dispute-settlement rules and procedures now look more like a part of the active shaping of a system of law valid for a particular period of time and sphere of life. At the same time, because of the equating of the arbitration ruling with a judgment having legal force (§ 1055 *German Civil Procedure Act* – “ZPO”), the ruling can be reviewed or suspended by a national court (though admittedly only on the narrow preconditions of § 1059 II ZPO). Furthermore, there is the possibility of having the ruling nationally enforced (§ 1060 f. ZPO).⁴⁰ These framework conditions do not, however, alter the self-regulatory core of private autonomy that characterizes commercial arbitration, unfolding indeed a great density of regulation brought about by the parties themselves. Choosing the substantive and procedural law makes

Habermas, *Die Zukunft der menschlichen Natur* (Frankfurt: Suhrkamp 2001); *idem*, Faktizität und Geltung (*supra* note 34), 483: ‘in the idea of private autonomy, expressed in law in terms of the greatest possible degree of equal subjective freedom of action, nothing has changed. What have changed are the perceived social contexts in which the private autonomy of each is to be realised in equal fashion.’ On the concept of proceduralization cf. Wiethölter, *Materialisierungen und Prozeduralisierungen von Recht*, Ms., Florenz 1982; in English in: Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State* 221-249 (Berlin/New York: Walter de Gruyter 1986); Zumbansen, *Ordnungsmuster* (*supra* note 14), 287 ff.; and in detail on the extension of Habermas’s project through procedural law: Calliess, *Prozedurales Recht* (Baden-Baden: Nomos 1999); cf. also the interview with the Chair of the Governmental ‘corporate governance’ Commission set up in May 2000, Theodor Baums, following submission of the Commission’s report on 11 July 2001, in: 2 *German Law Journal*, Nr. 12 (15 July 2001), under <http://www.germanlawjournal.com> (search: Baums).

37 F. Scott Fitzgerald, *The Great Gatsby* (1926), London: Penguin 1950, 172.

38 Wolfgang Voit, *Privatisierung der Justiz*, in: 52 *Juristenzeitung* (JZ) 120-125 (1997), at 122.

39 Voit (*supra* note 38), 122.

40 For details see Berger, *Entstehungsgeschichte und Leitlinien des neuen deutschen Schiedsverfahrensrechts*, in: *idem*, (ed.); *Das neue Recht der Schiedsgerichtsbarkeit/The New Arbitration Law* (Köln: RWS 1998), 1 ff., 6 ff.; most recently, *idem*, *Das neue Schiedsverfahrensrecht in der Praxis – Analyse und aktuelle Entwicklungen*, in: *Recht der Internationalen Wirtschaft* 7-20 (2001), at 17, in relation to a preferentially ‘cautious practice in decisions in the area of arbitration law’ by the ordinary courts: cf. *ibid.*, 18, ‘the German courts have since the reform continued the course they had already embarked on and accepted actions for reversal only in extreme cases.’ There is, then, no ‘*révision au fond*’ (*ibid.*, 19); cf. also R. H. Kreindler, *Das neue deutsche Schiedsverfahrensrecht*, in: K.-P. Berger et al. (eds.), *Festschrift für Otto Sandrock zum 70. Geburtstag* (Heidelberg: Recht und Wirtschaft 2000), 515-535, 531 f.; H.F. Gaul, *Die Rechtskraft und Aufhebbarkeit des Schiedsspruchs im Verhältnis zur Verbindlichkeit des staatlichen Richterspruchs*, *ibid.*, 285-328.

it possible to step outside of nationally enacted law to a far greater extent than at all conceivable in the contracting out from particular (formal) provisions permissible in any more or less sizeable contractual relationship.⁴¹ It is nonetheless advisable to treat depictions of international arbitrators' performances as having a 'genuine law-making function'⁴², comparable to that of national judges, with a certain degree of reservation. Likewise claims should be evaluated against the experiential background of nationally rooted, constitutionally underpinned legal systems that continuously undergo further differentiation. This is, however, to be understood as being neither an expression of hope for a complete correspondence between national implementation of law and transnational arbitral jurisdiction, nor that the like would at all be desirable. The point is instead to allow for a critical assessment of the evaluative criteria being brought to bear for each of the legal spheres.

3. *Quis Judicabit?* The Rule-of-Law in Relation to Commercial Arbitration

Limited judicial review of tribunal decisions provides arbitral awards with an autonomy that underlines the bindingness of the arbitration for the parties. At the same time, it positively confirms the system of arbitration law and strengthens it from within.⁴³ Certainly, from a skeptical point of view, this provokes the occasionally voiced criticism of commercial arbitration being somewhat 'lawless'⁴⁴, at least from those legal circles that wish to resist the carving out of conflict settlement procedures from structures of 'judicial' conflict resolution.⁴⁵ Here, the often claimed advantages of arbitration threaten to turn into their opposite. "By choosing the *lex mercatoria* the

41 Cf. the provision in § 1030 I ZPO, dropping the link in the old law between eligibility for arbitration and eligibility for compromise in favour instead of a distinction between property and non-property claims. On this see the critique in Voit (*supra* note 38), 124 f.; on the question of the applicable law on conflict of laws see: A. Juncker, Deutsche Schiedsgerichte und Internationales Privatrecht (§ 1051 ZPO), in: Festschrift Sandrock (*supra* note 35), 443-464.

42 Berger (*supra* note 1), 67; cf. also R. David, L'Arbitrage Dans Le Commerce International (Paris: Economica 1982), 13: 'L'arbitrage doit être distingué de la justice des tribunaux. L'arbitre est une simple personne privée. Il prononce sa décision en s'appuyant sur une convention intervenue entre les intéressés; il n'impose pas en vertu d'un pouvoir à lui conféré par l'État.'

43 See e.g. the US Supreme Court decision: *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614 (1985) - <http://supct.law.cornell.edu/cgi-bin/sup-choice.cgi?473+614>.

44 Jörg Gentinetti, Die lex fori internationaler Handelsgerichte, Bern 1973, speaks of 'arbitration outside law'. See also McConaughay, Northwestern L. Rev. 1999, 453 ff., who speaks of 'lawlessness' of arbitral jurisdiction (cited from Berger, Das neue Schiedsverfahrensrecht in der Praxis, *supra* note 40, there Fn.153); see also Lowenfeld, Lex Mercatoria (*supra* note 8), 73: 'The English view, hostile to freedom from judicial control anyhow, regards lex mercatoria as a slightly wicked misnomer (not to say contradiction in terms), on the ground that lex mercatoria is not law at all.'; see also Pierre Mayer "Reflections on the International Arbitrator's Duty to Apply the Law (The 2000 Freshfields Lecture)" 17(3) Arbitration International (2001) 235; L. Nottage, Is (International Commercial) Arbitration ADR?, in: Bar News (2002), forthcoming.

45 E.g. England: on this see Lowenfeld, Lex Mercatoria (*supra* note 8), 71 f.

parties oust the technicalities of national legal systems and they avoid rules which are unfit for international contract. Thus they escape peculiar formalities, brief cut-off periods, and some of the difficulties created by domestic laws (...). [T]hose involved in the proceedings – parties, counsel and arbitrators – plead and argue on an equal footing; nobody has the advantage of having the case pleaded and decided by his own law and nobody has the handicap of seeing it governed by a foreign law.”⁴⁶

The possible pros and cons for and against commercial arbitration are easy to mobilize, the array of procedural law based considerations we might wish to unfold against the intransparency threat enshrined in commercial arbitration is waiting to make itself heard. Allegedly positive elements such as procedural brevity, reliability, purposiveness and the special knowledge of the arbitrator⁴⁷ can awaken, from the viewpoint of constitutionally protected procedural law, the impression of the arbitration mechanisms’ failure to incorporate such procedural principles as formality, publicity and reviewability.

4. Self-regulation and the State

If however, we consider these opposed standpoints in light of the ongoing changes of traditional forms of statehood towards a higher degree of societal self-regulation, but also of international cooperation and interaction, the observation presents itself quite differently: we then are inclined to ask whether the law of commercial arbitration merely accompanies these changes or whether it reflects an ongoing search for more varied and differentiated forms of governance. Here two views are of particular importance. One relates to the development of national competitive States distinguished by engaging, together with their institutions, in a race for re-regulation and de-regulation, with the object of adapting to allegedly successful trends towards global convergence.⁴⁸ For the law of commercial

46 Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 *Int’l. & Comp. L.Q.* 747, 748 (1985) (zit. bei Lowenfeld, *Lex Mercatoria*, oben Fn. 1, 75 f.).

47 Lehmkuhl, *Transnational Commercial Arbitration* (*supra* note 9), 19.

48 See, for the case of company law, H. Hansmann & R. Kraakman, *The End of History for Corporate Law*, in: 89 *Georgetown L. J.* 439 (2001); D. M. Branson, *The Very Uncertain Prospect of “Global” Convergence in Corporate Governance*, in: 34 *Cornell Int’l. L. J.* 321 (2001); see hereto the approach taken by Herbert Kitschelt et al., *Convergence and Divergence in Advanced Capitalist Countries*, in *Continuity and Change in Contemporary Capitalism* 427-460 (Herbert Kitschelt/Peter Lange/Gary Marks/John D. Stephens eds., Cambridge: Cambridge University Press 1999), drawing on D. Soskice’s work on national systems of production and the ensuing resistance capacities to convergence pressures; see D. Soskice, *Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980’s and 1990’s*, *ibid.*, 101-134; *c.f.* S. Vitols, *Varieties of Corporate Governance: Comparing Germany and the UK*, in: *Varieties of Capitalism* (Peter A. Hall/David Soskice eds., Oxford/New York: Oxford University Press 2001), 337-360; M. Rhodes/B.v.Apeldoorn, *“Capital Unbound? The Transformation of European corporate governance”*, in: 5 *Journal of European Public Policy* 406-427 (1998); see the reaction to the *Varieties of Capitalism* approach, taken by L. Nottage, *Japanese Corporate Governance at a*

arbitration, this would imply an international competition for the setting of legal conditions which are supposedly likely to attract arbitrators and – with them – the wide range of high profile business transactions they are connected with. Whether or not a State adopts a welcoming arbitration law then becomes a competitive issue, even if this approach cannot change the fact that the State can only codify a portion of the law that will finally govern the arbitration. The State can, however, set up or adapt transnationally drafted legal frameworks which arbitrators might find attractive enough for the hosting of arbitral proceedings.

Another view, opposing the alleged trend towards convergence, instead upholds an array of comparative institutional advantages and points to enduring national and regional differences with regard to organizational patterns of market regulation.⁴⁹ Due to the absence of an elaboration of this theory's connection to the issue of commercial arbitration, it is difficult to assess the distinctive place of arbitration in this theoretical framework. Promising research will, however, have to engage in further investigating the adaptation processes of national law to transnational commercial transactions, hereby unfolding a spectrum of inquiry that specifically asks for the role of law in relationship to and within emerging forms of commercial practice as examples of societal self-regulation.

In this light, a decisive analytical focus overarches these opposed interpretations, allowing us – for now – to leave aside the convergence/divergence debate and, meanwhile, to see as it were *below* these just mentioned levels of perception: this analysis starts from (and ends with) the strong, even if qualitatively changed, presence of the State. 'Bringing the State back in' has long been the formula describing the dialectical movement in which the Welfare State retreats to the setting of framework conditions in order first to enable and to promote contextual autonomy, mainly by allowing for a learning confrontation of 'reflexive law' with social environments⁵⁰, but on the other hand comes back to monitoring it through detailed subsequent review.⁵¹ An international competition for the best arbitration system might thus have two kinds of effects. On the one hand,

Crossroads: Variation in "Varieties of Capitalism?", in: 27 N.C.J. Int'l Law & Com. Reg. 255 (2001), 256-261 (with particular reference to Japan).

49 See Hall/Soskice, Introduction (*supra* note 2); Pauly/Simon (*supra* note 2); see also M. Rhodes/B.v.Apeldoorn, Capital Unbound? The transformation of European Corporate Governance, in: 5 Journal of European Public Policy 406-427 (1998); P.A. Gourevitch, The macropolitics of microinstitutional differences in the analysis of comparative capitalism, in: S. Berger/R. Dore (eds.), National Diversity and Global Capitalism (Ithaca, NY: Cornell U.Press 1996), 239-259.

50 See hereto in particular G. Teubner/H. Willke, Kontext und Autonomie: Gesellschaftliche Selbststeuerung durch reflexives Recht, in: Zeitschrift für Rechtssoziologie 5 (1984), 4-35; G. Teubner, Reflexives Recht, in: ARSP 1982, 13; G. Teubner, Law as an Autopoietic System (1993), Ch. V.

51 See, e.g. H. Willke, Supervision des Staates (Frankfurt: Suhrkamp 1997); G. Britz, Die Mitwirkung Privater an der Wahrnehmung öffentlicher Aufgaben durch Einrichtungen des öffentlichen Rechts, in: VerwArch 2000, 418-437.

there might be a re-nationalization and re-localization of legal disputes. On the other, it has to be seen whether or not the self-regulatory requirements of transnational law are ultimately strong enough to influence the competing national adjustment efforts at the best arbitration system in the direction of *lex mercatoria* and its actors.⁵²

5. The differentiation of *Lex Mercatoria*

Christian Joerges⁵³, in contrasting authors like Gentinetti and Kronstein, identifies the critical shortcomings inherent to any attempt to ‘understand’ *lex mercatoria* in closest connection and mimicry to the commercial practice out of which it is believed to grow. Whereas Kronstein admittedly saw commercial arbitration as highlighting the relationship between law and economic power⁵⁴, an author like Gentinetti is exclusively concerned with as comprehensive and exhaustive as possible a portrayal of the arbitration system as an undeniable phenomenon of transnational law. But, by trying – as Gentinetti does – to legally embrace the specific features “proper” to international economic transactions, law’s very validity claim might be put into question. In counterposing Gentinetti’s and Kronstein’s approaches, Joerges can thus unfold the fundamental legitimacy questions which arise in connection with the increasing importance of transnational private law.⁵⁵ Thereby, the transnationalization of legal theory becomes an essential mode of fundamental criticism of law’s function of ordering society. Our central question remains then whether the normative questions arising in the world of *lex mercatoria* are comparable to those that have long marked the law of modern, post-industrial nation States and pluralistically differentiated societies. The point is thus to investigate the connection between the ongoing development and differentiation of transnational economic law and the changes of national law.⁵⁶

52 For this, see G. Teubner, Global Bukowina (*supra* note 3).

53 Joerges, Das Rechtssystem der transnationalen Handelsschiedsgerichtsbarkeit, ZHR 138 (1974), 549-568, 549 f.

54 H. Kronstein, Arbitration is Power, 38 New York U. L. Rev. 661-700 (1963); *idem*, Business Arbitration - Instrument of Private Government, 54 Yale L.J. 36 (1944), here cited from Kronstein, Ausgewählte Schriften/Selected Essays, Müller: Karlsruhe 1962, 37-68.

55 This does not mean that *mercantile law* did not have an important place even before the age of globalization. On the replacement of the primacy of politics by that of economics, and the effects on international law and theory of the State, see Joerges, Vorüberlegungen (*supra* note 14), 9 ff.; Lehmkuhl, Transnational Commercial Arbitration (*supra* note 9), 4: „Private resolution of business conflicts has a long history.’ Lehmkuhl points out that the development of the European nation States led to a temporary suppression of this private dispute settlement system, something which, however, changed again after the Second World War. The empirical fact of these various changes does not of course replace analysis of the political conceptions that describe them.”

56 On this see, e.g., M. Schmidt-Preuß, Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung, in: VVDStRL 56 (1996), Berlin, New York 1997, 160-234; see also U. Di Fabio, *ibid.*, 235-282; H.-H. Trute, in: Deutsches Verwaltungsblatt 950 (1996).

Involved on both sides are pressing questions of the emergence, functions and validity conditions of law and political organization.⁵⁷ The worldwide development of legal principles and specialized procedures and institutions⁵⁸ points towards a noteworthy repetition of struggles within national legal systems. The fragmentation and differentiation of formal law, its reshaping and materialization by legal policy programming, and finally the further development in specific areas of legal principles in constant need of adaptation impressively reflect the learning experiences of law, which are continuing into the present.⁵⁹ The *unity of law*⁶⁰ as a formula for hope can in these circumstances no longer be understood as an appropriate description of the legal system, but at most as a forever fought-over depiction of a *past* paradigm of law. The boundaries between areas thought of as in principle separate from each other (public law/private law) have persistently been called in question since the birth of the interventionist State a hundred years ago⁶¹, and the increasingly observable mixed phenomena in the area of the so-called third sector⁶² the major State financial assistance to failing

57 See Günther/Randeria, *Recht, Kultur und Gesellschaft* (*supra* note 15), 85: 'Studies devoted to the interactions between differing normative systems are increasingly replacing the definitional debates as to whether and how far these systems are to count as 'law'; in connection with this position on pluralism of law, see also G. Teubner, *Privatregimes* (*supra* note 15).

58 See, e.g., A. von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, in: 5 Max Planck Yearbook of United Nations Law 609-674 (The Hague: Kluwer 2001).

59 Joerges, *Vorüberlegungen* (*supra* note 14); Teubner, *Verrechtlichung - Begriff, Merkmale, Grenzen, Auswege*, in: Friedrich Kübler (ed.), *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität* (1984), Frankfurt: Suhrkamp 1985, 289-344, *ibid.*, *Verrechtlichung - ein ultrazyklisches Geschehen: Ökologische Rekursivität im Verhältnis Recht und Gesellschaft*, in: Nicolai Dose/Rüdiger Voigt/Klaus Ziegert (eds.), *Politische Steuerung moderner Industriegesellschaften*, Diskussionspapier 11, München 1997; Kl. Günther, „Ohne weiteres und ganz automatisch“? Zur Wiederentdeckung der „Privatrechtsgesellschaft“, in: 11 *Rechtshistorisches Journal* 473-500 (1992); Ladeur, *Negative Freiheitsrechte* (*supra* note 36); *idem*, *Social Risks, Welfare Rights and the Paradigm of Proceduralization*, EUI Working Paper Law No. 95/2; Habermas, *Faktizität und Geltung* (*supra* note 34), 470: "This *social change in law* was understood as a process in the course of which a new instrumental understanding of law relating to social-State conceptions of justice overlay, pushed back and finally replaced the liberal model of law. German jurisprudence has perceived this process, which broke up the classical unity and systematic structure of what seemed to be the only rational legal system, as a *crisis of law*."

60 See M. Baldus, *Die Einheit der Rechtsordnung*, Berlin 1995; D. Felix, *Einheit der Rechtsordnung*, Tübingen 1998.

61 See Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft* (Karlsruhe: C.F.Müller 1953); D. Grimm, *Zur politischen Funktion der Unterscheidung von öffentlichem Recht und Privatrecht*, in: W. Wilhelm (ed.), *Studien zur europäischen Rechtsgeschichte* (Frankfurt: Klostermann 1972), 224-242; Stolleis, *Die Entstehung des Interventionsstaates und das öffentliche Recht* (*supra* note 36); *idem*, *Öffentliches Recht und Privatrecht im Prozeß der Entwicklung des modernen Staates*, in: W. Hoffmann-Riem/E. Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Baden-Baden: Nomos 1996), 41-61.

62 See, e.g., G.F. Schuppert, *Staat, Markt, Dritter Sektor – oder noch mehr?*, in: Th. Ellwein/J.J. Hesse/R. Mayntz/F.W. Scharpf (ed.), *Jahrbuch zur Staats- und Verwaltungswissenschaft*, Band 1 (Baden-Baden: Nomos 1987), 47-87; *idem*, *Die öffentliche Verwaltung im Kooperationspektrum staatlicher und privater Aufgabenerfüllung: Zum Denken in Verantwortungsstrukturen*, in: 31 *Die Verwaltung* 415-447 (1998); *idem*, *Die öffentliche Verwaltung im Kooperationspektrum staatlicher und privater Aufgabenerfüllung – Erscheinungsformen von*

corporate groups, or the influence of interested economic lobbyists on legislation without taking the 'roundabout route' through parliament⁶³, are making the presumed boundary between formally made 'law' and otherwise-produced norms and rules seem ever more questionable. If the gaze crosses State frontiers, it lights upon similar developments. And specifically the legal-sociology research trend of legal pluralism has made clear the difficulty of depicting the law of transnational actors on our accustomed pattern, which counts as law only what was produced by an institutionalized norm-setting body.⁶⁴

Against this background, a special importance attaches to the phenomena of differing transnational legal, but also political, economic and cultural, developments, since they might convey a clearer picture of the structural requirements and regulatory needs arising with the internationalization and globalization of politics and the economy.⁶⁵ Transnational law is thus teaching us, while still in the process of emerging, something about its own necessity and the hard-to-follow architecture of global law and global governance. The descriptions occasionally to be found of an ideal world order as a 'world State'⁶⁶, and the conceptions, recently enjoying a

Public Private Partnership als Herausforderung an Verwaltungsrecht und Verwaltungswissenschaft, in: Dietrich Budäus/Peter Eichhorn (eds.), *Public Private Partnership* (Baden-Baden: Nomos 1997), 93-124; G. Frankenberg, *Shifting Boundaries: The Private, The Public, and the Welfare State*, in: M.B. Katz/Chr. Sachße (eds.), *The Mixed Economy of Social Welfare* (Baden-Baden: Nomos 1996), 72-94; R. Wiethölter, *Begriffs- oder Interessenjurisprudenz – falsche Fronten im IPR und Wirtschaftsverfassungsrecht*, in: A. Lüderitz/J. Schröder (eds.), *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts. Festschrift für Gerhard Kegel* (Frankfurt: Metzner 1977), 213-263, 240, talks about a 'diffuse mosaic of a mixed economy'; cf. also Nicholas Kaldor, *Public or Private Enterprise – The Issues to be considered*, in: William J. Baumol (ed.), *Public and Private Enterprise in a Mixed Economy*, London/Basingstoke 1980, 1-12; and in general see: H.D. Assmann, *Wirtschaftsrecht in der Mixed Economy* (Frankfurt: Athenäum 1980).

63 See the example in Günther/Randeria, *Recht, Kultur und Gesellschaft* (*supra* note 15), at 57-9.

64 On this see e.g. the contributions to Volkmar Gessner/Ali Cem Budak (eds.), *Emerging Legal Certainty: Empirical Studies on the Globalization of Law*, Brookfield 1998 and, most recently, in: Appelbaum/Felstiner/Gessner (eds.), *Rules and Networks* (*supra* note 3); Günther/Shaliner, *Recht, Kultur und Gesellschaft* (*supra* note 15), 88: '...insistence on the model of unity of law...as 'legal ideology' of the professionalized ranks of lawyers.' (With a reference to Sally Falk Moore, *Law as Process: An Anthropological Approach*, London 1978). See earlier, by the same author, *Law and Social Change: The Semi-Autonomous Legal Field as an Appropriate Field of Study*, in: 7 *Law and Society Review* 719-746 (1973); see also F. De Ly, *Emerging New Perspectives Regarding Lex Mercatoria*, in: *Festschrift Sandroek* (*supra* note 40), 179-203, 190-192 with references to the beginnings of legal pluralism in Santi Romano, applied to the *lex mercatoria* by Francois Rigaux, Philippe Kahn and Eric Loquin.

65 See e.g. M. Albert/Lothar Brock/Stephan Hessler/Ulrich Menzel/Jürgen Neyer, *Die neue Weltwirtschaft. Entstofflichung und Entgrenzung der Ökonomie* (Frankfurt: Suhrkamp 1999); J. Neyer, *Spiel ohne Grenzen. Weltwirtschaftliche Strukturveränderungen und das Ende des sozialkompetenten Staates* (Marburg 1996); Appelbaum/Felstiner/Gessner (eds.), *Rules and Networks* (*supra* note 3); cf. also Ch. Sabel/M. Piore, *The Second Industrial Divide* (New York: Basic Books 1984); M. Best, *The New Competition* (Cambridge: Harvard U.P. 1990).

66 M. Albert, *Introduction: World Society*, in: *idem*/L. Brock/Kl.-D. Wolf (eds.), *Civilizing World Politics. Society and Communication beyond the State*, Lanham et al. 2000, 1-17; St. Oeter, *Internationale Organisation oder Weltföderation? Die organisierte Staatengemeinschaft und das Verlangen nach einer 'Verfassung der Freiheit'*, in: Hauke Brunkhorst und Matthias Kettner (eds.), *Globalisierung und Demokratie* (Frankfurt: Suhrkamp 2000), 208-239, 209; but see N. Luhmann, *Die Politik der Gesellschaft* (Frankfurt: Suhrkamp 2001), 220: 'Anyone wishing to estimate the

renaissance, of social-policy ‘subsidiarity’⁶⁷ or of the ‘private-law society’⁶⁸, reflect the stubbornness with which favoured self-descriptions persist even once the bases for such conceptualizations have long become implausible. At the same time, however, such theorizations always run the risk of extending the accustomed normative allocations of a political, economic and legal order, almost entirely independently of the existence of their real substrate.⁶⁹ Where, for instance, there is talk of constitutionalizing the world-wide market society,⁷⁰ then instead of insight into the border-crossing societal differentiations of social functions in the direction of a ‘world society’⁷¹, a clinging to old (neo-) liberal conceptions of a State-based

function and importance of ‘States’ at the end of this millennium would be advised to start from the concept of world society’. Cf. earlier *idem*, Die Weltgesellschaft, in: 57 ARSP 1 (1971); *idem*, Metamorphosen des Staates, in: N.Luhmann, Gesellschaftsstruktur und Semantik IV (Frankfurt: Suhrkamp 1995), 101-137, 117: „Weltgesellschaftssystem”.

67 From the rich literature, not primarily in European law, see P. Häberle, Das Prinzip der Subsidiarität aus der Sicht der vergleichenden Verfassungslehre, in: Alois Riklin/Gerard Batliner (eds.), Subsidiarität. Ein interdisziplinäres Symposium, Vaduz 1994, 267-310; and for further illumination: Chr. Sachße, Subsidiarität: Zur Karriere eines sozialpolitischen Ordnungsbegriffs, 40 Z.f.SozReform 717-738 (1994); G.F. Schuppert, Selbstverwaltung, Selbststeuerung, Selbstorganisation - Zur Begrifflichkeit einer Wiederbelebung des Subsidiaritätsgedankens, in: 114 Archiv des öffentlichen Rechts 127-148 (1989).

68 Fundamentally, Fr. Böhm, Privatrechtsgesellschaft und Marktwirtschaft, ORDO 17 (1966), 75-151; R. Wiethölter, Art. Bürgerliches Recht, Wirtschaftsrecht, in: A.Görlitz (ed.), Handlexikon Rechtswissenschaft (Darmstadt: WBG 1972), 47-55, 531-539; for recent attempts to revive the concept: F. Bydlinksi, Das Privatrecht im Rechtssystem einer „Privatrechtsgesellschaft”, Wien, New York 1994; *idem*, „Privatrechtsgesellschaft” und Rechtssystem, in: Karsten Schmidt/Eberhard Schwark (eds.), Unternehmen, Recht und Wirtschaftsordnung: Festschrift für Peter Raisch zum 70. Geburtstag (Köln 1995), 7-23; E.-J. Mestmäcker, Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts, in: 10 Rechtshistorisches Journal 177-192 (1991); on this see the discussion in Günther; „Ohne weiteres und ganz automatisch?” (*supra* note 59); with an eye to the new regulatory questions and the changed nature of the carrying out of State tasks see also M. Stolleis, Auferstanden aus der Wende: Die bürgerliche Gesellschaft und ihr Recht?, in: 11 Rechtshistorisches Journal 500-507 (1992), 506 f.; cf.. most recently E.-J. Mestmäcker, Die Wirtschaftsverfassung der EG zwischen Wettbewerb und Intervention, in: Bruha/Hesse/Nowak (ed.), Welche Verfassung für Europa? (Baden-Baden: Nomos 2001), 163-189.

69 This translation ought admittedly to be interrupted by another piece of translation. Thus, one way out of the trap of the transferability of national law into international and transnational social relations might lie in a turn away from an approach based on normative action theory. Thus, instead of complaining about the absence of international consolidation, still less *integration*, one might, with Luhmann, Die Politik der Gesellschaft (*supra* note 66) and Joerges, Rechtssystem (*supra* note 14), 559 note 54, direct the focus towards the areas of *expectation*, i.e. those functional spheres in which formations of standards and rules through learning take place. The question whether identity formations can adequately be addressed in the context of hopes for (EU and other) integration says more about the wealth of prerequisites underlying these integration concepts. For a proposal to reformulate this question using categories of contractual, constitutional and expectational contexts, cf. Zumbansen, Spiegelungen von „Staat und Gesellschaft” (*supra* note **), 37 ff.

70 See e.g. P. Behrens, Weltwirtschaftsverfassung, in: 19 Jahrbuch für neue politische Ökonomie 5-27 (2000); E.-U.Petersmann, Europäisches und weltweites Integrations- und Verfassungsrecht, in: Bruha/Hesse/Nowak (eds.), Welche Verfassung für Europa? (*supra* note 68), 191-209; *idem*, The Transformation of the World Trading System through the 1994 Agreement establishing the World Trading System, in: European Journal of International Law 1996, 161 ff., 189: ‘constitutionalization.’

71 Luhmann, Die Weltgesellschaft (*supra* note 66); E.-O. Czempiel, Kluge Macht. Außenpolitik für das 21. Jahrhundert, München 1999; R. Stichweh, Die Weltgesellschaft (Frankfurt: Suhrkamp 2000); cf. also Joerges, Rechtssystem (*supra* note 14), 559, who speaks of a *global social system*.

framework for a market thought of as healthy and capable of comprehensive self-regulation is what threatens. The theoretical embrace of a concept of 'world society' proposed by Niklas Luhmann as long as thirty years ago has nothing in common with the transfer of free-market ideologies to the global level. Instead of a tacit transfer of nationally learned political patterns to world level, Luhmann deconstructed the central semantic significance of the concept of the 'State' as a traditional ascription formula for the political system, from which was deduced the a simple equating of the 'market' with 'society'. Understanding, instead, the State as a system *within* the social system, permits us to retrace its differentiation⁷² and to arrive at identifying the claims that underpin the (still contemporary) talk of 'State' and 'Society'. Because the aim of research and analysis thus ought to be to better understand newly emerging forms of social activity, *inter alia* as political (self-) government, skepticism should prevail vis-à-vis suggestions of a global constitutionalization where those are mere continuations of dreams for a 'private-law society' going global. Those dreamers can be advised to make themselves (re-)acquainted with debates they might hold outdated, e.g. on the relationship between governmental and private and economic power⁷³, or concerning the tension between the rule-of-law and the social State⁷⁴, as well as the debates carried on in connection with privatizations and the delegation of State powers of action to private actors with the objective of redefining the relationship between State and society.⁷⁵

Ultimately, the disputed issues in contemporary globalization debates appear as nothing less than 'basic questions of one's sense of the State'.⁷⁶ But, as should have become evident, the descriptive formula of 'State and society'

72 Luhmann, *Metamorphosen des Staates* (*supra* note 66); *idem*, *Politische Theorie im Wohlfahrtsstaat* (München und Wien: Olzog 1981).

73 Böhm, *Das Problem der privaten Macht* (1928), in: *idem*, *Reden und Schriften* (Karlsruhe: C.F.Müller 1960), 25-45, *idem*, *Privatrechtsgesellschaft* (*supra* note 68); R. Pound, *The New Feudalism*, 16 *American Bar Association Journal* 553-558 (1932) [also reprinted as *The New Feudal System*, 35 *Commercial Law Journal* 397-403 (1930), 397-403]; H. Kronstein, *Arbitration* (*supra* note 54); R. Wiethölter, *Die Position des Wirtschaftsrechts im sozialen Rechtsstaat*, in: Helmut Coing, Heinrich Kronstein, Ernst-Joachim Mestmäcker (eds.), *Wirtschaftsordnung und Rechtsordnung*, Festschrift für Franz Böhm zum 70. Geburtstag, 1965, 41-62; *idem*, *Privatrechtstheorie als Gesellschaftstheorie?*, in: F. Baur/J. Esser/F. Kübler/E. Steindorff (eds.), *Funktionswandel der Privatrechtsinstitutionen*, Festschrift für Ludwig Raiser zum 70. Geburtstag, (Tübingen 1974), 645-695; Mestmäcker, *Über die normative Kraft privatrechtlicher Verträge*, in: 19 *Juristenzeitung* 441-446 (1964); *idem*, *Der Kampf ums Recht in der offenen Gesellschaft*, in: 20 *Rechtstheorie* 273-288 (1989); *idem*, *Wiederkehr* (*supra* note 68); J. Habermas, *Theorie des kommunikativen Handelns* (Frankfurt: Suhrkamp 1981).

74 Cf. the contributions to Forsthoff (ed.), *Rechtsstaatlichkeit und Sozialstaatlichkeit* (Darmstadt: WBG 1968); Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat* (*supra* note 14), 93 ff.

75 See G.F. Schuppert, *Staatsaufsicht im Wandel*, DÖV 1998, 831-838; *idem*, *Jenseits von Privatisierung und „schlankem“ Staat: Vorüberlegungen zu einem Konzept von Staatsentlastung durch Verantwortungsteilung*, in: Christoph Gusy (ed.), *Privatisierung von Staatsaufgaben: Kriterien – Grenzen – Folgen* (Baden-Baden: Nomos 1998), 72-115; see earlier *idem*, *Rückzug des Staates?*, in: *Die öffentliche Verwaltung* 761-773 (1995)

76 Großmann-Doerth, JW 1929, 3447, cited in Berger (*supra* note 1), 26 note 110.

does not impose itself for dealing with the regulatory relationships associated with globalization. For apart from the fact that beyond and above the nation State the political architecture has been seeking new foundations,⁷⁷ it is impossible to allocate the various actors on the global stage as well as the norms and rules set by them unambiguously to either a private or a public sphere. This demarcation of possibilities of action, hard to put into terms of categories, contains an unsuspected number of possibilities of differentiations and identifications.⁷⁸ Here, experience to date with the difficulties of keeping the law constantly open for new regulatory requirements ought to have sensitized us to rely on *learning-capable experiments* instead of programme-controlled implementation.⁷⁹ Thus, the law of the *lex mercatoria* could be understood as law of the economy organized in decentralized fashion, where this 'economy' cannot appropriately be described by national economic policy positions 'here' and the regulatory claims expressed in the transactions 'there'. It has instead to be assumed that both inextricably interpenetrate, just as can be perceived in national markets. Thus, instead of imploring the birth of a new, qualitatively different law, one ought rather to think of observing the manifold manifestations of transnational actors and their regulations from the viewpoint of a continually *learning proceduralized law*, able to respond to the development of autonomy by forming standards for sub-areas, and appropriately sensitive contextual regulations.⁸⁰

77 See e.g. J.N. Rosenau and E.-O. Czempiel (eds.), *Governance Without Government: Order and Change in World Politics*, Cambridge 1992; Rosenau, *Along the Domestic-Foreign Frontier - Exploring Governance in a Turbulent World*, Cambridge 1997; for a critique of such 'escape routes', see Sassen, *Globalization and Its Discontents*, New York 1998.

78 On this see e.g. Engel, *A Constitutional Framework for Private Governance*, Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter, Bonn 2001/4; see *idem*, *Hybrid Governance Across National Jurisdictions as a Challenge to Constitutional Law*, Preprint, *id.*, 2001/4.

79 On this see primarily Ladeur, *Postmoderne Rechtstheorie* (*supra* note 36); *idem*, *Das Umweltrecht der Wissensgesellschaft* (Berlin: Duncker & Humblot 1995); *idem*, *Negative Freiheitsrechte* (*supra* note 36); in this connection also Gerald Spindler, *Market Processes, Standardization, and Tort Law*, in: 4 *European Law Journal* 314-336 (1998), at 317: 'The fundamental hypothesis underlying the substitution of legal norms by private standards is that we can leave much of the juridification task to market forces as markets tend to harmonise standards in an efficient manner. The democratic control of the sovereign by parliament is replaced by markets that select efficient private standards and eliminate 'bad' ones.'; see *ibid.* 332 f. on the confrontation of information and standards of industry with those of private consumer organizations and standardization organizations, with the effect of continual rechecking of available expert knowledge. This also gives the State (or else the EU) a quite new role '[D]eregulation in favour of private governance is perfect in the sense that the state limits its activity to the setting of an indispensable framework of rules.' (*ibid.*, 333)

80 From this viewpoint the focus would no longer be on a sharp distinction between *lex mercatoria* and national law but, instead on a better communication between transnational economic law and the materialized standards developed within the nation State; on this see Joerges, *Vorüberlegungen* (*supra* note 14), 26; on the basis of the linkage between proceduralization and materialization cf. Wiethölter, *Materialisierungen und Prozeduralisierungen* (*supra* note 36) *idem*, *Proceduralization of the Category of Law*, in: Joerges/Trubek (eds.), *Critical Legal Thought: An American-German Debate*, Baden-Baden 1989, 501-510; see also Teubner, *Reflexives Recht*, ARSP 1982, 13-59; Ladeur, *Postmoderne Rechtstheorie* (*supra* note 79); *idem*, *Das Umweltrecht der Wissensgesellschaft* (*supra* note 79); *idem*, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation* (*supra* note

III. TRANSLATING CONCEPTIONS OF GOVERNANCE

In order to better assess the task of designing models of governance that are suitable to a decentralized world society, a short-circuiting of developments within and beyond the nation State is needed. At least three major developments can be identified on the level of nation States which meet with our observations of globalization: these developments can be seen as correlatives in shaping both the structure and our understanding of governance. The continuing fragmentation and diversification of legal and political regulatory areas, the privatization of State action and, finally, the pluralisation of contexts of societal self-organization characterize contemporary issues of political regulation, state intervention and governance – both public and private. Political action is no longer confined to the ‘State’: instead, social spheres crystallize out *below* and *alongside* formalized State action in various ways as ‘contexts of disposition and decision’ in which binding arrangements are arrived at for those concerned.⁸¹ Simultaneously, the opening up of the nation State towards international cooperation can be seen not only as prompting a loss of influence and sovereign powers but, rather, as a sign of the expansion and proliferation of agendas for political action.⁸² The range of tasks to be handled by international, transnational or supranational organizations and associations can be read as rephrasing the structural changes undergone by a exclusively hierarchically organized State towards a more cooperative, supervisory State, which can no longer be characterized with reference only to its institutional body, but with regard to the wide range of tasks it

36); most recently Günther/Randeria, *Recht, Kultur und Gesellschaft* (*supra* note 15), 25 with a reference to David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, in: *Utah L. Rev.* 545 (1997); cf. also R. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, in: 144 *Univ. Pa. L. Rev.* 1643-1696 (1996).

81 Examples of this range from religious or ethnic and cultural associations; see, e.g., G. Britz, *Kulturelle Recht und Verfassung: über den rechtlichen Umgang mit kultureller Differenz* (Tübingen: Mohr 2000; *eadem*, *Der Einfluss christlicher Tradition auf die Rechtsauslegung als verfassungsrechtliches Problem?*, in: *Juristenzeitung* 2001, 1127-1133; see for a discussion of the Traditional Slaughter Decision of the German Federal Constitutional Court of 15 January 2002: 3 *German L.J. No. 2* (1 February 2002), available at: <http://www.germanlawjournal.com> (search: slaughter); For assessments of border-crossing investment and consortium agreements: comprehensively: E. Schanze, *Investitionsverträge* (*supra* note 3).

82 Günther/Randeria, *Recht, Kultur und Gesellschaft* (*supra* note 15), 85: ‘What would be necessary, in contrast to the anti-State perspective of some legal pluralism tendencies, would be a comprehensive analysis of law as a political phenomenon and an understanding of the State as the central ground, even if still fought over. In conditions of economic, political and legal globalization, the State and the international system should be analysed as a complex of social fields in which governmental and non-governmental, local and transnational social relations interact and conflict with one another’; see also Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz* (Berlin: Duncker & Humblot 1998); *idem*, *Die Zukunft des Völkerrechts im Zeitalter der Globalisierung*, in: 37 *Archiv des Völkerrechts* 253-282 (1999); E. Denninger, *Vom Ende nationalstaatlicher Souveränität in Europa*, in: 56 *Juristenzeitung* 1121 (2001).

assumes.⁸³ This implies that issues of regulatory powers will continue to arise with the same urgency we have long been accustomed to in administrative science and theory of the State.⁸⁴

1. The Political Underpinnings of *Lex Mercatoria*

There cannot of course be a one-to-one transfer of familiar legal principles to phenomena of transnational sovereignty and governance.⁸⁵ But, the globalization debate can be understood as a discourse on ways to legitimize political order in a world, where even its depiction as being made up 'open constitutional States'⁸⁶ reflects an increasing understanding of our world as a network of global communications. It is within this discourse that we repeatedly face fundamental questions of a constitutional political order – not despite but because of ever new actors, instruments and arenas.⁸⁷

Although the emerging legal reality of global and transnational governance regimes and its protagonists cannot without further ado be displayed on the traditional map drawn up with traditional conceptions of politics and the market, 'State and society', 'public' and 'private' law, these conceptions continue to shape our contemporary efforts to design political order beyond the confines of the nation State. And the heritages of the Nation State can in fact be traced back into the heart of our fundamental legal understandings. On this field, an ubiquitous economic interpretation of globalization threatens to forcefully merge with a definite and reductionist private-law

83 Günther/Randeria, *Recht, Kultur und Gesellschaft* (*supra* note 15), 17: speaking of a '...rediscovery or at least...reevaluation and enhanced...legitimation of State functions...'; see D. Grimm (ed.), *Staatsaufgaben* (Baden-Baden: Nomos 1994); U. Di Fabio, *Privatisierung und Staatsvorbehalt*, in: JZ 1999, 585-592; Günther, *Der Wandel der Staatsaufgaben und die Krise des regulativen Rechts*, in: Dieter Grimm (Hrsg.), *Wachsende Staatsaufgaben - sinkende Steuerungsfähigkeit des Rechts*, Baden-Baden 1990, 51-68.

84 Cf. once again Günther/Randeria, *Recht, Kultur und Gesellschaft* (*supra* note 15), 49-51, with reference to the constitutive role of the 'security State' as holder of the monopoly of force in the transnationalization of the various functional systems; on the concept of the security State or 'protective State', cf. earlier H.-A. Der Schutz-Staat. *Rechtssoziologische Skizzen in dunkler Zeit*, Baden-Baden 1995; *idem*, *Der Schutz-Staat geht um*, in: 46 *Juristenzeitung* 744-747 (1991); see also R. Pitschas, „Schutzstaat“ oder Sicherheit als gesellschaftlicher Mehrwert? – Staatliche Integration als nationaler Wertekonflikt, in: 'Neues Polizeirecht'. 121 *Speyerer Arbeitshefte* 157-168 (1999); and from the US debate, M. Taggart (Ed.), *The Province of Administrative Law*, 1997; see specifically J. Freeman, *Symposium: The Contracting State*, in: 28 *Fla. St. U. L. Rev.* 155 (2000), with further references; cf. also *idem*, *The Private Role in Public Governance*, in: 75 *N.Y.U. L. Rev.* 543 (2000).

85 See D. Schmidtchen, *Territorialität des Rechts, Internationales Privatrecht und die privatutonome Regelung internationaler Sachverhalte*, in: *RabelsZ* 59 (1995), 56-112, 69; M. Streit/A. Mangels, *Privatautonomes Recht und grenzüberschreitende Transaktionen*, in: *ORDO* 47 (1996), 73-100, 74, 82 ff.

86 See U. Di Fabio, *Das Recht offener Staaten. Grundlinien einer Staats- und Rechtsheorie* (Tübingen: Mohr 1998).

87 See St. Hobe, *Der kooperationsoffene Verfassungsstaat* (Berlin: Duncker & Humblot 1998); Di Fabio, *Das Recht offener Staaten* (*supra* note 86); see also the Interview with FCC Justice Di Fabio in 2 *German Law Journal* Nr. 9 (1 June 2001), at <http://www.germanlawjournal.com> <http://www.germanlawjournal.com/>.

conception: both identify the private ordering mechanisms in transnational commerce as a noble reflection of societal self-government by embracing a matter-of-fact affirmation of *lex mercatoria* as the expression of private, autonomous, market-related power. This underlying conception of an ostensibly pure, private law, free from political intervention and influence, is directly derived, however, from a nineteenth-century perception of an alleged divide between an *apolitical* market society on one side and the State on the other. In this polar opposition, the State is ideologically portrayed as merely setting the framework conditions for economic exchange while supposedly being able to remain in firm distance from legitimacy claims and society's appropriation of political power. The true story of the State's systematic involvement in the market will be told – now historically - of having begun much later, usually connected with the rise of the Interventionist and Welfare State towards the end of the nineteenth century.⁸⁸ The diabolic thrust of this narrative, however, remains: the Interventionist State, while increasingly getting pulled into society's struggles over market power, cartels, employment and social security,⁸⁹ continues to be seen as a separate entity. This imagery continues to guide the interpretation and understanding of transnational phenomena, regardless of what we, by now, could have learned about the mutual involvement of public law and private law, which must in fact be seen as an irreversible historical experience.

The distance of legal science from the domestic and international manifestations of the dissolving liberal order, associated with the theoretical and methodological victory of positivism in the late nineteenth century, favoured the fixation of dogmatic traditions which in their ideas moved increasingly further away from social reality.⁹⁰ International law understood

88 See M. Stolleis, *Der lange Abschied vom 19. Jahrhundert*, Berlin, New York 1997; *ibid.*, Entstehung des Interventionsstaates (*supra* note 64); Joerges, Rechtssystem (*supra* note 14), 562; about this 'misunderstanding' of the 19th Century, see also Brüggemeier, Probleme einer Theorie des Wirtschaftsrechts, in: Assmann/Brüggemeier/Hart/Joerges, *Wirtschaftsrecht als Kritik des Privatrechts*, Königstein 1980, 41: „Das Paradoxon, mit dem es bürgerliches Privatrecht in Deutschland zu tun hat, ist, daß es zwar in der hier explizierten Weise den Begriff der bürgerlichen Gesellschaft voraussetzt, diesem Begriff aber nie ein reales soziales Substrat entsprochen hat.“; see also K.W.Nörr, *Zwischen den Mühlsteinen* (Tübingen: Mohr 1988); *ibid.*, *Die Leiden des Privatrechts* (Tübingen: Mohr 1994); for a discussion of Nörr, see Zumbansen, *Ordnungsmuster* (*supra* note 14), 260-7.

89 On this see H.Backhaus-Maul/Th.Olk, Von Subsidiarität zu „outcontracting“: Zum Wandel der Beziehungen von Staat und Wohlfahrtsverbänden in der Sozialpolitik, in: Wolfgang Streeck (ed.), *Staat und Verbände*, PVS-Sonderheft 25, Opladen 1994, 100-135; F.Hegner, Organisations-„Domänen“ der Wohlfahrtsverbände: Veränderungen und unscharfe Konturen, in: *Zeitschrift für Sozialreform* 38 (1992), 165-190; H.-J.Puhle, Vom Wohlfahrtsausschuß zum Wohlfahrtsstaat, in: Gerhard A. Ritter (ed.), *Vom Wohlfahrtsausschuß zum Wohlfahrtsstaat. Der Staat in der modernen Industriegesellschaft*, Köln 1973, 29-68.

90 Joerges, *Vorüberlegungen* (*supra* note 14), 14; the decisive discussion on Positivismus took place during the 1926 Convention of Public Law Scholars and Teachers in Münster; see the analysis by W. März, *Der Richtungs- und Methodenstreit der Staatsrechtslehre, oder der staatsrechtliche Positivismus*, in: Knut Wolfgang Nörr/Bertram Schefold/Friedrich Tenbruck (eds.), *Geisteswissenschaften zwischen Kaiserreich und Republik. Zur Entwicklung von*

in as it were pre-legal or supra-legal terms, primarily as marked by the structural principle of private autonomy, had, because of its State-centredness and blindness to individual, private economic actors, very little to say about internationalizing economic relations. The regulation of private economic relations was thought of as being for each State in its own framework, while international economic law concerned States, not individuals. Positivism brought a one-sided orientation in international law towards foreign policy, while simultaneously confining private international law to a *champ étatique*. Here, its national roots called into question its truly international claims, so that calling private international law 'international' eventually seemed inappropriate⁹¹.

Little to no attention was paid to the social reality of private law, as it was only understood as the law of economic transactions among equal market participants. Instead, the free nature of private law was seen as 'given', as 'a matter of fact,' thereby (mis-)understood as an adequate description of its practice. This carefree liberal attitude thus remained domestically decisive in theoretical terms, while its correlative can easily be identified: international law took the individual for granted but excluded him from the legal order. Domestic Private Law and Public International Law pictured the individual as a self-sufficient and autonomous actor, paying, however, no heed to his concrete needs or claims. While positivism led to domestic private law shutting its eyes to a market reality characterized by cartels, monopolies and associations and social-welfare politics, a positivistically thinking public international law focussed on the political existence of sovereign nation States in spite of the abundant proliferation of transnational economic transactions among States and private parties. Just as border crossing economic relations were not taken as an occasion for self-reflection of international law,⁹² so there was no fundamental self-criticism of private law

Nationalökonomie, Rechtswissenschaft und Sozialwissenschaft im 20. Jahrhundert (Stuttgart 1994), 75-133; see also Chr. Möllers, Braucht das öffentliche Recht einen neuen Methoden- und Richtungsstreit?, in: 99 VerwArch. 187-207 (1999).

91 Joerges, Vorüberlegungen (*supra* note 14), 16; in this connection see also the criticism in M. Streit/A. Mangels, Privatautonomes Recht, in: ORDO 1995, 78 ff.; see also R. Wiethölter, Begriffs- oder Interessenjurisprudenz (*supra* note 62), 215: '...private international law – national in blood, international in soul...'. On the interactions between the internationally oriented, but always oriented towards a community of *States*, public international law and private international law, see the brilliant study by Robert Wai, Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization, Col. J. Transnatl. L. (2002 – forthcoming), Ms. p. 28: 'The paramountcy of the municipal over the international in private international law influenced very much the manner in which public policy goals are advanced and argued in private international law. Public policy goals could be advanced, but they had to be argued as domestic public policy.'

92 R. Wiethölter, Begriffs- oder Interessenjurisprudenz (*supra* note 62), 256 ff., also gives private international law a poor report card because in the area of border-crossing economic transactions it continues to be oriented to ward the formality of civil formal law, without taking account of the 'economic constitutional' dimension of economics, political control and political framework conditions ('political economy') in a mixed economy, for instance in relation to the hard-to-classify legal quality of multi-national enterprises, *ibid.*, 258-260. Here Wiethölter, almost anticipating the

in the light of the radicalization of private economic exchange transactions and the publication of private law by labour and social law and interventionist policy. Although the social foundations of these areas of law (private, labour, social law) were the same, the presumed boundaries between the disciplines were never seriously called into question.⁹³ With labour, social and constitutional law understood (as is still the case⁹⁴) as mere emergency assistance programs to an otherwise intact private law, the hereby conveyed idea of private law had already moved far away from social reality. Private law thus acquired a presumably free status of purity and untouchability. From this viewpoint, admittedly, positivism's own positivism can rightly be doubted, since the appeal to its lack of preconditions is nothing but a value-oriented shift in direction, the main objective of which consists in denying this very preliminary assumption⁹⁵. This certainly meant missing the opportunity to take a fundamental challenge to legal science from 'social phenomena' as an opportunity for theoretical and practical self-criticism.⁹⁶

current debate on codes in the area of corporate governance, was already talking of the "multi-nationals' conduct codes". But whether these are really to be the decisive bearers of rights, makers of laws and actors in market society depends on how far the pressing questions of 'justice' in the new circumstances can still be raised: 'In *nuce*, it is the – old, and new – alternative between a 'private-law society' and a 'political society' (ibid., 259). In private international law in the 21st century that is starting, the necessity continues to be recognised of taking these new actors in lawmaking into account; on this cf. J. Basedow, The Effects of Globalization on Private International Law, in: *idem*/T. Kono (ed.), Legal Aspects of Globalization. Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy, Kluwer Law International 2000, 1-10, 6 ff., who wants to see the term 'private international law' replaced by 'conflict of laws', because of the likely increase in relevant private lawmaking even below the level of the nation States.

93 But see R. Wiethölter, *Rechtswissenschaft* (Frankfurt: Fischer 1968), 168; M. Bullinger, *Öffentliches Recht und Privatrecht, Studien über Sinn und Funktion einer Unterscheidung* (Stuttgart: Klett 1968), last chapter, where Bullinger addresses the 'poor' chances for a common law'; *idem*, Die funktionelle Unterscheidung von öffentlichem Recht und Privatrecht als Beitrag zur Beweglichkeit von Verwaltung und Wirtschaft in Europa, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Baden-Baden: Nomos 1996), 239-260; by contrast, a sharp separation is insisted on by M. Fuchs, *Zivilrecht und Sozialrecht* (München: Beck 1992); *idem*, *Sozialrecht und Zivilrecht*, in: VSSR 1990, 161-189 with further references.

94 See, e.g., U. Diederichsen, Die Selbstbehauptung des Privatrechts gegenüber dem Grundgesetz, *Jura* 1997, 57-64, 64, according to which intervention by the Federal Constitutional Court in private law is justified only 'in genuine extreme cases'. For a discussion and references of the most recent case development see 2 German L. J. No. 6 (1 April 2001) and 2 German L.J. No. 15 (15 September 2001), both available at: <http://www.germanlawjournal.com> (search: marital). See the thorough elaboration of this theme in: Michael Bäuerle, *Vertragsfreiheit und Grundgesetz* (Baden-Baden: Nomos 2001); Matthias Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts* (Tübingen: Mohr 2001).

95 On this see Wiethölter, *Begriffs- oder Interessenjurisprudenz* (*supra* note 62), 228-235, 234: 'It does not help any further to assess our pre-1945 past as 'positivist' and post-1945 as 'non-positivist'. A positivism worthy of the name from today's viewpoint has not existed in recent legal history (yet). A more useful approach, and more promising for the future, is probably how 'positive' law can at the same time be guaranteed to be 'right' law'.

96 The replacement of the term private law by economic law, with the aim of characterizing the overlaps and transformations arising between private law and public law, has not to date really managed to make headway.

2. Law's Speechlessness

The questions pressing in recent years, and now drastically urgent, of the treatment in public international law of non-State actors can be attributed to this starting position.⁹⁷ The scandalization of human-rights violations perforating State frontiers and the universalization of human rights building thereon⁹⁸, at first sight seems to raise fewer legal theoretical problems than a 'law of the international economy'. For the presumably better-known human rights and their codification in international treaty texts⁹⁹ can only briefly deceive one as to their abstractness vis-à-vis competing validity claims. However immediately obvious the principles of human dignity and private autonomy may always have seemed in liberal theory, we are nonetheless very far removed from a worldwide law of human rights or a global economic law.

What does this mean for our conceptualization of the 'soft' law of transnational economic relations, and its rules and institutions? Against the horizon of the conceptual separation of 'State and society', the herefrom deduced body of 'private law' is from the outset denied any claim to carrying out *public* tasks.¹⁰⁰ Its 'de-statalization' and rebirth as *lex mercatoria* contains its proverbial privatization¹⁰¹. Within this private law, no room seems to be left for the carrying out of tasks for the common weal. This implies a continuation of the misunderstandings regarding formal private law¹⁰² we described above. By seeing private law solely as the law of exchange between equally entitled, autonomous economic actors, notice is taken

97 On this see D. Thürer, *The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State*, in: Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law. International Law – From the Traditional State Order Towards the Law of the Global Community*, Berlin 1999, 37-58.; see also St. Hobe, *Individuals and Groups as Global Actors: The Denationalization of International Transactions*, 115-135; Zumbansen, *Die vergangene Zukunft des Völkerrechts* (*supra* note **) 59 ff., with further references.

98 Kl. Günther, *Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem*, in: Kl. Günther/L. Wingert (eds.), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit. Festschrift für Jürgen Habermas*, Frankfurt 2001, 539-567, 540; *idem.*/Randeria, *Recht, Kultur und Gesellschaft* (footnote 17 above), 16 ('contested universals'), 45; on scandalization cf. also Teubner, *Privatregimes* (footnote 17 above); A. Bianchi, *Globalization of Human Rights: The Role of Non-state Actors*, in: G. Teubner (ed.), *Global Law without a state*, Dartmouth 1997, 179-221.

99 This is admittedly an improper simplification: on the complexity of human rights see e.g. R. Kreide, *Soziale Menschenrechte und Verpflichtungen*, in: Anderheiden/Huster/Kirste (eds.), *Steuerungsfähigkeit des Rechts unter den Bedingungen der Globalisierung*, ARSP-Beiheft 79 (2001), 121-144; see also the papers in: Philip Alston (ed.), *The EU and Human Rights*, Oxford 1999.

100 Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat* (*supra* note 14), 270 ff.

101 Joerges, *Rechtssystem* (*supra* note 14), 562: 'The chain of exclusions starts by imagining the problems concerned as exclusively private disputes'. This is then, consistently, associated with the call for a world anti-trust authority supposed to protect the 'market' in the context of a 'world internal policy'. On this see Joerges, *Vorüberlegungen* (*supra* note 14), 31.

102 See Brüggemeier, *Probleme einer Theorie des Wirtschaftsrechts* (*supra* note 88); see already Wiethölter, *Art. Wirtschaftsrecht*, in: A. Görlitz (ed.), *Handlexikon der Rechtswissenschaft* (Darmstadt: WBG 1972), 572 f.

neither of its transformations by public law nor of its manifold materializations and politicizations.¹⁰³ To the degree that a connection between the Welfare State and private law actually is created, the image is painted of malformations and ‘breaches’ of a private law presumed to be originally healthy¹⁰⁴ – a state it might have been last in Kant’s understanding.¹⁰⁵

It may be that this heritage places too heavy a burden on any attempt to construct an appropriately sensitive, learning-capable economic law which would have to provide answers to the eminent questions of international contract law¹⁰⁶, tort¹⁰⁷ or company law¹⁰⁸ as well as for the legal riddles posed by cross border co-operation, e.g. in funding of development-policy infrastructure.¹⁰⁹ That we cannot domesticate and discipline these questions within the boundaries of “private law”, “private international law”¹¹⁰ or “public international law” is not only visible in proliferating “Trade and...” debates in the WTO.¹¹¹

3. Methodological Biases

For private international law, the contractual agenda which accompanies border-crossing transactions implies a radical expansion of connection

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- 103 Günther, „Ohne weiteres und ganz automatisch“? (*supra* note 59); Habermas, Faktizität und Geltung (*supra* note 34); Zumbansen, Ordnungsmuster (*supra* note 14), 209 ff.
- 104 Cf. Nörr, Die Leiden des Privatrechts (*supra* note 88).
- 105 On this see Maus, Freiheitsrechte und Volkssouveränität. On Jürgen Habermas’ Reconstruction of a System of laws, in: 26 Rechtstheorie 507-562 (1995).
- 106 Cf. e.g. Kötz/Flessner, Europäisches Vertragsrecht (I), Tübingen 1996; O.Lando/H.Beale (eds.), The Principles of European Contract Law, Dordrecht 1995.
- 107 Chr. von Bar, Gemeineuropäisches Deliktsrecht, München 1996; cf. also recently Jan von Hein, Das Günstigkeitsprinzip im internationalen Deliktsrecht, Tübingen 1999; Spindler, Market Processes (*supra* note 79).
- 108 See St. Rammeloo, Corporations in Private International Law, Oxford 2001; W. Powell, The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise, in: P. Dimaggio (ed.), The Twenty-First Century Firm. Changing Economic Organization in International Perspective (Princeton: P.U.P 2001), 33-68; R. Whitley, The Institutional Structuring of Business Transactions, in: R. Appelbaum/W. Felstiner/V. Gessner (eds.), Rules and Networks (*supra* note 3), 73-99; R. Gilson, Globalizing Corporate Governance: Convergence of Form or Function, 49 Am. J. Comp. L. 329 (2001); J.W. Cioffi/St.S. Cohen, The state, law and corporate governance: the advantage of forwardness, in: CORPORATE GOVERNANCE AND GLOBALIZATION (St.S. COHEN & G. BOYD EDS., EDWARD ELGAR: CHILTENHAM, UK/NORTHAMPTON, MA, U.S.A.) 307 (2000); W.R. Emmons/F.A. Schmid, Corporate governance and corporate performance, *ibid.*, 59; R. La Porta/F. Lopez-de-Silanes/A. Shleifer/R. Vishny, Legal Determinants of external finance, 52 Journal of Finance 1131 (1997); D.Hanf/P.Zumbansen, Harmonizing Corporate Governance Regimes in Europe (work in progress 2002).
- 109 Joerges, Rechtssystem (*supra* note 14), 563.
- 110 Berger, Kodifizierung (*supra* note 1), 9 f.: ‘It is a main concern of the theory of transnational economic law to exclude the imponderables of national conflict of laws by avoiding the ‘leap into the dark’ of the conflict-of-laws rules of a private international law that has fallen into crisis’. (footnotes omitted); Günther/Randeria, Recht, Kultur und Gesellschaft (*supra* note 15), 22: ‘The highly differentiated and complex systematics of conflict of laws [in private international law, P.Z.] has its counterpart in an extreme reticence on all questions involving content or legitimation.’
- 111 Cf. recently Petersmann, Europäisches und weltweites Integrations- und Verfassungsrecht (*supra* note 70); see also Bogdandy, Law and Politics in the WTO (*supra* note 58).

points for conflict of laws and specialized standards. “Neither the contractual consignment of X against a consignment of Y nor the incorporation of a firm in A or B and so forth but, for instance, the set up of a manufacturing plant in legal form X with gradual conversion of capital involvement, the partial supply of technical know-how, the training of management staff within the country, purchase commitments to be entered into and flanking safety agreements, State subsidies and international agreements – it is a series of programmes like this that define a global *organization* of ends and means in which all the interests involved, specifically because of their procedurally but not substantively fixed combination, each find their *suum*. Involved at the core are processes of transformation of contract programmes into organizational and procedural programmes.”¹¹² This shift in focus from bi- and even multilateral contractual relations to clusters, organizations and networks of interaction creates a link between a contract law understanding held in private international law and movements in (domestic and international) economic law. The readiness of private international law to approach complex border crossing commercial transactions and self-regulatory mechanisms of global legal entrepreneurs¹¹³ is both challenge and promise. This implies first of all a necessity to clarify the relation of private international law to this ambiguously perceived body of transnational law. In methodological respects the distinction seems adequately clear, since PIL must by nature be concerned with bringing a legal dispute under a national legal system, while transnational economic law wishes to be the law of economic situations unfolding beyond the confines of national frontiers.¹¹⁴ One paradoxical problem with PIL is accordingly its qualifying link with national law, which in the event of a conflict of laws it at best seeks to balance out, but not to *transcend* in favour of a different, overall assessment. The emerging pressure on this conflict-of-laws approach can be seen in, for instance, complex contracts where the establishment of their supposed ‘centre of gravity’ would run counter to their very specificity as complex contractual relations.¹¹⁵

These movements take place against the background of a changed market reality due to structural shifts in industrial and post-industrial production with far-reaching implications for the institutional and legal design of the

112 Wiethölter, Begriffs- oder Interessenjurisprudenz (*supra* note 62), 260.

113 See Dezalay/Garth, Dealing in Virtue (*supra* note 12; F. De Ly, Lex Mercatoria (New Law Merchant): Globalisation and International Self-regulation, in: Appelbaum et al. (eds.), Rules and Networks (*supra* note 3), 159-188.

114 Lehmkuhl, Transnational Commercial Arbitration (*supra* note 9), 15 f., 19; Gaillard, Transnational Law (*supra* note 21), 54; Lowenfeld, Lex Mercatoria (*supra* note 8), 85; It cannot therefore be surprising that the link with PIL is increasingly getting lost in codifications of arbitration law to be observed internationally in recent years.

115 Berger, Kodifizierung (*supra* note 1) 10 f.

corporation and its transactions.¹¹⁶ Furthermore, the fading of neo-liberal faith in the nation State's provision of a stable framework for economic action and the "exhaustion of utopian energies" of the Welfare-State (Habermas) fuel the development of new alliances, networks and legal, social and political relations.¹¹⁷ It appears thus that we make our observations of globalization and the associated changes in law always against the background of our specifically confined legal and political experiences. In normative terms this means that a discussion of specific governance phenomena 'beyond the nation State'¹¹⁸ has to look beyond the specific *challenges* and *self-descriptions* of those active in this area in order not from the outset to cut itself off, by the weight of empiricism, from prospects of a more exact analysis of the ordering models and their functions as they are often portrayed.¹¹⁹ The recurring promise of transnational law as the autonomous (private) law of autonomous (world) citizens thus requires a comprehensive, overarching view of the regulatory requirements and conditions of law beyond the nation State. Only then can transnational law be more than mere market law, laid down by MNCs¹²⁰ without participation or input by those who have - in the context of lengthy and exhaustive national learning experiences - sought after a constitution for society through and with law.

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- 116 See Ch. Sabel/M. Piore, *The Second Industrial Divide* (New York: Basic Books 1984); see; also P.Hirst/J.Zeitlin, *Flexible Specialization: Theory and Evidence in the Analysis of Industrial Change*, in: J.Rogers Hollingsworth/Robert Boyer (eds.), *Contemporary Capitalism. The Embeddedness of Institutions* (Cambridge: C.U.P. 1997), 220-239; Benjamin Coriat, *Globalization, Variety, and Mass Production: The Metamorphosis of Mass Production in the new competitive Age*, *ibid.*, 240-264; P. Drucker, *From Capitalism to Knowledge Society*, in: Dale Neef, *The Knowledge Economy* (Woburn, MA: Butterworth Heinemann 1998), 15-34; W. Powell, *The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise*, in: P. Dimaggio (ed.), *The Twenty-First Century Firm. Changing Economic Organization in International Perspective* (Princeton: P.U.P 2001), 33-68; R. Whitley, *The Institutional Structuring of Business Transactions*, in: R. Appelbaum/W. Felstiner/V. Gessner (eds.), *Rules and Networks* (*supra* note 3), 73-99.
- 117 See J. Habermas, *Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien*, in: *id.*, *Die neue Unübersichtlichkeit* (Frankfurt: Suhrkamp 1985), 141-163; see also the references in the preceding note.
- 118 See M.Zürn, *Regieren jenseits des Nationalstaates* (Frankfurt: Suhrkamp 1998); *ibid.*, *Sovereignty and Law in a Denationalised World*, in: Appelbaum et al. (eds.), *Rules and Networks* (*supra* note 3), 39-39-71.
- 119 Joerges, *Rechtssystem* (*supra* note 14), 552. At the same time optimism would be out of place: 'The objection that a legal theory considers connections only briefly need not oppose their success' (*ibid.*, 563); *idem*, *Vorüberlegungen* (footnote 7 above), 41: 'The theory of transnational law narrows its object of study by concentrating on an approach corresponding to one of the viewpoints of those directly involved. It cannot take sight of just those themes that have both nationally and internationally determined the transformation of private law into economic law: checks on economic power and the political control of the economy.'
- 120 M. Lutter, *Das europäische Unternehmensrecht im 21. Jahrhundert*, ZGR 2000, 1: 'Enterprises are the motors of the European internal market'; St. Rammeloo, *Corporations in Private International Law* (*supra* note 108), 3: 'It's beyond dispute now that corporations have replaced states as the most important makers of waves in the world's economy.'

4. Governance by Contract

In this respect, obviously the vigorous private legal production¹²¹ *between* international law and national economic law deserves special attention. Global contracts make the impossible possible: they themselves create their non-contractual pre-conditions. They do this by hierarchicalizing, temporalizing and externalizing.¹²² The hierarchicalization is brought about by and from within the contract as the contract itself serves to lay down the law to be applied to it. Recourse to 'external law' no longer seems necessary.¹²³ As a consequence, the contract's law must contain two things that ought at first sight to be separated. First, the contract regulates an agreement on primary obligations, but secondly it must on this view also contain the law of secondary obligations and defects of performance. Its regulatory scope is thus enormous. The traditional defensive reaction would consist in casting doubt on this law-generating contractual practice because of its presumed incompleteness. How, for example, can the contracting parties think of all the necessary regulations that are to find application to a cessation of the basis for the transaction that both sides have to name and that has to be recognizable as such? Would this not presuppose the availability of a similar background of experience regarding the basis and limits of this legal institution, in order even to design the contract for such possibilities? The answer, however, is that it is no longer only the individual contract which is involved, or a complex, multi-polar contractual web and the rules contained in it. Instead, the transnationally practised law of contract continually produces norms that precipitate out in the arbitration rulings of the tribunals and in the list of organizations as a true 'secondary law'. Hereby, the law of contract is being brought into a lasting reflexive relationship to its law-making performance so far.

This has direct effects another function of transnational contracts, the temporalization they bring about. This seems at first sight to be a

121 On this most recently Chr. Engel, Hybrid Governance Across National Jurisdictions as a Challenge to Constitutional Law (*supra* note 78); cf. also F. De Ly, Emerging New Perspectives Regarding Lex Mercatoria, in: Festschrift Sandrock (*supra* note 40), 179-203, 181 ff., with a concise introduction to the schools formed at the outset of the lex mercatoria debate (between Schmitthoff – complementation and supplementation of international and national law by self-made law – and Goldman – autonomous transnational economic law); cf. Cl. Schmitthoff, Das neue Recht des Welthandels, in: 28 *RabelsZ* 47-77 (1964); B. Goldman, Nouvelles réflexions sur la Lex Mercatoria, in: *Études de droit international en l'honneur de Pierre Lalive*, Basel 1993, 241-255; H.-J. Mertens, A self-applying system beyond national law?, in: G. Teubner (Ed.), *Global Law Without A State* (Dartmouth: 1997), 31-43; F. Juenger, American Conflicts Scholarship and the New Law Merchant, in: 28 *Vand. J. Transnat. L.* 487-501 (1995).

122 G. Teubner, Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus, *Rechtshistorisches Journal* 15 (1996), 253-290, 274 ff. [Engl.: Global Bukowina: Legal Pluralism in the World-Society, in: Gunther Teubner (ed.) *Global Law Without A State*. Dartmouth: London 1996, 3-28].

123 See here Hugh Collins, *Regulating Contracts* (Oxford/New York: O.U.P. 1999), 142 f.; St. Macaulay, Non-contractual Relations in Business: A Preliminary Study, 28 *American Sociological Review* 55 (1963); E. Schanze, *Investitionsverträge* (*supra* note 3), 169-172.

characteristic familiar from long-term and relational contracts that by now are to be regarded as an established form of contract.¹²⁴ Yet there is an important distinction to be made. Within a relational contract what is involved is the 'shift from discrete to relational' that is, the shift in perspective from a one-off contractual exchange relationship towards a flexible, 'soft', even 'informal' arrangement in which the possibilities of 'adapting the contract' desired and claimed by the parties are suitable for making the boundaries between contract and society, between exchange and co-operation, vanish to the point of unrecognizability.¹²⁵ A lasting contractual relationship develops, out of its execution and realization, quasi-social qualities, thereby opening up a more or less flexible framework for adapting and shaping the contract *through time*. While the explanatory approaches in legal theory for these phenomena concentrate on 'informality', 'non-contract' and 'trust'¹²⁶, the temporalization idea meant here aims further. A common law of contract is in the process of emergence. A contract, by pointing to contracts of the past but also to future contracts as possible conflict solutions, including the available mutually competing general terms of business and the decisions of arbitration tribunals, means not just that the individual contract is a building block of transnational law, but that the latter is depicted within it.¹²⁷

The third function of contracts, externalization, ultimately comes about through the fixing and confirmation in the contract of the very institution that will, if necessary, monitor its implementation. The arbitral tribunal invoked here is first of all authorized by the contract.¹²⁸ This self-reflexivity leads to a divergence of an 'official' and a 'non-official' version of global law,

124 See the fundamental text by Macaulay, Non-contractual Relations in Business (*supra* note 123); I. Macneil, Contracts: Adjustment of Long-Term Economic Relations under Classical, NeoClassical, and Relational Contract Law, in: 72 Nw. U. L. Rev. 854 (1978); *id.*, Relational Contract: What we do and what we do not know", 1985 Wisconsin Law Review 483-525; E. Schanze, Symbiotic Contracts: Exploring Long-Term Agency Structures Between Contract and Corporation, in: Christian Joerges (ed.), Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States, Baden-Baden 1991, 67-103; *idem*, Symbiotic Arrangements, in: The New Palgrave Dictionary of Economics and the Law, Vol. 3, Basingstroke 1998, 554-559; on this cf. also Joerges, Vorüberlegungen (*supra* note 14), 70 f.; Collins, Regulating Contracts (footnote 120 above), 140 ff.; J. Oechsler, Wille und Vertrauen im privaten Austauschvertrag. Die Rezeption der Theorie des Relational Contract im deutschen Vertragsrecht in rechtsvergleichender Kritik, 60 RabelsZ 91-124 (1996); Zumbansen, Ordnungsmuster im modernen Wohlfahrtsstaat (*supra* note 14), 207 ff. with further references; most recently, S. Johnson, J. Macmillan, Chr. Woodruff, Courts and Relational Contracts, Sloan School of Management, Massachusetts Institute of Technology (MIT), Working Paper No. 4338-02; Stanford Law and Economics Program. Working Paper No. 227, 2001, available at SSRN (<http://papers.ssrn.com/abstract=291802>).

125 See in particular, I. Macneil, Relational Contract: What we do and what we do not know (*supra* note 124); J. Esser, Institutionalizing Industry: The Changing Forms of Contract, in: Law and Social Inquiry 593 (1996); see, recently, G. Teubner, Contracting Worlds: The Many Autonomies of Private Law, in: 9 Social & Legal Studies 399-417 (2000), specifically 404-5; see the comments and replies by O. Gerstenberg, *ibid.*, 419-429, I. Macneil, *ibid.*, 431-438, and D. Campbell, *ibid.*, 439-447.

126 See the contributions in: S. Deakin/J. Michie (eds.), Contracts, Co-operation, and Competition (Oxford, New York 1997).

127 Cf. Lowenfeld, Lex Mercatoria (*supra* note 8), 90.

128 Teubner, Globale Bukowina (*supra* note 3), 276.

since the arbitral, *official* control makes the law laid down in private autonomy *unofficial*. Arbitration law and *private legislation* (general terms of business) together form a system of decisions in which the hierarchicalization known from the contract is beginning to be repeated.¹²⁹

5. Traditionalists versus Transnationalists

‘...while one does have trust in practice, one checks it on the basis of one’s own fundamental legal convictions.’¹³⁰

Against this background, the occasional criticism of the debate about *lex mercatoria* as being too passionate cannot be sustained.¹³¹ In fact, it cannot be passionate enough. A fateful misunderstanding threatens where the whole of transnational law is presented as a *minus* vis-à-vis fully codified nation State law. From the viewpoint of *lex mercatoria* this viewpoint from the outset misses *lex mercatoria*’s special nature. This implies a whole range of difficulties in trying to assess the heavily prejudiced relationship between national and transnational law – both in doctrinal as in historical terms.¹³² Apart from the usual reproaches towards transnational law regarding its sources and procedures, for *lex mercatoria* the point need not be a fully fledged codification, which were to repeat the juridification experiences of the nation State. Indeed, transnational law does not and cannot directly follow the path of the materialization experiences that so far have taken place in the nation State accompanying its development from the rule-of-law and the social and welfare State into a complex institutional cluster of multi-polar and multi-level governance. Already, these very experiences, while opening up new, expanded interpretive perspectives, did not necessarily all lead to codifications. Such exceptions as the *AGBG* of 1977 (*Act on General Terms and Conditions of Trade*) can be seen to confirm the rule. The alleged deficient character of transnational law in comparison to nation State law could however be taken seriously in another way. With an eye to the learning experiences that mark nation-State law, the point might be to make use of these experiences to extend and further elaborate transnational law.

129 Teubner, *Globale Bukowina* (*supra* note 3), 277; Ursula Stein, *Lex Mercatoria, Illusion und Wirklichkeit* (Frankfurt: Klostermann 1995), 164 ff.

130 Schödermeier, *Sonderprivatrecht für internationale Wirtschaftsverträge*, Köln 1989, 198, cit. from Berger, *Kodifizierung* (*supra* note 1), 24.

131 Berger, *Kodifizierung* (*supra* note 1), 29: ‘One basic evil in the debate over the theory of *lex mercatoria* is that it is perhaps carried on (too) passionately.’

132 See, e.g. Teubner, *Globale Bukowina* (*supra* note 3); De Ly, *Lex Mercatoria* (*supra* note 113); see also the papers now by Osterhammel, Spiliotis und Wirz in: 27 *Geschichte und Gesellschaft* (2001), No. 3, 464 ff.. Jürgen Osterhammel’s paper is a convincing plea in favour of a sensitive, context-related, ‘system-theoretical’, informed analysis of social strong points outside but above all *beyond* the definitional framework of the nation State. This makes the paper a magnificent *tour d’horizon* of existing shortcomings in dealing with the theory of transnationalism.

This law, being - in a primary and decisive respect - the law of the economic actors involved, will sooner or later inevitably be exposed to similar dynamics as have pushed forward our national law and legal consciousness. The *lex mercatoria* is then – just like civil formal law – ‘endangered’ in its presumed autonomy by re-politicizations. But this is just where its opportunity lies. The political challenge for this law - conceived of as autonomous - need not necessarily be understood as a mere reflection of ‘society’ organizing itself by and with the help of law, prompting the transformation and eventual hegemonization of formerly free actors and their institutions but, instead, as *socialization of law* in a comprehensive sense. No discussion of *lex mercatoria* can, then, refrain from confronting questions of international economic policy, international relations and the manifold forms of transnational social self-organization.

Looking at private, contractual law-making, it would seem as if global contractual law almost naturally constitutes and *constitutionalizes* itself. Here, constitutional interpreters face a heavy task. For this law is extremely flexible, fixed in de-centralized fashion and still so close in its validity claims to its creator – the sovereign – that any even only cautiously teleological interpretation comes into conflict with the moods and unpleasantnesses of a constantly changing *soft* body of law.¹³³ But here too, in a climate of numerous constituent assemblies, established, well-drilled transnational economic practices are undergoing juridification. Comprehensive self-regulatory organization in the separation-of-powers triad of ‘private legislation, self-government and arbitral judiciary’ will only too quickly become accustomed to being grown up. The regulatory claims and representation needs of economic, cultural and political systems – of both State and non-State nature - will increasingly test the stability of the emerging de-bordered legal system, and every step towards juridification will amplify the call for its completion. In this sense, re-politicization means a claim put forward from outside, but at the same time the point is to secure the self-generative basis for legitimation with an eye to the law as going on being made primarily by the economic actors involved themselves. *Lex mercatoria* then is law which is just as autonomous as it is endangered. Whether the autonomization process driven forward by current de-statalization trends will ultimately succeed remains to be seen.

133 To that extent the view in economic analysis of this ‘de-centralized’ creation of law might be extended considerably. On the economic analysis of law, cf. the statements in Berger, Kodifizierung (*supra* note 1), 25 f.. See also the critique of a one-sided economic interpretation of *lex mercatoria* in Teubner, Privatregimes (*supra* note 15).

IV. THE GUIDING OF THEORY BY PRACTICE

‘Jurisprudence working with modern problems is evidently compelled to develop theories that no longer – in line with their own academic tradition...- claim only the status of heuristic explanations of legal texts, but instead seek to deal with, assess and regulate social reality in a comprehensive sense...’¹³⁴

Accordingly, just as one’s own premises and observational standpoints must be pondered, so in principle one must ask about the function of transnational law and explore the role of the actors that are its bearers. This implies at the minimum an interdisciplinary research agenda, and surely one that transgresses the noted rifts between public and private (law), thereby reaching beyond legal dogmatic confines.¹³⁵ Trying to recognize and to explore more exactly which concepts of law and society *lex mercatoria* is based on, opens the legal debate to insights from sociology, history and political science. In view of the multiplicity of State and social systems, contemporary inquiries regarding constitutionalization or the EU’s expansion will inevitably raise further reaching questions.¹³⁶ More clearly: the study of transnational law cannot be separated from questions of the conditions and possibility of governance beyond the nation State.¹³⁷ The struggle within national legal systems with the specific and “tricky”¹³⁸ nature of the empirical and theoretical phenomenon of *lex mercatoria* reflects the lingering absence of a more exact definition of the ‘specificity of the

134 Joerges, *Rechtssystem* (*supra* note 14), 557 referring to Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, Frankfurt 1972; Volkmar Gessner, *Soziologische Überlegungen zu einer Theorie der angewandten Rechtsvergleichung*, in: 36 *RabelsZ* 229 (1972).

135 See *Editorial* to G.-P. Calliess, *Lex Mercatoria: A Reflexive Law Guide to an Autonomous Legal System*, in: 2 *German L.J.* No. 17 (1 November 2001), available at: <http://www.germanlawjournal.com> (search: *lex mercatoria*), or at: http://www.germanlawjournal.com/past_issues.php?id=109: „Jurisprudence meets International Relations, Legal Pluralism meets Political Science, Comparative Law meets Anthropology, Law meets Politics.”

136 Cf. e.g. Stolleis, *The Influence of the ‘ius commune’ in Germany in the Early Modern Period on the Rise of the Modern State*, in: *Rivista Internazionale di Diritto Comune* 11 (2000), 275-285, ‘In Europe the state takes a hundred forms.’ Cf., on the conditions of a European Constitution, *ibid.* 283 f.; see recently also the papers in 2 *German Law Journal* Nr. 14 u. 15 (1. /15. September 2001), <http://www.germanlawjournal.com>, and in: Christian Joerges/Yves Meny/Joseph H.H. Weiler (eds.), *What Kind of Constitution for What Kind of Polity?: Responses to Fischer* (2000), <http://www.iue.it/RSC/symposium> or <http://www.jeanmonnetprogram.org/papers/00/symp.html>.

137 Esp. M.Zürn, *Regieren jenseits des Nationalstaates* (*supra* note 118); Joerges, *Rechtssystem* (*supra* note 14), *op.cit.*, and in the same sense Lehmkuhl, *Transnational Commercial Arbitration* (*supra* note 9), 2.

138 See F. Dasser, *Lex Mercatoria – Critical Comments on a Tricky Topic*, in: Appelbaum et al. (eds.), *Rules and Networks* (*supra* note 3), 189-200.

international context'.¹³⁹ For this very reason a theoretical definition of transnational law is needed. That the definition problems, however, arise right from the outset, namely with the concept of "the transnational" itself, is readily recognized. Thus, studies on the practical and theoretical extent of globalization, if the difficulty in developing interdisciplinary 'research agendas' alone is considered, will continue to proliferate.

1. Transnational Law as a semi-autonomous System

The struggle to attack or defend *lex mercatoria* has so far received a great deal of attention.¹⁴⁰ In its special nature as 'natural jurisdiction of the international economy',¹⁴¹ commercial arbitration can be seen as the institutional crystallization of transnational economic law, awakening likewise opposed passion. The whole repertoire consisting of legal sources and procedural principles can by contrast just as easily be mobilized as it can be refuted with regard to *lex mercatoria's* claim to be autonomous.¹⁴² If, however, attention is directed at the question what *lex mercatoria* in the best sense is to be autonomous of, then this leads us back much further. Instead, then, of comparing historically grown, dogmatically and institutionally established structures of legal production with the theory and praxis of transnational economic law, one ought to ask about the function and value of the law itself in its role for social self-organization.¹⁴³

The ensuing question of the intricate relationship between legality and legitimacy is aimed at reconstructing the conditions for the emergence of binding legal norms and the framework conditions in which validity is allotted to them. From this viewpoint, admittedly, it seems often to be a natural course to strive for a better understanding of the multiplicity of interaction and communication structures, since this is the only way an appropriate description of law *in* society can be hoped for. From this viewpoint even the formalized, nationally tested legal system no longer seems all-embracing and autonomous vis-à-vis other social complexes of norms.¹⁴⁴ Thus the debate over *lex mercatoria* is not simply an extension of what we are ordinarily accustomed to recognize as law. Instead it is about

139 On this see esp. G. Teubner/H. Willke, Kontext und Autonomie: Gesellschaftliche Selbststeuerung durch reflexives Recht, in: Zeitschrift für Rechtssoziologie 5 (1984), 4-35.

140 See, comprehensively, Berger, Kodifizierung (*supra* note 1), 85 ff.; Teubner, Globale Bukowina (*supra* note 3), 264, speaks of a 'downright clash of faiths'.

141 Berger, Kodifizierung (*supra* note 1), 83.

142 Berger, Kodifizierung (*supra* note 1).

143 See S. Falk Moore, Law and Social Change: The semi-Autonomous Field as an appropriate Subject of Study, in: Law & Society Review 1972/73, 719-746.

144 Günther, Rechtspluralismus und universaler Code der Legalität (footnote 54 above), 553; Teubner, Globale Bukowina (*supra* note 3); Falk-Moore, Law and Social Change (*supra* note 143).

the social function of law against the background of a largely differentiated world of States and societies.¹⁴⁵

In this sense, too, the impression is more than apposite that it is 'ultimate questions of one's sense of the State' that are involved, only with the difference that the list of questions has been extended well beyond the conceptual horizon of the 'State'. Questions raised against the background of an unsatisfactorily defined framework, merely marked with and depicted by with the connotation of the 'State', cannot however be neither appropriately understood nor answered with the conceptual machinery oriented to the State. Whether, however, for this reason the reconstruction of legitimacy problems ought better to come under the semantic umbrella of 'society', or as market, civil or private-law society, has to be doubted. Not only would our use of the term society probably get stuck in the State-oriented context of ideas that has marked our understanding of 'society',¹⁴⁶ but even the turn towards the 'other pole' would ultimately mean nothing else but a continuation of this bi-polar structural description.

The challenge to a legal theory interested in the legitimacy questions of a differentiated, pluralist society consists precisely in taking such effects into account, but doing so with an exact focus on the classificatory and regulatory problems that arise. That we cannot get away from descriptions of problems like market failure or policy failure by turning towards 'governance beyond the nation State' (M. Zürn) seems accordingly to be an unavoidable consequence. The 'non-political origin and character' of the *lex mercatoria* cannot prevent its repoliticization.¹⁴⁷ The forces proceeding from international economic policy competition are too strong for this to remain without consequences for transnational private economic law.¹⁴⁸ For the continuing, and continually re-radicalizing, north-south conflict, which can only inadequately be described by the buzzword of the 'new economic world order', the same is true.¹⁴⁹

145 In this sense see Joerges, Vorüberlegungen (*supra* note 14), 8.

146 See Habermas, Die postnationale Konstellation und die Zukunft der Demokratie, in: Die postnationale Konstellation (Frankfurt: Suhrkamp 1998), 91-169, 91-93.

147 G. Teubner, Globale Bukowina (*supra* note 3), 282 f.

148 One example of this is the competition for a national insolvency system (netting clauses) appropriate to financial transactions; on this cf. Günther/Randeria, Recht, Kultur und Gesellschaft (*supra* note 15), 55-59. This is the expression of how national legislative procedures are manifestly affected by pressure from enterprises, something Saskia Sassen uses the term 'economic citizenship' for (cf. *ibid.*, 57); cf. also the example of Russia's new company-law legislation, a process in which a variety of foreign conceptions are competing with each other: E. Schanze, Legislating for System Change: The Russian Company Acts of 1995 and 1998, in: JITE 156 (2000), 19-29, 22.

149 Teubner, Globale Bukowina (*supra* note 3), *ibid.*; cf. Dezalay/Garth, Dealing in Virtue (*supra* note 12); Shalakany, Arbitration and the Third World (*supra* note 12).

2. Constitution or Constitutionalization?

‘International arbitrators do seek to achieve just results within a legal framework, and that framework is by definition wider than the frontiers of any state.’¹⁵⁰

The challenge from practice-led theoretical work to the phenomenon of transnational law accordingly consists primarily in casting light on this practice.¹⁵¹ Valuable advantages for this undertaking arise, for all the difficulty of it, already from the fact that there cannot be direct recourse to a (world) constitution. Thus, it appears appropriate instead to look for permanence of *formation* of a constitution in the sense of ongoing constitutionalization processes.¹⁵² Various approaches are conceivable.¹⁵³ The search for precipitates of constitutional law in various sub-areas of ‘ordinary’ law¹⁵⁴ as it were illuminates the many points of contact and, still further, overlaps between basic constitutional approaches and standards with norms and institutions of ordinary law, admittedly pointing thereby to the need continually to justify both levels.

Seen in this light, the advance recently made in the direction of legal theoretical systemization of basic features of international law¹⁵⁵ is aimed not just at the legitimation difficulties of State-centred international law that have emerged in an age of increasing activities of non-governmental organizations.¹⁵⁶ Central to the proposal to recast the conceptual design of global governance under the heading of ‘legalization’ is the definition of three decisive features of international legal institutions – obligation,

150 Lowenfeld, *Lex Mercatoria* (footnote 1 above), 91.

151 In this sense see, very early R. Wiethölter, *Begriffs- oder Interessenjurisprudenz – falsche Fronten im IPR und Wirtschaftsverfassungsrecht* (*supra* note 62); Joerges, *Vorüberlegungen* (*supra* note 14).

152 On this cf. Schanze, *Entwicklung von Institutionen*, in: Chr.Meier-Schatz (ed.), *Die Zukunft des Rechts. Forschungsgespräch der Rechtswissenschaftlichen Abteilung anlässlich des 100-Jahr-Jubiläums der Universität St.Gallen im Juni 1998*, Bibliothek zur Zeitschrift für Schweizerisches Recht/Beiheft 28, Basel u.a. 1998, 195-206, 203 ff., see earlier *idem*, *Investitionsverträge* (footnote 113 above), 185-187 (‘theory of formative elements’).

153 For international law cf. J.A. Frowein, *Konstitutionalisierung des Völkerrechts*, in: *Berichte der Deutschen Gesellschaft für Völkerrecht* 39 (1999), 427-448; Chr. Walter, *Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess*, Talk at the symposium „Grenzüberschreitende Konstitutionalisierungsprozesse“ on the occasion of the 65th birthday of Prof. Dr. Dres. h.c. J.A. Frowein, 59 *ZaöRV* 961-983 (2000); Matthias Ruffert, *Zuständigkeitsgrenzen internationaler Organisationen im institutionellen Rahmen der internationalen Gemeinschaft*, 38 *Archiv des Völkerrechts (AVR)* 129-168 (2000), 133 ff.

154 Siehe hierzu G.F. Schuppert/Chr. Bumke, *Die Konstitutionalisierung der Rechtsordnung. Überlegungen zum Verhältnis von verfassungsrechtlicher Ausstrahlungswirkung und Eigenständigkeit des „einfachen“ Rechts*, (Baden-Baden: Nomos 2000).

155 See J. Goldstein/M. Kahler/R. Keohane/A.-M. Slaughter, *Introduction: Legalization and World Politics*, in: *International Organization (IO)* 54 (2000), 385-399; Kenneth W. Abbott/Robert O. Keohane/Andrew Moravcsik/Anne-Marie Slaughter/Duncan Snidal, *The Concept of Legalization*, *ibid.*, 401-419.

156 Cf. the references in Zumbansen, *Die vergangene Zukunft des Völkerrechts (The Past Future of Public International Law)*.

precision, delegation. These features are supposed to lend international law precise outlines just where, because of the lack of enforceability, it is continually exposed to the harsh verdict of irrelevance.¹⁵⁷ If such contentious proceedings were extended by views on transnational economic law, sometimes neglected by international lawyers and IR scholars because of its presumed 'private' nature, this would constitute a first step in the direction of a better understanding of contemporary law and society.

Between the poles of constitution and constitutionalization, then, one could bring about a 'short circuit' by emphasizing the procedural nature of every constitution under conditions of uncertainty. This would on the one hand expand the view of the constitutional document by a perception of its constant need for legal, political and social interpretation, without this being taken as a blot on the constitution.¹⁵⁸ On the other hand, however, constitutionalization would no longer be understood purely as the *supplementation* of a reductionist formal legal concept of rule-of-law by human-rights and environmental-protection concerns currently very popular in the WTO debate. Instead, the procedural nature of the constitution would have to be taken seriously as a challenge to a political practice continuing to make available, against the background of learning experiences of exhausted concepts of justice¹⁵⁹ on the one hand and institutional differentiations of various models of the State on the other, possibilities of conflict settlement still accepted by the participants, even if not always made use of.¹⁶⁰

157 Abbott et al., The Concept of Legalization (footnote 139 above), 402: 'Our conception of legalization creates common ground for political scientists and lawyers by moving away from a narrow view of law as requiring enforcement by a coercive sovereign. (...) [T]he forms of legalization we observe at the turn of the millennium are flourishing in the absence of centralized coercion.' The three features mentioned are oriented towards the criteria developed by H.L.A. Hart (The Concept of Law – 1961) for his 'secondary rules': recognition, change, adjudication; cf. Abbott et al., op.cit., 403 f.; see also F. Mégret, "War?" Legal Semantics and the Move to Violence?, in: 13 European Journal of International Law 361- 400 (2002).

158 On this see e.g. the statements by R. Koselleck, Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung, in: Gegenstand und Begriff der Verfassungsgeschichtsschreibung (Redaktion: Helmut Quaritsch), Berlin 1983, 7-21.

159 Engel, Hybrid Governance (*supra* note 78), 3: 'The constitution assumes that this governance authority has struck the right balance between competing constitutional concerns.'

160 Vgl. hierzu Habermas, Faktizität und Geltung, 477.