local authorities to regulate international commercial relations. Thus, the "picture of an authoritarian control is everywhere in evidence; yet the lines of the agencies of supervision are far from clean-cut. The activities of a people passing out of feudalism do not lend themselves to our distinction between public and private" (Hamilton, 1931: 1141). This was to change in the second phase in the development of the law merchant when international commercial relations came to be insulated and isolated in what was to emerge as the private sphere of markets and economic activity. As the discussion now turns to review the second phase, it becomes evident that the emergence of states and their attempts to nationalize and to control foreign commercial activities signaled a change in both the ability and the willingness of political authorities to regulate international transactions. These developments, in combination with emerging capitalism and its ideological foundations, provided powerful rationalizations for the nationalization and political neutralization of international commercial relations as part of the nascent private spheres of law and economy.

5 State-building: constituting the public sphere and disembedding the private sphere

The second phase in the development of the law merchant is characterized by the juridification of international commercial relations as productive and exchange relations were subject to increasing legal discipline. More international commercial activities came to be regulated through law, while legal disciplines were juridified through the creation of national and territorial-based state power, and its association with establishing control over foreign commercial relations through legislative and judicial means. Juridified commercial relations are characterized by rationalized, systematic, and positivist legal regulation and discipline, exhibiting consciousness in planning or design and formalism in operation. Ultimately, juridified commercial relations established the disciplinary link and "natural" affinity between law and capitalism noted, as discussed below, by Max Weber, Karl Polanyi, and others.[1]

With the development of a system of territorial-based sovereign states, and with the movement from feudalism to capitalism, the public/private distinction came to be firmly established. State-building projects involved the nationalization and control of foreign commercial activities, which were increasing in volume. The consolidation of states signaled a change in both the ability and the willingness of political authorities to regulate international commercial transactions. This is evident in the priority given to positive law as the most appropriate mechanism for regulating international commerce and the displacement

[1] Although Michel Foucault cast his concept of disciplinary society much more broadly than a focus on law and legal discipline, John O'Neill (1986) persuasively argues that we might extend Weber's analysis of the nature of rational, bureaucratic-legal discipline under capitalism through Foucault's analysis of knowledge and power in disciplinary society. See, for example, Foucault (1979 a; 1979 b; 1980). See also, Hunt (1993) and Hunt and Wickham (1994) for insightful applications of Foucault to legal analysis.

of custom as a primary source of law. The result was increasing formalism as regards the sources and subjects of law and the development of a tension between the localizing tendencies of national regulation through positive state-based law and the delocalizing and denationalizing tendencies of private, customary regulation. The private sphere contracted as merchant autonomy in law-creation and in private dispute settlement declined. Effective enforcement came to be associated with the state. Any ambiguity that might have been evident in the subjects and sources of law in the earlier phase was settled by the unambiguous formal designation of the state and its positive law (both in the form of domestic law and public international law) as the determinants of subject and sources doctrines. Indeed, the constitutional frameworks established by the principles of territorial sovereignty and legal positivism came to discipline subject and sources doctrines, establishing a state- and consent-based international legal order. In the domestic sphere, as the discussion will illustrate, the liberal ideology of the autonomous "legal subject" exercised similar discipline, creating a consent-based private legal order. As Evgenii Pashukanis (1978: 119) observes about the relation between the state and law, "the impersonal abstraction of state power functioning with ideal stability and continuity in time and space is the equivalent of the impersonal, abstract subject."

Dispute settlement and enforcement became functions of the public sphere as the geographic expansion of commercial relations rendered the self-enforcement system of merchants inadequate. The collection of information regarding the creditworthiness and honesty of merchants became more expensive. The sanctions of market exclusion and loss of reputation became difficult to enforce as markets proliferated in number, as commerce extended to faraway places, and as the practice of simultaneous exchange in markets was replaced by nonsimultaneous exchanges over time and distance. The imposition of the sanction of bankruptcy and the enforcement of agreements became the prerogatives of states and thus contingent upon national intervention as states adopted laws and procedures governing the enforcement and execution of commercial agreements.

During this period, the expansion of trade through colonization, the development of mercantilist doctrine, and the advent of capitalism brought new insights into the role of commerce in determining national power.[2] Political authorities developed a new understanding

[2] See Cox (1987: ch. 5) for a discussion of these developments.

of the importance of regulating international commerce for achieving national welfare goals and political autonomy. This understanding, coupled with the development of the institutional and legal machinery capable of disciplining international transactions, rendered states more willing and more able to regulate international trade.

This chapter reviews the second phase in law-creation and dispute settlement. The discussion illustrates how the balance between public and private authority shifted in favor of the former as state authority replaced the overlapping authority structures of the medieval period. States became the subjects, while their positive law became the primary source of public international law. Moreover, states exercised stronger and more comprehensive control than did the local religious and political authorities of the earlier phase. Notable, however, is the profound change in the nature of public regulation. Medieval paternalistic and religious restraints were replaced by a permissive and facultative approach inspired by liberal political economy, which appeared later in the period. Liberalism sanctioned capitalist business techniques and provided a normative and a theoretical rationale for free-market principles, establishing the basis for the separation between politics and economics. It provided a foundation for assumptions concerning the natural, neutral, consensual, efficient, and apolitical nature of private regulation. The widespread acceptance and legitimacy of prices established under freedom of contract or by the market, the weakening influence of strict liability standards for defective goods, and the growing legitimacy of interest charges show the increased importance of free-market principles and the value of facilitating exchange. However, while establishing the terms of a contract became a private activity, its enforcement became a public, judicial activity.

The trend towards increasing reliance upon national judicial enforcement was bolstered by the incorporation of the jurisdiction of merchant courts into national judicial systems. However, as will become evident, states differed in the extent to which national courts assumed jurisdiction over commercial matters. In addition, significant differences in national regulation eroded the universality of commercial law and generated a movement for its global unification in the next phase in the development of the law merchant.

While there was a profound transformation resulting from the growing territorial individuation of state power and the advent of capitalism and liberal political economy, the conventional view is that the law merchant persisted:

> The Law Merchant did not die. It changed in the seventeenth century, becoming less universal and more localized under state influence; it began to reflect the policies, interests and procedures of kings. Merchant custom remained the underlying source of much commercial law in Europe, and to a lesser degree in England, but it differed from place to place. "National states inevitably required that their indigenous policies and concerns be given direct consideration in the regulation of commerce. As a result, distinctly domestic systems of law evolved as the official regulators of both domestic and international business."[3]

There is much truth to the view that elements of the law merchant persisted beyond the medieval period, but it is important to recognize significant disjunctures and discontinuities. These stem from two central developments: the growing territoriality of state power and the transition to a capitalist mode of production. These developments enabled the articulation of distinctions between domestic and foreign commercial transactions and between private and public international law. Both distinctions were to facilitate the neutralization of many aspects of international commerce as "private" matters, thus insulating them from politics and public regulation. The story of the evolution of the law merchant is as much the story of the construction of public, state authority as it is about the isolation and disembedding of private authority. Before turning to consider the processes of law-creation and dispute settlement it will be useful to provide a sense of the historical, material, and ideological contexts of these developments.

Nationalizing and Localizing the Law Merchant

A number of developments during the second phase changed the environment for international commerce. A shift in commercial power to the Atlantic states, which was related to the establishment of strong nation-states in Western Europe engaged in state-building and in overseas expansion, the universal acceptance of the idea of national sovereignty, the Reformation, the rise of capitalism, the advent of liberal political economy, an increase in the volume of trade, and an enhanced understanding of the economic basis of national power all contributed to an alteration in the material, ideational, and institutional environments for commercial relations. States engaged in the process of state-building sought control over commercial activities. One of the means

[3] Benson (1988–89: 653) quoting Trakman (1983).

adopted to achieve national control was the nationalization and localization of trade law and practice. States came to incorporate the law merchant into their national legal systems. The notion of *jus commune* disappeared as states focused on the creation of national commercial law. This period of codification "engendered an attitude of legal positivism which was further aggravated by nationalist sentiments. Jurists now considered their national law to be the Law" (David and Brierley, 1978: 62).

> The universities in each country no longer taught anything but national law. This gave birth to a new and revolutionary concept. Law came to be regarded as a national phenomenon, controlled by politics and bound up with the existence of the state. The idea of common law disappeared. The existence of natural law, its force drawn purely from the idea of justice, and independent of all state-authority, was challenged: and this idea came to seem more moral than legal, even to those remaining faithful to it. In the eyes of international lawyers, private international law itself ceased to be anything but a regulation of international commercial relations *by the will of the national legislature in a particular state*. It became simply a national system of conflict of laws: its object is and can only be, to say which *national* law governs a particular transaction. (David, 1972 a: 4, original emphasis)

As Harold Berman and Colin Kaufman (1978: 227) observe, "[t]his was an age not only of nationalism but also of positivism." The role of commercial custom declined as states came to regard national legislation and case law as definitive sources of law. The preeminence of custom was challenged "in the West, by philosophy and by lawyers anxious to base law on reason. In the nineteenth century this long struggle terminated. People ceased to believe that wisdom lay in conformity with tradition; they wanted, too, to unify the law at the national level, and to increase the certainty considered indispensable in legal relations. Customary law gave way to law based essentially on legislation in the countries of the European Continent, and on judicial decisions in England" (David, 1972 d: 100–1).

The significance of the movement from a delocalized system of customary merchant law to a localized one of national and positive legal commercial regulation, and the intensification of legal discipline that resulted, are crucial developments in our understanding of the nature and operation of law. Max Weber provides important insight into the "binary relationship between law and the rise of capitalism" for he believed that "only a particular type of legal system is conducive to the growth of

capitalism" (Beirne, 1982: 54). A key element of the legal system that differentiates the precapitalist from the modern merchant order is rationality and the dominance of a juridico-political ideology that establishes relationships between law and rationality and between systematic legal regulation and bureaucratic control and efficiency (Weber, 1978 a). This was a first step in the association of (bureaucratic) rationality and (legal) domination that is crucial to the process of juridification and the intensification and deepening of law as a coercive and dominating force. Indeed, Herbert Marcuse (1972 b: 214), in analyzing Weber's conception of rationality, provides the important insight that "in becoming a question of domination, of control, this rationality subordinates itself, by virtue of its own inner dynamic, to another, namely, the rationality of domination." The process of juridification was instrumental in subordinating rationalized and localized legal systems to the broader rationality of domination inherent in capitalism.

The process of legal nationalization and the juridification of commerce "though universal, was carried out in the various countries for different reasons, in different manners and in differing degrees" (Schmitthoff, 1961: 131). Significantly, juridification served particular interests and is linked to specific processes of state-building and national capital accumulation. In England, the nationalization of the law merchant occurred, in part, as a component of the consolidation of the system of the common law and its courts, and in part, as a necessary complement to the country's growing commercial power. In France, nationalization was achieved through various codifications motivated in the early years by concerns of economic state-building, or mercantilism, and in the later years by French revolutionary ideals. In Germany, nationalization occurred through codifications aimed at securing political unification through the creation of uniform laws. In the United States, nationalization was achieved by the adoption of English commercial law and the unification of state commercial law and practices. The following discussion will consider the experiences of each country after reviewing the impact of the most significant developments on the theory and practice of commercial law: the growth of the nation-state, initially in its mercantilist formation and later in its capitalist formation, the reformation, and the advent of liberal political economy.

State formations and the isolation of private international law

It is no accident that the states that were to become the major players in the development of commercial law were those that were the most

significant commercial powers. By the beginning of the sixteenth century, Mediterranean trade had declined in importance as Atlantic ports became the major focus of commercial activity. The shift in commercial activity from the Mediterranean to the Atlantic was a result of the discoveries and overseas expansion, undertaken by Western states, and the assistance that their strong national governments gave to the promotion of commerce. Spain and Portugal were the major commercial powers in the sixteenth century, France and Holland in the seventeenth century, France and England in the eighteenth century, and England in the nineteenth century.

> In the Mediterranean, from the central position in Europe, trade sank till it was almost a backwater. In part the change was caused by political factors. The new, strong, national states threw their weight behind their merchants and pushed their trade by force of arms. Lusty young countries like France and Spain made Italy their battleground . . . Spain, Portugal, France and England (and later Holland) – all had governments strong and rich enough to push the explorations and develop the colonies. The very fact that they had not played a major role in medieval commerce made them all the more eager to seize the new opportunities and all the more ready to venture in untried ways. Moreover, in the era that was dawning, the state was to play an active role in commerce. A city which was not part of a big nation state could scarcely hope to compete in naval rivalry, in tariff wars, in the struggle for markets. (Clough and Cole, 1946: 120–1)

Baltic trade, too, declined in importance as commercial opportunities were lost to the newly emerging nation-states and as the Thirty Years' War (1618–48) contributed to the economic decline of Germany.

While the last chapter illustrated that local authorities did regulate local markets and transactions in the medieval phase, state intervention took on new meaning in the second phase as states adopted overtly mercantilist policies for a broad range of commercial activities. This was due, in part, to the tremendous increase in the volume of foreign commercial transactions generated by colonial expansion. It is estimated that British exports and imports increased by 500 percent from the seventeenth to the eighteenth century (Clough and Cole, 1946: 257). The experience in France was similar, with the major commercial expansion occurring in the eighteenth century. In Holland, in contrast, the expansion took place in the seventeenth century.

Mercantilism may be defined as "economic state-building" and involves the use of national policies and practices to achieve a variety of

goals (ibid., 257). These goals include securing economic unity through the creation of a national economy, attaining control over domestic economic processes and actors through a weakening of controls exercised by the Church, town, and guild authorities, and enhancing national power through the development of industrial and economic strength (see also, Heckscher, 1955).

It is important here to recall the nature of the relationships between law, the state, and the mercantilist mode of production discussed in Chapter 3. As Robert Cox (1987: 104) notes, "[n]ew modes of social relations of production become established through the exercise of state power." States, or rather the "social forces upon which state power ultimately rests," determine the organization of production by "fixing the framework of laws, institutions, practices, and policies affecting production" (ibid., 106). Moreover, "the legal-institutional framework set up by the autonomous state creates the basis for the social relations of production, laying down the conditions for the development of the dominant mode of social relations of production and for the subordination of other modes to the dominant mode" (ibid., 149). The state's particular orientation to legal regulation is in turn shaped by conditions of world order and the state's "historic bloc" or the "configuration of social forces upon which state power ultimately rests" (ibid., 105). Cox describes the relationship between a state's historic bloc and the conditions of world order thus:

> The novelty of the European developments of the fifteenth and sixteenth centuries was the founding of a state system in a context of economic changes that accumulated wealth in centres that ultimately were able to transform that wealth into a capitalist development process – a process that spread from its points of origin in Europe over the whole world.
>
> The state system provided a framework within which that process engendered a world economy, developing and functioning according to its own dynamic. Initially, during the age of mercantilism, that world economy was constrained within political boundaries laid down by states through national monopolies and trade restrictions. By mid-nineteenth century, with the sponsorship and political support of the most powerful state, the world economy achieved autonomy, such that its own laws began to constrain state policies. (Ibid.: 107)

Mercantilist practices and balance of power politics characterized the particular configuration of social forces and world order throughout

the eighteenth century.[4] "Mercantilism varied in every country, according to local conditions and traditions; yet it can be said in a general way that it was the economic counterpart of the political process by which the national states were being built up" (Clough and Cole, 1946: 197). The mercantilism of Portugal and Spain was more protectionist than that of the Dutch, while English and French mercantilism stressed the encouragement of domestic industrial production in addition to the expansion of trade and the accumulation of wealth.[5] However, what united the various approaches was the increased recognition of the role that economic matters played in the determination of national power. This recognition is closely linked to the rise of capitalism and to the economic expansion of Europe.

> It was the increase in capitalist business that turned the attention of people to economic matters as the key to wealth and power. Sometimes the businessmen supported the mercantilist policies; sometimes they opposed them. In a general way, however, mercantilism helped the capitalist by putting the power of the state behind him, even though it hampered and restricted him at the same time. When the businessman had grown strong enough and wealthy enough (by the eighteenth century) he began to think about shaking off the control of the state and using it for his own purposes. The expansion of Europe made the search for national strength in part a competition for commerce, sea power, and colonies and greatly widened the field in which mercantilism could be applied. Furthermore, it brought to the fore just those areas on the Atlantic where the new states were developing national and mercantilist policies. (Clough and Cole, 1946: 198)

The rise in capitalist business techniques and the growth in mercantilist doctrine had a major impact on moral theology and, in effect,

[4] It is beyond the scope of this discussion to consider the balance of power system; however, for a good overview see Cox (1987: ch. 5).

[5] Portuguese mercantilism focussed almost entirely upon the adoption of policies aimed at securing and maintaining royal control of the spice trade with India. Portuguese policies included exploiting the colonies for the exclusive benefit of the mother country, ensuring an excess of exports over imports, and accumulating bullion. Spain adopted similar policies, imposing considerable controls on colonial trade, while the Dutch adopted more open policies aimed at expanding trade through the imposition of few customs duties and tariffs on imports. England and France, in contrast, emphasized the importance of both domestic production and trade expansion to economic state-building. In England, the guild system and protective tariffs served to encourage domestic industry, while the Navigation Acts and Corn Laws were designed to protect and to enhance national trade. In France, high protective tariffs, policies to encourage exports and to enhance the productive capabilities of domestic producers formed the core of mercantilist practices. For a fuller review of the various forms that mercantilism took in these countries see Clough and Cole (1946: ch. 7); Clough (1959, ch. 2); and North (1981, ch. 11).

sanctioned "a new degree of freedom from religious constraints on individual enterprise and individual aspirations for economic betterment" (Viner, 1978: 113; see also, Weber 1978 b). With the growth of investment practices, capital markets, and new forms of business enterprises the Church had to adapt moral theology to commercial practices. While the impact of such developments was felt more strongly in Protestant theology than in Catholic theology, by the end of the Reformation there was a considerable erosion of the Church's influence on commercial activity.[6] Religious controls on prices, product liability, and usury weakened as states developed different national standards governing commercial transactions. The requirement of just prices and the enforcement of market offences persisted into the seventeenth and eighteenth centuries. However, by the seventeenth century there was an erosion of the just price requirement as the number of permitted exceptions proliferated (Tawney, 1962: 40–1). As Viner (1978: 85) notes "the doctrine of the just price lost most of whatever practical importance it may have had earlier as a justification for state, guild, or ecclesiastical interference" with competitive processes. However, it retained doctrinal and practical significance in cases of monopolies, disputes where there was no ascertainable market price, and where abnormal conditions, such as famine or siege, obtained.

The "paternalist model" of price fixing and the enforcement of market offences continued into the seventeenth and eighteenth centuries. Regulatory statutes continued to be enacted in the eighteenth century controlling prices, but with less frequency.[7] So, too, local authorities continued to enforce the market offences of forestalling, regrating, and engrossing. "Indeed, for most of the eighteenth century the middleman remained legally suspect, and his operations were, in theory, severely restricted."[8] These regulations formed part of the measures adopted by local and state authorities to gain control over economic activities in the era of mercantilism and state building. However, while mercantilist policies assisted states in the accumulation of wealth, as Cox (1987)

[6] Viner (1978: 113) attributes this differential impact to the fact that Protestant churches were more closely tied to the state: "Mercantilism, which was nationalist in essence and stressed national objectives as against the moral claims of individuals or other peoples, found an easier entry into the doctrinal teaching of clergymen belonging to the various state-established, state-supported and largely state-dominated churches of Protestantism than into the corpus of the tradition-bound and supra-national Catholic Church."

[7] See Atiyah (1979: 169). And see Thompson (1971: 109, n. 106) for examples of price regulations enacted in England at this time.

[8] Thompson (1971: 83). See also Thompson (ibid., 84, n. 23 and 6, n. 64) for examples of the enforcement of market offences in the eighteenth century.

notes, the "insular mercantilist state" contained inherent contradictions between social forces aimed at localizing wealth and capital and those aimed at delocalization:

> the commercial interests entrenched in mercantilism, as well as those of the state itself, were resolutely opposed to the further steps necessary to emancipate wealth for capitalist development. These steps would be to transform land and labor power into commodities and to remove mercantilist restrictions on the market when they became an impediment to capital accumulation. (117)

As the rationale for mercantilist regulation came under attack, so too did the foundation for fixed prices and market regulations. The advent of *laissez-faire* theory and the values of economic liberalism in the eighteenth and nineteenth centuries and their adoption by the most powerful commercial states gave new meaning to the idea of merchant autonomy in contract law that reflected more fundamental transitions in world order. The advent of the liberal state marked a transformation in world order and fundamental changes in productive relations: "the liberal state and the liberal world order emerged together, taking shape through the establishment of bourgeois hegemony in Britain and British hegemony in the world economy" (Cox, 1987: 123). Cox (ibid.: 111–12) notes that the "coming of the liberal order was the culmination of the first major transformation in state structures, historic blocs, and modes of social relations of production to have left its traces in the present." Indeed, the advent of the liberal state marked an important development in the juridification of commercial relations by establishing an unequivocal link between law and capitalism and inscribing a tension that persists today between the localizing tendencies of the state system and remnants of feudal and mercantilist legal regulation and the delocalizing tendencies of a world economy and capitalist legal regulation aimed at removing barriers to globalizing economic relations.

Merchant autonomy in commercial law was recast in a manner consistent with the principles of freedom of contract and, in combination with the principle of the sanctity of contract (*pacta sunt servanda*), provided the ideological and theoretical foundations for modern contract theory. The will theory of contract, which stresses the free will of the parties to contract on terms agreeable to themselves, replaced medieval notions of equity in contracting. England played a leading role in changing domestic pricing practices and thus exerted a profound normative influence in terms of the transmission of standards through states that

inherited or adopted the common law system through colonial expansion. In 1772 legislation in England against forestalling was repealed, signaling a victory for the "new political economy" of *laissez-faire* and economic liberalism (Thompson, 1971: 89). As E. P. Thompson (ibid., 89) suggests, the "new political economy" involved a "demoralizing of the theory of trade and consumption no less far-reaching than the more widely-debated dissolution of the restrictions upon usury." Demoralization meant that the political economy was "disinfested of intrusive moral imperatives." In the language of Karl Polanyi (1944), this was part of the process by which the economy was progressively disembedded from society. In the context of previous discussions of the origin of the public/private distinction, this move was crucial in the construction of the public sphere and in disembedding and insulating the private sphere of capital accumulation from political or social regulation, thereby neutralizing it of political content. Liberal economists argued that fixed prices distorted markets, which were regarded as organic in origin and operation, and that the marketing offences interfered with natural patterns of exchange. The private sphere was thus infused with an organic and natural character that was embodied in juridico-political understandings of the nature and function of private law. Marketing offences disappeared and the requirement of the just price was superseded by what Adam Smith referred to as the "natural price" (Atiyah, 1979: 299). In law this came to mean the price agreed to by the contracting parties and, in the absence of agreement or in cases of underspecification, the courts implied that the parties intended the current market prices to apply.

The influence of liberal political economy extended beyond the common law family and embraced all Western systems of law in some degree. The principle of freedom of contract became the foundation for contract law on the Continent and beyond.[9] Importantly, legal theory intersected with the dominant social forces of the day. Liberal theory associated contractual freedom with efficiency and the facilitation of exchange. Moreover, freedom of contract was regarded as the necessary corollary of freedom of trade, the growth of commerce, and the accumulation of wealth. "The autonomy or free choice of private parties to make their own contracts on their own terms was a central feature of contract law . . . [and] had a profound effect on the functions of contract law

[9] See David and Brierley (1978) for the foundations of contract law in the different legal systems of the world.

as perceived by the courts . . . [the] primary function [being] facultative" (Atiyah, 1979: 408). The judicial function came to be conceived in terms of facilitating commercial exchange through the enforcement of contracts with minimum intervention into the substantive contractual terms. This might involve the implication of market prices (or other terms) in cases of disagreement or underspecification, but it did not involve reviewing the substantive fairness of the bargain. Indeed, the willingness of the courts to imply a contractual price based on the market price reflected the belief that they had a duty to enforce bargains arrived at by competent and consenting parties and their faith in market mechanisms as the proper arbiter of price disputes. The medieval notion that exchange could be measured by some objective standard of fairness or equivalence in exchange drops from sight and is replaced by the belief that the value of exchange is a matter of subjective choice as articulated through market mechanisms. As Patrick Atiyah (ibid., 167) observes, "[t]he extreme individualism, the belief that all prices are a matter of subjective choice, the stress on the will and intention of the nineteenth century were not found in the law of the eighteenth century in any degree. They only really emerged in the late eighteenth century," marking the birth of Karl Marx's "legal subject." The "legal subject" became the individual bearer of economic rights to the protection of private property through contract in the material and ideological contexts of what C. B. Macpherson (1962) refers to as the property rights associated with the cult of "possessive individualism." The birth of the "legal subject" signaled a fundamental transformation in legal regulation, for it established a legal relationship of "equality" between contracting parties that simply could not exist under feudalism, where birth, inheritance, custom, and legal privileges dominated economic relations. It also legitimized rights to private property, contributing to the transformation from feudal to capitalist conceptions of property.[10] As Evgenii Pashukanis notes:

> [c]ustom or tradition as the supra-individual basis for legal claims, corresponds to the restrictive nature and inertia of the feudal social structure . . . Equality between subjects was assumed only for relations which were confined to a particular narrow sphere. Thus the members of one and the same estate were equal in the realm of the law of that estate, members of a guild were equal in the realm of guild law. At this stage, the legal subject as the universal abstract bearer of

[10] See Cutler (2002 d) for analysis of the transition from feudalism to capitalism as a transition in dominant conceptions of property.

> every conceivable legal claim is in evidence only as a bearer of concrete privileges . . .
>
> Since there was no abstract concept of the legal subject in the Middle Ages, the concept of the objective norm, applicable to a wide indeterminate circle of people, was also connected with the establishment of concrete privileges and freedoms. (1978: 119–20)

For our purposes it is significant to note that Marx's conceptualization of the juridical equality between independent economic subjects is itself a fetishized relationship that reflects the fetishism of the commodity exchange relationship under capitalist production. Moreover, it is a fetishized relationship infused with moral and ethical content.[11] Like the fetishized commodity relationship it, too, obscures the reality of the inequality and dominance of the underlying productive relations. Marx attributed both ideological and coercive roles to law. Ideologically, law establishes the legitimacy of capitalist exchange relations in "idealized form," hiding the fundamentally exploitative character of capitalist production (Young, 1979: 145). For Marx, capitalist exchange relations take the juridical form of the contract between two autonomous and willing individuals:

> [t]his juridical relation, whose form is the contract . . . is a relation between two wills which mirrors the economic relation. The content of this juridical relation (or relation of two wills) is itself determined by the economic relations. Here the persons exist for one another merely as representatives and hence owners, of commodities . . . the characters who appear on the economic stage are merely personifications of economic relations; it is as bearers of these economic relations that they come into contact with one another. (1976: 178–9)

However, the commodity relationship is a fetishized one in which the relationship between the commodity and its producer is inverted so that the producer appears to owe his existence to the commodity rather than the reverse, whereby the commodity owes its existence to its producer. For Marx, the "mystical" and "enigmatic" character of the commodity lies in its assumption of its own objective existence and life-form apart from its creator.[12] In the fetishized commodity relationship, "things take on the character of active, productive subjects, whilst social relations take on the character of things" (Rose, 1977: 29). This creates a distance between "the visible reality of appearance" and "the invisible reality of essence" (ibid., 38). "Legal fetishism" in turn "complements commodity fetishism"[13] for the relationship between the law and the producer is similarly inverted so that the economic subject appears to owe his existence to the law, rather than the reverse. Accordingly, "individuals affirm that they owe their existence to the law, rather than the reverse, inverting the real causal relationship between themselves and their product" (Balbus, 1977: 583). The law takes on an objective form, obscuring its real essence as a product of human design and choice. The fetishized legal form thus "both produces and reinforces illusory, rather than genuine, forms of equality, individuality, and community" (ibid., 580). As Gary Young (1979: 161) observes, to "go beyond the limits of bourgeois ideology, law would have to acknowledge the existence of capitalist exploitation" by probing the mystification resulting from the commodity form and legal fetishism. This would take one into examining the coercive function of law, illustrated by Marx in his analysis of the role law played in the creation of capitalist productive relations through laws against vagrancy, draconian penalties for theft, maximum wage laws, and minimum workday legislation, and the fundamental transformations affected through the Factory Acts.[14] Juridico-political notions of equal exchange thus obscure the underlying coercive nature of productive relations and mask the crucial role played by liberal theories of contract in the concealment of law's other, coercive face. The "double face of law," as a concealing movement between consent and coercion is nicely captured by Gramsci's insight that law exists at the intersection of hegemony (consent) and coercion.[15]

[11] Evgenii Pashukanis (1978, 151–2) identifies the commodity-producing society with the fusion of "man as a moral subject," "man as a legal subject," and "man as an egoistic subject." "All three of these seemingly incompatible stipulations which are not reducible to one and the same thing, express the totality of conditions necessary for the realisation of the value relation, which is a relation in which social relations in the labour process appear as a reified characteristic of the products being exchanged."

[12] See Marx (1976: 163 et seq.) for his discussion of the fetishism of commodities.

[13] Pashukanis (1978: 117). Pashukanis's analysis of the commodity and the subject is probably the most developed analysis of the relationship between law and the commodity form under capitalism. Unfortunately, he limits himself to analysis of the exchange relation as definitive of capitalism, thereby obscuring the relationship between law and production. Moreover, he also tends toward a formalistic understanding of law, regarding it as part of the superstructure that would disappear with the disappearance of the capitalist state. See Hirst (1979); Fraser (1978); and Jessop (1980) for excellent reviews and criticisms of Pashukanis's work.

[14] Marx (1976) and see Thompson (1975) for an exhaustive analysis of legislation that transformed the feudal mode of production into the capitalist mode of production. See also O'Neill (1986) for an interesting comparison of factory discipline analyzed by Marx and prison discipline analyzed by Foucault, and see Santos (1985: 313–16) for an excellent analysis of Marx's treatment of the Factory Acts.

[15] See Benney (1983: 205). And see Gramsci (1971: 195–6).

The centrality of the law and increasingly juridified relations to the emergence of capitalism and the liberal state has been noted by many. The tendency of Max Weber to associate capitalism with specifically legal regulation, rationalized and systematized by the development of national legal systems and juridico-political bureaucracies, institutions, and ideologies, has already been noted. Karl Polanyi (1944), too, associates the movement from feudalism to the free-market economy with legislative moves to create free markets in land, labor, and money. Polanyi dispels the misunderstanding that *laissez-faire* means the absence of regulation by documenting in some detail the extensiveness and intensiveness of legislative initiatives involved in the effort to create a free-market civilization. As Boaventura de Sousa Santos (1985: 300 and 307) observes, capitalist societies are specifically "legal formations or configurations" and one of the most striking differences between capitalist and feudal societies is the "extent to which power relations are institutionalized and juridified." However, it is a particular form of legal rationality and juridico-legal ideology that informs the association between law and capitalism: it is the fetishized understanding of law associated with legal formalism. Max Weber (1978 a: 811) captures the relationship between law and capitalism perfectly: "[j]uridical formalism enables the legal system to operate as a technically rational machine," or at least to operate with an appearance of rationality.

Indeed, the juridification of commerce is informed by a juridical ideology that embodies understandings of the proper judicial role that strictly differentiate the legal/judicial function from economics, politics, and morality. These tendencies were addressed in earlier chapters in the context of the legal formalism that characterizes dominant theories of law. Informed by ideological separations between private and public activities and between economics, politics, and law, the common law courts have limited the judicial function. Rules precluding judicial evaluation of the equivalence of exchange or the prudence of bargains, embodied in the legal doctrine of consideration, came to narrowly circumscribe judicial intervention on the grounds of fairness.[16] Morton Horwitz's belief that these developments reflect a decline of the medieval tradition

[16] The doctrine of consideration did not come from the law merchant, but was developed by the common law. Under the common law, an agreement is unenforceable unless it is contained in a sealed instrument or it is supported by valuable consideration. While the origin and evolution of the doctrine of consideration are complex, at the core of the doctrine is the belief that there must be an exchange of value arrived at by way of a bargain in order for a promise to be binding. The doctrine was developed in the late eighteenth century by common law judges. While early statements of the doctrine might suggest

of substantive justice and the equitable conception of contract is worth citing in full:

> Modern contract law is fundamentally a creature of the nineteenth century. It arose both in England and America as a reaction to and criticism of the medieval tradition of substantive justice that, surprisingly, had remained a vital part of eighteenth-century legal thought, especially in America. Only in the nineteenth century did judges and jurists finally reject the longstanding belief that the justification of contractual obligation is derived from the inherent justice or fairness of exchange. In its place, they asserted for the first time that the source of the obligation of contract is the convergence of the wills of the contracting parties . . . [I]n a society in which value came to be regarded as entirely subjective and in which the only basis for assigning value was the concurrence of arbitrary individual desire, principles of substantive justice were inevitably seen as entailing an 'arbitrary and uncertain' standard of value. Substantive justice, according to the earlier view, existed in order to prevent men from using the legal system in order to exploit each other. But where things have no 'intrinsic value,' there can be no substantive measure of exploitation and the parties are, by definition, equal. *Modern contract law was thus born staunchly proclaiming that all men are equal because all measures of equality are illusory.* (Horwitz, 1974: 917–19, emphasis added)

Whereas the medieval equitable theory of contract limited and defined contractual obligations in terms of the fairness of exchange, under modern contract theory contractual obligation depends upon the convergence of the wills and desires of individuals (ibid., 923): Marx's "juridical subjects." The role of the law was thus to enforce "willed transactions" that the parties believed to be to their mutual interest and advantage (ibid., 947). The law was not to police the equity of the bargain.

that the doctrine was intended to regulate equivalence in exchange, in deference to free-market values and the principle of freedom of contract, the common law adopted the rule that it is not for the courts to enquire into the adequacy of consideration. "A court of equity, for example, should not be permitted to refuse to enforce an agreement for simple 'exorbitancy of price' because 'it is the consent of parties alone, that fixes the price of a thing, without reference to the nature of things themselves, or to their intrinsic value' . . . 'a man is obliged in conscience to perform a contract which he has entered into, although it be a hard one.'" (Powell, quoted in Horwitz, 1974: 918). For a fuller discussion of the origins of the doctrine of consideration see Farnsworth (1969) and Atiyah (1979).

No similar requirement exists in the civil law. While some civil law countries, such as France, require the existence of a sufficient *causa* to make a contract valid, this concept is not the same as the common law concept of consideration. The modern doctrine of *causa*, rooted in Roman law, was developed in the seventeenth and eighteenth centuries and came to signify a juridical reason, rationale, or purpose for contracting. See Lorenzen (1919).

Indeed, the autonomy of economic and commercial relations was established by "abstracting" them from the "original disciplinary science of government and morals" (O'Neill, 1986: 50). As Horwitz (1974: 952) argues, this vision of contract law gave expression to the ideology of the market economy that dominated the nineteenth century. The development of extensive markets at the turn of the century:

> contributed to a substantial erosion of belief in theories of objective value and just price. Markets for future delivery of goods were difficult to explain within a theory of exchange based on giving and receiving equivalents in value. Futures contracts for fungible commodities could only be understood in terms of a fluctuating conception of expected value radically different from the static notion that lay behind contracts for specific goods; a regime of markets and speculation was simply incompatible with a socially imposed standard of value. (Ibid., 946–7)

Moreover, the modern will theory of contract arose as part of the "procommercial attack on the theory of objective value" (ibid.) in the movement from the feudal to the capitalist mode of production. It both reflected and constituted fetishized understandings of markets and exchange relations. As the legal ideology of the juridical subject, the will theory of contract sealed the separation of economics and politics and neutralized private law by isolating and obscuring socioeconomic processes of capitalist production beneath a "gloss" of individual liberty and freedom of contract (O'Neill, 1986: 46). Nicos Poulantzas (1973: 128 and 284) describes this as the isolating effect of law, while for Nikolas Rose (1977: 37) it is a "movement of concealment," in that productive relations "disappear in the phenomenal forms in which they are manifest" producing a distance between the essential relations of production and the form of their appearance as exchange relations. To Marx, this concealment or isolation is not universal, but is historically specific to the capitalist mode of production. However, the capitalist mode of production is not self-sustaining. Certain conditions have to be met in terms of creating the ideological and technical infrastructure for the practice of fetishized law. These may be found in the legal rules governing contractual and property rights, which constitute the core of private, commercial law.

In domestic commercial law the norm for domestic contracts came to be the determination of prices according to the will of individuals bargaining freely in the exchange relationship and the application of current market prices in cases of underspecification. These norms were

evident in both common law and civil law countries, although the zeal with which the common law courts embraced the free-market approach and the peculiarities associated with the common law doctrine of consideration, might suggest that the norm was stronger for common law than for civil law jurisdictions.[17]

The decline in the equitable theory of contract is also evident in the changing standards governing liability for defective goods. While quality controls persisted into the seventeenth and eighteenth centuries, the common law developed the rule of *caveat emptor* or buyer beware. The rule limits the liability of sellers for defective goods to only those instances where the seller provided an express warranty of quality or was guilty of fraud. This rule is said to be an "ancient maxim of the common law," not traceable to Roman law, ecclesiastical law, or to the law merchant (Hamilton, 1931: 1156). In England, it first appeared in print in the sixteenth century and gained acceptance in the seventeenth century. However, it was only widely applied in the eighteenth and nineteenth centuries (ibid., 1164). As the "apotheosis of nineteenth-century individualism," it was consistent with the developing model of contract law which left each party to rely on his own judgment and imposed no duty to volunteer information to the other (Atiyah, 1979: 464). *Caveat emptor* was associated with the ideals of the new political economy. The responsibility to inspect goods was placed upon the purchaser, for it was assumed by the theory that "buyers discounted the prices and were prepared to pay to allow for the risk that the commodity they were buying might prove to be defective" (ibid., 466). According to this rationale, giving the purchaser a statutory protection against defective goods would be to provide a bonus for which he had not paid. The rule came into prominence in England, where Chief Justice Lord Mansfield is credited with stating its definitive application as the common law courts replaced those of the law merchant (see Horwitz, 1974: 945).

In the United States the rule was applied with even more vigor. "In the new republic the tradition of authority did not linger long after the war for independence, the intellectual individualism was reinforced by the spirit of the frontier, an emerging industrial system was not to be shackled by formal control, and the courts were quite loath to take up the shock of business friction" (Hamilton, 1931: 1,178). The rule was

[17] See Atiyah (1979) for a detailed exploration of the particular influence that liberal political economy had on the Bench and Bar in England.

consistent with prevailing views of free-market exchange, for it was felt that the purchaser was in the best position to bear the risk of defective goods through inspecting them upon receipt, refusing to accept defective or nonconforming goods, or negotiating an express warranty of quality.

> The laws contrived for the protection of the consumer were repealed or forgotten; the machinery of law enforcement fell into disuse. The matter of the quality of the ware, passed out of the province of government into the economic order. In the market, as the schoolmen of the day were wont to argue, sellers were balanced against buyers, each was in his mercenary methods checked by the competition of others of his kind, and quality even as price was neatly accommodated to individual want.
> (Hamilton, 1931: 1,183)

Thus the common law adopted the rule of limiting the seller's liability for defective goods to a narrow set of circumstances (express warranty and fraud). The situation was somewhat different for civil law countries where national commercial codes established rules governing liability for defective goods, carving out a broader scope for liability (see Tallon, 1983).

The disappearance of the prohibition of usury was also consistent with the advent of free-market principles, though, as noted before, exceptions to the prohibition and selective enforcement had been common. Full play was not given to the market for states continued to regulate the rate at which interest could be charged.[18] Moreover, some states established different rates for domestic and international transactions, allowing a higher rate for the latter (Tallon, 1983: 78).

The advent of *laissez-faire* theory and the values of economic liberalism in the eighteenth and nineteenth centuries and their adoption by the important commercial powers thus gave new meaning to the principles of merchant autonomy in contract law. Merchant autonomy was reformulated in the context of the principle of freedom of contract. Together the principles of freedom of contract and the sanctity of contract provided the respective *grundnorms* for the private and the public spheres. Freedom of contract provided the foundation for the construction of the private sphere as an insulated zone of "private" commercial activity secured by the state through the "public" enforcement of contracts. The will theory of contract, which stresses the free will of

[18] In England the Statute of Usury permitted interest charges that did not exceed 10 percent. See Tawney (1962: 180).

parties to contract on terms agreeable to themselves, replaced medieval notions of equity in contracting and articulated the legal framework for the differentiation between private and public activities, which sealed the separation between economics and politics. With the expansion of merchant autonomy in contracting, there was an erosion of the dualistic system of regulation characteristic of the medieval phase. Moreover, now merchant autonomy operated, not by virtue of the absence of political authority, but with the sanction and support of state authorities. In addition, while states limited their regulatory authority concerning the substantive content of commercial agreements, they expanded it in enforcement matters. The concealment of the fundamentally political and coercive nature of capitalism in domestic economic relations spilled over into international economic relations as the law merchant was absorbed into different national systems of law and subjected to the discipline of liberal political economy and ideology and the isolation of private international law.

As noted in Chapter 2, the distinction between public and private international law emerged out of a "double movement," reflecting the emergence of the nation-state and theories of sovereignty and the attempt of newly emerging states to create a private sphere free from regulation and state intervention. Territorially individuated state authority provided material, institutional, and ideological foundations for the separation of public and private international law, reflecting the emerging distinction between international and domestic legal relations. The advent of liberal theory and political economy further refined the distinction by associating private international legal relations with the economic realm of freedom of exchange and markets. The principles of freedom of contract and the protection of private property were thus articulated as the natural and organic conditions of the private sphere and the *grundnorms* for international commercial relations. By the nineteenth century the distinction between public and private international law was clear, although doubts persisted as to the conceptual status of private international law as properly "international" law, particularly in the Anglo-American legal world. By the end of the Second World War, the distinction was an "article of faith" for public international lawyers and the isolation of private international law was complete (Paul, 1988: 163).

However, it will become evident, as the discussion turns to consider the experiences of the key commercial powers, that these developments were experienced rather differently by states.

Law-Creation, Enforcement, and Nation-States

The nationalization, localization, and neutralization of the law merchant proceeded differently and did not produce uniform results in states. The loss of merchant autonomy was more pronounced in common law states, particularly in England, where merchants disappeared as a separate class. In contrast, on the Continent, many countries retained special jurisdictions and courts for commercial actions. Furthermore, national differences emerged in the specific rendering of law merchant norms.

> As national judges and legislators codified commercial law, it tended to lose its cosmopolitan character and outlook. This process of nationalization of commercial law and of its increasing divorce from experience was characteristic of legal development not only in England and in the United States, but also in France, Germany, and the other countries of Europe. When this process was coupled, as it often was, with a hostility toward the proof of mercantile customs, the result was to impede the adaptation of law to new economic circumstances. The tendency of traders to develop new commercial devices thus ran headlong into the tendency of national legal systems to codify, whether through statute or precedent or legal doctrine. (Berman and Kaufman, 1978: 227–8)

Legal developments in England, the United States, and France have been the most significant in the evolution of the law merchant. English commercial law formed the foundation for commercial relations in the common law countries of the world. Laws modeled on British statutes and common law were adopted by countries of the common law tradition. Through colonial expansion and trade relations, the standards embodied in English commercial law have been transmitted throughout the world.[19] While the influence of British law was, arguably, most significant at the height of Britain's hegemony and commercial supremacy in the activities of English traders and the great trading companies, the influence has been even more profound and enduring. The principles embodied in English commercial law established the core for a major part of Western commercial law and, while they have been subject to some modification over time, they have provided much normative consistency. The basic emphasis on freedom of contract and the sanctity of contract has endured.

As British commercial supremacy waned and the United States gained in influence, American commercial standards became more significant.

[19] See David and Brierley (1978) for the transmission and reception of the common law throughout the world.

The United States adopted British commercial law during the formative stages of its municipal legal system, but later came to enact significant reforms under the Uniform Commercial Code (UCC). As shall become evident, the standards embodied in the UCC became influential in establishing global commercial laws in the third and modern phase of the evolution of the law merchant.

Developments in French commercial law, and to a lesser extent in German law, have been significant as sources of civilian commercial law. Civil or Romano-Germanic law developed on the basis of the Roman *jus civile* and has also been transmitted and received throughout the world through the processes of colonization and adoption (see David and Brierley, 1978: 21). Although different in many respects, the common law and civil law share much at the level of guiding principle, thus enabling their classification as one "great family of Western law." "In both, the law has undergone the influence of Christian morality and, since the Renaissance, philosophical teachings have given prominence to individualism, liberalism, and individual rights" (ibid., 24).

Decline of merchant custom

The second phase in the development of the law merchant was marked by a decline in pluralism of both the sources and subjects of the law. Positive law replaced customary law as the primary source of law, though as will become evident, elements of commercial custom persisted. This created a tension between the localizing tendency of national positive law and the delocalizing tendencies of international commercial custom.

As regards subjects of the law, there was also a decline in pluralism. With the articulation of the distinctions between domestic and international law, states replaced individuals as the proper subjects of international law, which was increasingly associated with *public* international law. Here too, however, private associations, corporations, and individuals continued to exercise some influence over law-creation, albeit not as legal "subjects," but as "objects." They too gave rise to delocalizing and globalizing tendencies that conflicted with states' efforts to localize and nationalize international commercial law. With the further articulation of distinctions between public and private international law, the individual and other private entities such as business corporations assumed significance as part of the isolated, concealed, and politically invisible sphere of private international trade law.

In England, nationalization of the law merchant proceeded on two fronts. One involved the disappearance of the specialized courts as

their jurisdiction was absorbed by the common law courts. The other involved the absorption of substantive merchant law into the common law (Tallon, 1983: 48–9). While the next section will focus on the disappearance of merchant courts, by the seventeenth century the law merchant "was being gradually absorbed into the general legal system of the country. As in the case of internal trade, so in the case of the foreign trade, the older mercantile courts had ceased to exist. Jurisdiction was therefore assumed by the ordinary courts of law and equity."[20] But the disappearance of commercial courts and the assumption of jurisdiction by the common law courts produced certain anomalies. As previous discussions have shown, the common law courts did not recognize or enforce most transactions and procedures enforceable in the law merchant courts. As a result, merchants were either forced to resort to private arbitration or when possible to the courts of equity.[21] The common law courts responded by absorbing the law merchant into the common law. Under Lord Coke, as Chief Justice in the seventeenth century, this involved the application of the law merchant as custom and not as law, and only to merchants. Merchants had to prove that they were merchants and then prove the customs upon which they relied to the satisfaction of the common law courts. And

> as the Law Merchant was considered as custom, it was the habit to leave the custom and the facts to the jury without any directions in point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the custom from the facts; as a result little was done towards building up any system of mercantile Law in England. (Scrutton, 1909: 13)

However, there was considerable discontent with this approach. Berman and Kaufman (1978: 226) note that, as a body of customary law articulated by juries, "the law merchant was hardly suited for a leading

[20] Holdsworth (1907: 304). The Admiralty Court survived until the Judicature Acts of 1872–5 and then became a division of the High Court of Justice. See Tallon (1983: 136).

[21] The Court of Equity developed alongside the common law courts under the office of the Chancellor. It was also known as the Court of Chancery and was regarded as a court of "conscience" for it dispensed justice when the other courts were incapable of providing the claimant with a remedy. Lord Ellesmere in *Earl of Oxford's Case* (1615) 1 Rep. Ch. 1 at 6 stated the function of the Court of Chancery thus: "men's actions are so diverse and infinite that it is impossible to make a general law which may aptly meet with every particular and not fail in some circumstances. The office of the chancellor is to correct men's consciences for fraud, breaches of trust, wrongs and oppressions of what nature soever they may be, and to soften and mollify the extremity of the law." Quoted in Baker (1990: 122–3).

commercial power, which England had become in the eighteenth century." Moreover, merchants needed the law to be more clearly defined, while "from the point of view of national policy, there was a need for the law to be developed officially and not merely informally by commercial experience" (Honnold, 1964: 75–6). As a result, in the eighteenth century, under the direction of Chief Justice Lord Mansfield, the law merchant was made part of the common law, applicable to all persons.[22] Henceforth, positive law would displace custom as the primary source of law.

The incorporation of the law merchant, however, did not have a uniform influence on different areas of the common law. Merchant custom, formerly an integral component of law-creation, came to be of variable significance in different areas of the law. Merchant customs continued to influence the development of laws governing financial transactions, insurance, and shipping.[23] As a result, these areas remained truer to their law merchant origins. This was not the case for the law governing contracts of sale, which came to adopt distinctively English rules (Honnold, 1964: 72). In some cases, innovations from the law merchant were incorporated into the common law.[24] In other cases, however, incorporation was carried out by modifying the law merchant to suit the common law and its procedures.[25]

> The customary doctrines of the law merchant could not be fitted in all cases into the more rigid framework of the common law without distortion. In more than one direction that was bound to affect its commercial application, the common law had been subjected to backgrounds peculiarly English and divorced from any international influences. With the conclusion of the period of absorption, therefore, the commercial law of England still might be based fundamentally on the customs of merchants, and to that extent might retain a cosmopolitan flavor as its chief distinction; but the direct reflection of former days had become a refraction. (Thayer, 1936: 142–3)

[22] In *Pillans v. van Mierop* 3 Burr. 1663, 97 Eng. Rep. 1035 (KB 1765) Lord Mansfield held that the rules of the law merchant were questions of law to be decided by the courts and not matters of customs to be proved by the parties.

[23] Lord Mansfield is noted for the systematic use of merchant juries to assist in the adjudication of these kinds of commercial dispute. See Honnold (1964: 72).

[24] As in the cases of actions of account, certain rights among partners, and the right of stoppage of goods in transit.

[25] This was the case for the development of many of the doctrines of contract law (i.e., the rules governing formation of contract and consideration) and for the standards of liability for carriers of goods by sea.

During the nineteenth century, significant areas of commercial law were codified on the basis of common law decisions.[26] In some cases, codification contributed to a further decline in the cosmopolitan nature of English commercial law, and ultimately a decline in the universality of the law merchant, by strengthening the national character of the rules.[27] Discontinuities appear, however, in that in other areas codification incorporated merchant custom. Codification of the laws governing bills of exchange, insurance, and maritime matters (e.g. shippers, carriers, general average, and salvage) incorporated international mercantile custom, thus retaining significant universality (Honnold, 1964: 75–6). Moreover, to the extent that these areas of law came to be regarded as strictly private commercial matters, they were insulated and isolated as private international trade law. Indeed, the isolation of private commercial law is most pronounced in the area of maritime law.[28] Increasingly, the laws governing maritime transport and insurance were isolated from public international law as the *commercial* and *industrial* aspects of maritime trade came to be regarded as matters of private international law, while matters of *ocean use* were classified as public international law. Maritime transport and insurance thus evolved as private regulatory regimes, subject to the controls of powerful private associations and organizations, including shipping cartels, shipping or liner conferences, and shipowner, insurance, and other mercantile associations.[29]

In the United States, the law merchant was applied from the eighteenth century. Commercial law was regarded as part of the ordinary law and administered by the ordinary courts (Tallon, 1983: 54). It was only in the nineteenth and twentieth centuries, however, that codification of commercial law occurred. As in England, the common law was codified into and supplemented by commercial statutes governing the sale of goods, bills of lading, negotiable instruments, and other commercial matters.[30] English legislation provided the model and foundation for American legislation in many areas[31] and English law was relied upon extensively in commercial disputes. As a result, commercial law

[26] For example, the laws governing the sale of goods, bills of exchange, carriers' liability, marine insurance, merchant shipping, bills of lading, partnerships, and companies.
[27] For example, sale of goods law.
[28] This argument is developed fully in Cutler (1999 c).
[29] See Cafruny (1987) and Gold (1981) for excellent reviews of the history and political economy of the international maritime transport regime.
[30] Owing to the federal structure these statutes were enacted at the state level.
[31] This is particularly so for the laws governing bills of exchange and negotiable instruments. See Honnold (1964: 74).

in the United States embodied similar reflections of and departures from the medieval law merchant. Moreover, local particularisms emerged in state laws, generating a movement in the twentieth century for the unification of state laws. Unification ultimately took the form of the Uniform Commercial Code (UCC). While the UCC unified domestic commercial laws, it also had an impact on international transactions by rendering American commercial rules more consistent with international usage.[32] This brought American practices somewhat closer to Continental legal theory and practice in several areas (Honnold, 1964: 83).

The nationalization and localization of the law merchant took quite a different course on the Continent. Many European countries retained distinct commercial jurisdictions, specialized commercial courts, and special treatment for merchants and commercial transactions. As Von Caemmerer (1964: 90) observes, "[o]n the continent it was the appearance of national legislation which effectively promoted the commercial law, but which at the same time led to the loss of its universality and to its splitting-up into particular national laws. The leading role here fell to France." There, land-based commerce and maritime trade were codified in the seventeenth century in the legislation of Colbert. The Ordinnance sur le commerce (1673) and the Ordinnance sur la marine (1681) provided the models for the Napoleonic Code de Commerce of the nineteenth century. The Napoleonic commercial code established the pattern of the separate and distinct treatment of commercial matters, a practice subsequently adopted by many civil law countries.[33] However, while this Code established the practice of distinct and separate treatment for commercial matters, it was inspired by French Revolutionary values that stressed the equality of citizens and freedom of commerce. Trade guilds were suppressed and the notion of a distinct status for merchants was replaced with the idea of a distinct status for commercial transactions. This marked a significant move to objectify commercial law through depersonalizing the commercial relationship, a development considered in later chapters to be the *modus operandi* of legal formalism. Tallon (1983: 8–9 and 30) argues that delinking special personal status from the special status accorded to the transaction was more consistent with

[32] This is particularly so for the provisions governing the sale of goods, terms of trade in transport documents, and negotiable instruments. See Honnold (1964: 228). And see Trakman (1983: 35).
[33] Von Caemmerer (1964: 90). The distinction is recognized in the Spanish Commercial Code of 1829, the Portuguese Code of 1833, the Dutch Code of 1838, the Brazilian Code of 1850, the Italian Commercial Codes of 1865 and 1883, and the German codifications of 1861 and 1900.

French Revolutionary emancipatory values. However, there was continuing hostility to the preservation of distinct commercial courts, as will become evident in the next section.[34] As Schmitthoff notes, the:

> Napoleonic codes gave final expression to the political ideals of the philosophy of the French Revolution. The fundamental concepts of the Napoleonic codification are freedom of contract and the assertion of ownership as an absolute right. The Napoleonic codes have been described as ratifying the triumph of the *tiers état* in which, as we know, the *commercants* and the liberal professions were prominent. The French codification is thus the final seal of a victorious political movement. (1961: 136)

The French Commercial Code has been adopted or copied by Belgium, Luxembourg, Greece, and the French colonies.[35] In France, in the nineteenth century, legislation outside the Commercial Code was enacted governing a number of commercial matters, including bills of lading and cheques (Tallon, 1983: 30).

In comparison to the Anglo-American experience, the nationalization of French commercial law has resulted in a decreased loss in universality. French commercial law retains a distinctiveness, more consistent with the medieval law merchant, but lost to the commercial law of the common law countries. Merchants have special rights and duties, the rules of evidence applied to commercial transactions are more liberal, while commercial transactions are subject to special jurisdiction in commercial courts comprised of merchant judges and subject to swifter and simpler procedures (ibid., 36–8).

In Germany, the foundations of commercial law derive from the customs and rules of the merchant guilds. As in France, the separate commercial jurisdiction of the sixteenth century persisted; however, in Germany there were no separate commercial courts. Some commercial legislation was enacted in the eighteenth century,[36] but the multiplicity of German states prevented codification prior to the nineteenth century.[37] The incorporation of the law merchant was largely achieved

[34] The distinction Tallon makes between the treatment of merchants and their transactions may be less important than he suggests for he notes (1983: 36) that French commercial law constitutes a "special regime" and confers on merchants a "special status."
[35] See Tallon (1983: 41–4) for a discussion of the experiences of these countries.
[36] The Prussian Maritime Law of 1727, the Law on Commercial Instruments of 1766, and the General law of Prussia of 1794.
[37] Thayer (1936: 144) and see Schmitthoff (1961).

through commercial codifications of the nineteenth century. Schmitthoff (1961: 136) argues that "in Germany the creation of commercial codes was the legal reflection of the struggle for political unity; it was a deliberate attempt to give impetus to the movement for German political unification by means of the creation of a uniform law." The first unitary commercial code was enacted in 1861, while the German Commercial Code became the law of the Confederation of Northern Germany and was extended to the entire German empire in 1871. It was revised in 1897 and, as in the case of France, legislative enactments in the nineteenth and twentieth centuries governing a variety of commercial matters outside the Code have added to German commercial law.[38] The German Commercial Code has been adopted by Austria and forms the basis for Japanese commercial law (see Tallon, 1983: 18–22). While the distinctiveness of merchant law is not as pronounced in the German system as in the French system, it too appears to bear a greater likeness to the medieval law merchant than do its Anglo-American counterparts.

Thus far the discussion has addressed the nationalization and localization of the law merchant through codification. However, it is also important to note that it was at this time that the field of conflict of laws, discussed in earlier chapters, emerged as a means of localizing and nationalizing international commercial transactions and as a mechanism for managing the increasing territoriality of state power. As mentioned before, conflict rules function to localize transactions with a foreign element in a particular national legal system. The proliferation at this time of national systems of conflict rules underscores the importance that states were attaching to the national and local regulation of international commercial relations. The belief that all transactions should be subject to the jurisdiction of one national legal system (i.e., the belief that there are no homeless or stateless contracts) epitomizes the national approach to regulation and is the legal manifestation of the doctrine of sovereignty that was to dominate the nineteenth century:

> Thus, according to the nineteenth-century point of view, efforts must above all be directed to the field of conflict of laws and jurisdictions. The aim is to decide which national legal system of law governs a given legal relationship having international elements, to fix, if possible,

[38] For example, the law on insurance contracts of 1908, the law on credit instruments of 1961, laws on transportation by river of 1895, road of 1952, air of 1922, rail of 1938, and various laws governing competition and industry.

which national court shall be exclusively competent to take cognizance of it, and, finally, to ensure the international validity of duly executed documents of foreign judgments delivered in accordance with these principles.
(David, 1972 a: 45)

Each national legal system developed its own system of conflict of laws, giving rise to significant differences in the rules used to localize international commercial transactions. Important differences emerged both among and between common and civil law jurisdictions. It was thus possible that a particular transaction could be localized in one country under one system of conflict rules, but in another country under a different system of rules. Toward the end of the second phase there were some efforts by states to harmonize national conflict of laws rules so as to produce uniform results. However, these efforts were undertaken by civilian jurisdictions and did not attract the attention or support of the common law jurisdictions. The Hague Conference on Private International Law was the main body that engaged in the harmonization of conflict rules in the late nineteenth century.[39] However, René David (1972 a: 142) observes that obstacles of "a dogmatic nature" inhibited the success of its efforts: the "lawyers from the various countries, delegated by their governments, did not want to abandon, without good reason which was lacking, the positions which their international [conflict] systems of law had adopted for doctrinal reasons or sometimes fortuitously." While these efforts did produce some results, it was only in the third phase, in the twentieth century, that significant efforts were made to unify substantive rules of commercial law.

In addition, while positive law was the dominant source of law, elements of merchant custom persisted. Their persistence created tensions between localizing and delocalizing influences. This is particularly so with regard to maritime law and insurance law where merchant custom remained a significant source of law. The continuing efficacy of merchant custom was linked to the growing significance of private trade and business associations and corporations, who, while not formal "subjects"

[39] The first Hague Conference for the harmonization of conflict rules took place in 1893. Only European states were invited; the United Kingdom was invited but did not attend. Membership in the Hague Conference was limited to Continental states until the twentieth century. The United Kingdom began participating in 1925 and became a member in 1951. The United States sent observers in 1956 and 1960 and became a member in 1963. Other notable efforts to harmonize conflict rules included those of the Latin and South American states, resulting in the Montevideo Convention of 1889 and the Pan-American Conference that first met in that same year and eventually produced the Code Busmante in 1928.

of public international law, were increasingly significant in creating customary private international law. This law was then transmitted globally through their transnational associations.

In the area of maritime transport, the nationalization and localization of the laws were accompanied by progressively more highly organized and institutionalized private arrangements between merchant shippers, marine insurers, underwriters, and financiers. These private groups were key figures in the construction of the mercatocracy, which functioned as the organic intellectuals, forming the core of the social forces that were to define global political/legal relations in the third phase of the law merchant. While more will be said in the next chapter about the role of early mercantile associations, their influence was significant in the area of maritime law. Maritime transport and insurance practices, for example, were generated and transmitted through the activities of a private group of marine underwriters who met regularly at a coffeehouse run by Edward Lloyd and engaged in the practice of underwriting marine risks. Lloyd published the *News* relating to current developments in shipping matters. It was replaced by *Lloyd's List* in 1734 and in 1760 the underwriters began to jointly publish Lloyd's *Register of Shipping*. "From a loose association of men doing business at the same place, the Lloyd's underwriters slowly became a well-organized society, with rules, standard policies, high ethical standards, and a marvelous information service. From the mid-eighteenth century to the present, Lloyd's has dominated the field of marine insurance" (Tetley, 1978). The adoption of standardized contracts of insurance, crystallizing customs and usages, and their widespread use throughout the world contributed to the universalization of insurance practices and the ideological coherence of the industry.

Merchant custom and private actors also figured in the development of "terms of trade" regulating transport agreements which were used routinely, first, in maritime and, later, in other forms of transport. These terms continue to operate today as customary international law and achieved their currency through regular use by shippers, insurers, and financiers.[40] Here, too, national differences began to emerge, generating

[40] Trade terms deal with the transfer of risk, arrangements for insurance and carriage, packing and marking of goods, documentation, inspection, and notifications. The oldest terms are contracts for the sale of goods "free on board" or fob sale or term, under which the seller is responsible for the cost of transport and bears the responsibility for the safety of the goods until the point of their passing the ship's rail. Once delivery is complete, the risk of loss to the goods and further costs of transport are transferred to the buyer. The

a movement for the unification of trade terms in the third phase of the law merchant.

Despite the persistence of merchant custom in some areas, national codification through positive law produced significant differences in commercial laws. In the area of finance, national legal systems came to recognize the various credit instruments formerly recognized under the law merchant. However, significant national differences emerged in the regulation of bills of exchange, promissory notes, and letters of credit.[41] In the area of insurance, states also became involved in the regulation of commercial practices, undermining the universality of law merchant practices. While more will be said about insurance in the next section on dispute settlement, significant national differences emerged in the area of insurance as well.

This review of the experiences of the major commercial states suggests that the process of nationalizing and localizing the law merchant did not produce uniform results and resulted in a tension between localizing and delocalizing tendencies. Common law jurisdictions emerge as more distinctively "national" and localized than do civil law jurisdictions. This tendency is also evident in the development of dispute settlement practices, to which the discussion will now turn.

Dispute settlement: a public affair

In dispute settlement, as well, tensions between the localizing and nationalizing tendencies of national courts of law and the delocalizing and globalizing tendencies of private dispute settlement are evident. An important element in the nationalization and localization of the law merchant involved the incorporation of the jurisdiction of merchant courts

fob term developed to suit the needs of merchants prior to the establishment of regular shipping lines. At the time it was customary for merchants to charter vessels for the transport of their purchases and to accompany the vessel on the voyage. It thus made sense for the buyer to assume responsibility once the goods were on board. However, with the establishment of regular shipping lines and the development of new forms of finance, the buyer was often not present at the point of delivery and payment was often made at a future date. To meet these new conditions, the cif term (cost, insurance, and freight) was developed and gradually replaced the fob term as the most commonly used contract in ocean trade. Under a cif contract the seller is responsible for shipping the goods or furnishing the documentation for goods already seaborne and for tendering the documents to the buyer. The documents include a bill of lading, a policy of insurance covering the goods, and an invoice showing the amount due from the buyer. Delivery and transfer of risk is satisfied upon delivery by the seller of the documents and not upon the physical transfer of the goods. The use of fob term is usually dated to the early nineteenth century. See Sassoon (1975) and Ramberg (1982: 120).

[41] See generally, David (1972 c: 127); Batt (1947); Thayer (1936: 149–50); and Ellinger (1970).

into national judicial systems. While this process occurred in all of the states under consideration, there were distinct differences in the extent to which national courts assumed jurisdiction over commercial matters. England and the United States adopted unitary systems, wherein the national courts assumed jurisdiction for most commercial matters. The specialized merchant courts disappeared, with the exception in England of the Admiralty Court,[42] whose jurisdiction had been severely limited by the common law courts, the rather unsuccessful Commercial Court,[43] and the earlier Insurance Court. During the seventeenth century the staples courts disappeared and the courts of "pie-powder" diminished in importance (Burdick, 1909: 43–4). In a competition for jurisdiction between the common law and Admiralty courts, the former won, with the latter surviving in diminished stature until its absorption by the High Court of Justice in the nineteenth century (Holdsworth, 1907).

In France, special commercial courts and commercial jurisdictions were retained. Tallon (1983: 139) notes that "these courts have retained the greatest importance. Some merchants consider them to be an essential element of their status as merchants. Despite all the criticism directed towards them they have survived a succession of reforms of judicial organization in France." The commercial courts are independent of the regular courts and operate under special rules of procedure, while merchant judges are elected by merchants and by business corporations.

In Germany, the jurisdiction of the merchant courts was assumed by the national courts; however, jurisdiction was retained in a special division for handling commercial matters. The commercial chamber comprises an ordinary civil judge and two commercial judges appointed upon the recommendations of business organizations (ibid.).

While states expanded their controls over dispute settlement, adjudication in national courts of law did not entirely eclipse dispute settlement through private arbitration. This created a tension between the national outlook of courts of law and the anational, delocalized nature of private arbitration panels. Indeed, for England and the United States, private mechanisms for dispute resolution persisted through the period of the nationalization of the law merchant and judicial system. The

[42] See generally, Mears (1908) and Holdsworth (1907).

[43] While the Commercial Court was created in 1895 and recognized in 1970 by the Administration of Justice Act as a specialized division of the Queen's Bench of the High Court, it does not operate as an independent court with a separate, fixed jurisdiction and has not been very successful. See Tallon (1983: 51–2); Devlin (1961: 8–11); and Lord McNair (1970).

sanction of market exclusion continued to be utilized by private trade associations to discipline their members and merchants turned to private arbitration when the national court systems were unable to settle disputes in an expeditious and satisfactory manner (William C. Jones, 1958). In England, for instance, for some time insurance disputes continued to be settled in private arbitrations owing to dissatisfaction with the abilities of the common law courts (Vance, 1909: 115). The experiences of these courts is instructive of the changing balance between private and public authority. In England, marine insurance had become highly specialized by the seventeenth century. The first English insurance act was enacted in 1601 at the instance of marine underwriters who were dissatisfied with the ability of the existing courts to adjudicate maritime insurance disputes. Prior to the accession of Lord Mansfield to the bench, insurance disputes were handled by merchant courts and private arbitration. "It was generally understood that the common law courts, which did not recognize the quasi-international customs of merchants, afforded no fit forum for the determination of causes among merchants" (ibid., 111). However, merchants were unable to enforce the judgments of the private courts and private arbitrators and so they turned to the courts of Admiralty and common law. These courts, too, proved inadequate:

> [T]he common law courts of that day, with their highly technical and tedious rules of procedure, as governed by precedents of agricultural rather than mercantile origin, were ill adapted for the settlement of merchant disputes. Thus it appears that at the beginning of the seventeenth century persons having insurance causes were without a satisfactory tribunal for their determination. The conventional [merchant] courts could not enforce their judgments, the courts of admiralty had proved inadequate, possibly because of the vexatious jealousy of the common law courts in unreasonably restricting their jurisdiction, while the common law courts were wholly unfit. (Ibid., 113)

The Insurance Act of 1601 established a special court of insurance commissioners, comprised of an admiralty judge, civil law and common law lawyers, and merchants, to hear insurance cases. However, the court was not successful because of its limited jurisdiction and it lapsed into disuse by the end of the century.[44] As a result, merchants continued to pursue private means to settle insurance disputes. With the accession

[44] Its jurisdiction applied only to policies issued in London and to insurance on goods. Only the insured and not underwriters could take actions and its judgments were not a bar to actions in other courts. Vance (1909: 114).

of Lord Mansfield to the bench in the eighteenth century, the incorporation of insurance principles from the law merchant into the common law began. He is famous for impaneling juries of merchants and often cited the Sea Laws of Rhodes, the Consulato del Mare of Barcelona, and the Laws of Oleron and Wisby in his decisions (Vance, 1909: 116). The common law courts adopted the law merchant principles governing sea loans and recognized the principle of the general average (Scrutton, 1907: 242–3).

The practice of arbitration came to be bolstered by state intervention in the form of legislation providing for the enforcement of arbitration agreements. In England, an arbitration act was enacted in 1697 providing for the state enforcement of private arbitration awards and was amended in 1889 to provide for the enforcement of agreements to arbitrate future disputes. William Jones (1958: 462) observes that by the end of the nineteenth century in England it was estimated that "almost all mercantile cases, even those that eventually came to the courts, went to arbitration. Exchanges such as the Liverpool Cotton Exchange, the London Stock Exchange, the London Corn Trade Exchange, and the Coffee Trade Association, had machinery for arbitration."

In the United States, private arbitration persisted until the end of the eighteenth century. The state courts were avoided as too costly, unjust in outcome, and resistant to rapidly changing commercial practices (Benson, 1988–9: 655). Bruce Benson (ibid., 655) observes that "it was not until the end of the eighteenth century that public judges began to convince merchants that they could understand complex business issues and practices, and that they accepted as law, agreements established to facilitate the reciprocal self-interest motives of traders." It was then that the private arbitration system began to disappear. Indeed, courts in the United States came to regularly invalidate arbitration clauses and agreements and evidenced considerable judicial hostility to the practice of arbitration. In England, courts likewise deemed arbitration agreements to be against public policy because they ousted the jurisdiction of the courts of law and the procedural justice afforded only in courts of law (see generally, Carbonneau, 1984: 39).

At the end of the nineteenth century there was a change in judicial attitude in the United States brought about by national policies and legislative changes creating a more hospitable environment for arbitration. What was regarded by many as overly intrusive state intervention into commercial disputes was limited by restrictions on the abilities of courts to interfere in arbitration proceedings (Benson, 1988–9: 656). The practice

of arbitration thus became more common again. Exchanges and mercantile associations proliferated at this time, providing arbitration facilities for their members.[45] A number of other trade associations were formed towards the end of the nineteenth century, providing for the arbitration of disputes.[46] Legislation was passed in New York in 1791 providing for the enforcement of arbitration awards and agreements by state courts. In England, as well, judicial hostility toward arbitration began to weaken as national arbitration legislation was enacted (see Carbonneau, 1984: 40–5). In France, judicial attitudes toward arbitration exhibited similar hostility, but later underwent similar revision (ibid., 53–7).

William Jones (1958: 463) concludes that in England and the United States in the nineteenth century "there was a development of private mercantile tribunals in which the bulk of mercantile disputes was settled entirely outside the state judicial system. The indications are that this trend has continued and exists today in a strengthened form." Indeed, as will be illustrated in the next chapter, private arbitration has eclipsed adjudication in national courts of law as the preferred method of settling international commercial disputes. The balance between private and public regulatory authority in dispute settlement appears to be shifting over time to the private sphere. However, the increasing prominence of private arbitration has been a result of the juridification of dispute settlement relations as state policy initiatives and legislative changes limited state/judicial intervention into the arbitration process. Private authority over dispute settlement thus exists with the support of the state and in a political and legal climate created by public authorities through the juridification of commercial relations. This is quite distinct from the autonomy of the dispute settlement system of the medieval merchants, whose autonomy flowed from the incapacity and general unwillingness of the local legal systems to enforce merchant laws.

Moreover, and of great significance, public authority continues to play an absolutely crucial role in the *enforcement* of commercial agreements. Only public state officials may make declarations of bankruptcy, order the execution of judgments through the seizure of assets, and generally enforce contractual performance or payment. Another way of framing

[45] These included the New York Stock, Produce, Mercantile, Cotton, and Coffee and Sugar Exchanges, the Chicago Board of Trade, the St. Louis Merchants' Exchange, the Philadelphia Commercial Exchange, the Kansas City Board of Trade and the Milwaukee Grain Exchange. See William C. Jones (1958: 462).

[46] The Grain and Feed Dealers Association, the National Hay Association, the National Cotton Seed Products Association, and the American Seed Trade Association. See William C. Jones (1958: 462–3).

the centrality of state enforcement is to consider that delocalized transactions must ultimately be localized in a system of legitimate legal compulsion in order to be enforced.[47] Indeed, as a review of the third phase in the development of the law merchant will reveal, it became increasingly more apparent that mechanisms were necessary to facilitate the recognition and enforcement of foreign arbitral awards. States came to be intimately involved in the practice of arbitration by recognizing and enforcing both domestic and foreign agreements and awards. National differences emerged in the treatment and status accorded to private arbitration by various legal systems, generating a movement for the unification of arbitration law in the third phase.

This review of the second phase in the evolution of the law merchant reveals that states came to assume a central role in the juridification of international commercial relations. Juridification forged links between law, capitalism, and rationalized domination – links that would come to be associated specifically with the capitalist mode of production. State authority replaced the overlapping authority structures of the medieval period. The dualistic system of regulation characteristic of the medieval phase was in many jurisdictions replaced by unitary systems of state control. Furthermore, states exercised stronger and more comprehensive discipline than did the local religious and political authorities of the earlier phase. State authorities engaged in state-building sought greater control over international commercial transactions and public authority largely eclipsed private authority in creating and enforcing international commercial laws. Merchant custom virtually disappeared as a source of commercial norms as positive law became the mark of state authority and legal codification a method of state-building. In the area of enforcement, private merchant arbitrations were replaced by adjudication in national courts of law under national commercial codes. However, the practice of arbitration persisted, anticipating a major expansion of private regulatory authority at the end of the period.

Merchant autonomy in law-creation and in enforcement contracted, while state authority expanded. During the early part of this phase, mercantilist principles informed state regulation of commerce, but later the advent of liberal political economy marked a shift in favor of a more permissive and facultative approach that stressed free-market principles. Public authorities thus generated laws and enforced disputes

[47] This factor is a significant influence in the conclusion drawn by Highet (1989: 616) that the law merchant might in fact be like the "Emperor's clothes."

consistent with private law principles stressing freedom of contract, the sanctity of agreements, and the facilitation of exchange. Freedom of contract became the *grundnorm* for the private sphere, while the sanctity of agreements formed the normative foundation for the public sphere. Both principles were linked through liberal political economy to greater efficiencies and to the generation of wealth and happiness. Significantly, liberal political economy and ideology gave rise to the distinction between public and private international law. In the commercial sphere, the relationships between individuals and private associations and corporations were juridified as part of the private sphere of capital accumulation. There they were neutralized from political control as the separation between economics and politics sealed their status as apolitical and neutral, economic transactions. Through distinctions between private and public international law and the rules governing international legal personality, individuals and business corporations were rendered "invisible" as "subjects" of the law, for legal theory and formalism recognized them only as "objects." The influence of liberal ideology was profound in terms of mystifying and fetishizing the emerging understanding of law, concealing its coercive face:

> [T]he separation of the economic from the political made possible both the naturalisation of capitalist economic exploitation and the neutralisation of the revolutionary potential of liberal politics – two processes that converge to consolidate the capitalist model of social relations.
>
> . . .
>
> Confined to the public place, the democratic ideal was neutralised or strongly limited in its emancipatory potential. On the other hand, the conversion of the public place into the exclusive site of law and politics performed a crucial legitimation function in that it convincingly obscured the fact that the law and the politics of the capitalist state could only operate as part of a broader political and legal configuration in which other contrasting forms of law and politics were included.
>
> (Santos, 1985: 306–7)

Over time, differences emerged in the way national legal systems regulated many private law transactions, bringing private international trade law greater visibility. National differences appeared in the legal interpretation and effect of trade terms, bills of lading, and liability standards in transportation. In the area of marine insurance, national distinctions also became evident. Differences in the interpretation and legal consequences of financial instruments, including bills of exchange and letters of credit, also developed. In the area of law-creation,

while national positive law replaced merchant custom as the primary source of commercial law, national systems became increasingly inflexible, differences in the legal weight to be given to newly developing customs emerged, and incompatibilities in national conflict of laws systems appeared. Finally, the expansion of public regulatory authority in the enforcement of commercial agreements reinforced national particularisms. These developments were all more or less consistent with the acceptance of national sovereignty and political autonomy as the fundamental ordering principles in international relations. Legal positivism articulated these principles by elevating positive law over customary law and by generating nationally-based conflict of laws systems to regulate international transactions. Many of these developments generated efforts to regain the lost universality and distinctiveness of the law merchant in its third phase.

6 The modern law merchant and the *mercatocracy*

The third phase in the evolution of the law merchant, the twentieth century, is said to be witnessing a revival of the law merchant and the "medieval internationalism" of the first phase (Schmitthoff, 1961: 139–40). Known as "global capital's own law" (Santos, 1995: 288), the law merchant is being revived as an integral force in the "hyperliberalization" of the state and world order. The "hyperliberal" state, "reasserts the separation of the state and economy" (Cox, 1996 b: 201), reinscribing distinctions between politics and economics and the public and private spheres through an intensification of juridified, privatized, and pluralized commercial relations. However, this marks a qualitatively new process of juridification because it is associated with transnationalized social forces (Cox, 1987: 357–9) and the "transnationalization of the legal field" (Santos, 1995: 276). Whereas earlier juridification occurred through the processes of state-building and national capital accumulation, contemporary juridified relations are being deepened and intensified through delocalizing and transnationalizing legal disciplines that both reflect and facilitate the transnational expansion of capitalism and related practices of competition states and patterns of flexible accumulation.[1] Moreover, contemporary juridification is intensifying the relationship between law and capitalism through processes that are more aptly described as "reregulatory" rather than "deregulatory,"[2] for the state plays an integral although different role in regulating international commerce.

At the heart of these transformations is the global mercatocracy, an elite association of public and private organizations engaged in

[1] See Chapter 2 for discussion of these concepts.
[2] Santos (1985: 324) argues that law has never been so hegemonic, especially in developed, core states.

the unification and globalization of transnational merchant law. This elite association exercises near hegemonial influence as the "organic intellectuals" of the transnational capitalist class, materially, ideologically, and institutionally.[3] Robert Cox (1999: 12) refers to a "nascent global historic bloc consisting of the most powerful corporate economic forces, their allies in government, and the variety of networks that evolve policy guidelines and propagate the ideology of globalization." The mercatocracy is an integral component of this nascent historic bloc. As "organic intellectuals," the mercatocracy provides a "general conception of life, a philosophy" and performs an educative role which assists in replacing coercive class relations with consensual relations (Gramsci, 1971: 103–4). Leslie Sklair (2001) describes this emerging historic bloc and the role of the transnational capitalist class:

> The transnational capitalist class is the main driver of a series of globalizing practices in the global economy. It is, therefore, the leading force in the creation of a global capitalist system. The *global* is the goal, while the *transnational*, transcending nation-states in an international system is in some respects still having to cope with them in others, is the reality. The global capitalist system and the global economy exist to the extent that private rather than national interests prevail across borders. (3)

The goals of this nascent historic bloc are consistent with the ends to which processes of globalization are leading: "the establishment of a borderless global economy, the complete denationalization of all corporate procedures and activities, and the eradication of economic nationalism" (ibid., 3). The mercatocracy plays a very significant role in the furtherance of these goals. Its contemporary focal point is the unification movement: a movement engaged in harmonizing, unifying, and globalizing merchant law. The decline in the universality of the law merchant, caused by the proliferation of national differences in the period of nationalization, generated efforts to unify commercial law. The unification movement is being advanced by social forces committed to

[3] See Kees van der Pijl (1998: ch. 4) for analysis of historical transnational class formation in the associations of Freemasons in the late seventeenth century. Merchants, the clergy, and royalty formed transnational links through the masonic institutions. Later in the nineteenth century he notes that bourgeois class formation tended to focus nationally, not transnationally. But elements of transnationalism were evident in the associations of international investment bankers or "haute finance" based mostly in London. He associates the transnational capitalist class in the twentieth century with the operations of the International Chamber of Commerce, a private organization that is argued here to be a central player in the constitution of private international trade law.

facilitating the transnational expansion of capitalism. The unification of commercial law facilitates exchange and the transnational mobility of capital by reducing national and territorial legal barriers to exchange through delocalized laws, procedures, and dispute settlement mechanisms. Transnationalized merchant laws are generating greater pluralism in law-creation, as new sources of law are legitimated and new subjects of law emerge to challenge conventional legal sources and subjects doctrines. Transnational merchant law is also blurring the boundary between the public and private domains as state elites participate in delocalizing law and dispute settlement, thus narrowing the jurisdiction and powers of the public sphere and broadening those of the private sphere.

This chapter reviews the third and contemporary phase in the development of the law merchant. Again the analytical focus is on law-creation, and dispute settlement. However, the context for these processes is increasingly transnational and global. The laws governing private international trade are increasingly being generated through multilateral initiatives to unify and harmonize divergent trade laws. In addition, a revival of private arbitration as the preferred method for settling international commercial disputes is sweeping the globe as an integral element of the unification movement. The mercatocracy is comprised of a diversity of public and private participants and is driving these developments in response to local and global conditions that are changing the terms of international commercial competition. Indeed, the chapter places the unification movement in the historical contexts of evolving global capitalism and contemporary disciplinary neoliberalism. It argues that the modern unification movement emerged as a cooperative strategy for managing conflicting nationally-based com--mercial laws and, thereby, facilitated the mobility of capital and the expansion of capitalism. While originally European and regional in scope, the movement attained global dimensions with the creation of an institutional framework under the auspices of the United Nations and under the leadership of the United States after the Second World War years. The initial disinterest of the United States in the unification movement and the radical shift in support of, and, indeed, its acquisition of monopoly over, the movement coincided with the crisis of late capitalism. Robert Cox (1987: ch. 8) associates the crisis with the disintegration of the post-Second World War neoliberal historic bloc and the decline of US hegemony, which became apparent in the economic turmoil of

the 1970s.[4] The efforts that the United States and other developed states put into unifying commercial law with a renewed neoliberal or, in fact, "hyperliberal"commitment to the efficacy and inherent superiority of the private regulation of commerce reflect attempts by core states to consolidate capitalism and to facilitate the denationalization and further expansion of capital.[5] This renewed assertion of the "primacy of the private" also coincided with the advent of the competition state and a shift in structural power from nationally to transnationally based interests.[6] This structural shift is argued to be manifested in the growing pluralism of sources of law, evident in the corporate legal preference for nonbinding "soft law" over binding "hard law," and a renewed emphasis on merchant custom as a source of law. It is also evident in increased pluralism in the subjects of law, with transnational corporations and private business associations functioning as *de facto* legal "subjects" and with a host of other identities aspiring to status as "subjects" of law. The expansion of privatized dispute settlement through private, delocalized, and transnationalized international commercial arbitration is also part of a corporate strategy to further disembed commercial law and practice from the "public" sphere and to reembed them in the "private" sphere, free from democratic and social control. The devolution of authority to resolve disputes and to enforce agreements to the private sphere through the increasing legitimacy of private arbitration, and the reassertion of merchant autonomy as the substantive norm are perfecting this reconfiguration of political authority. This is reordering state–society relations both locally and globally. While state enforcement of commercial bargains remains crucial to the stability of the system, states are recasting their enforcement roles and conferring more powers on corporate actors. Recalling the earlier discussion of stages in the decline of the public/private distinction, the meeting of public and private authority in the unification movement represents the final stage in its decline. However, the influence of the mercatocracy is neither complete nor hegemonic in the Gramscian sense, for the crisis also involves a crisis of representation and legitimacy. Indeed, competing social forces articulating new claims to subjectivity under international law are emerging

[4] See also, Fredric Jameson (1991).
[5] For developments in contemporary capitalism, see Gill (1995 a); Harvey (1990); and Held (1995).
[6] See Cerny (1990: 233–4 and 1997) and Gill (1998 and 1995 a) for discussion of the competition state. For the transnationalization of capital, see Gill and Law (1993) and Robinson (1996 and 1998).

from those of formerly marginalized and legally "invisible"status. They are pressing beyond the formal reaches of international law, suggesting potential sites for transformative and emancipatory politics.

Before turning to modern developments in law-creation and dispute resolution, the discussion will review the historical, material, ideological, and institutional contexts of the unification movement.

The Unification Movement and World Order

The modern unification movement seeks to recreate the medieval tradition of *jus commune*, which disappeared as international commercial law was assimilated by national legal systems in the second phase of the development of the law merchant.

> The legal process in general was characterised in the nineteenth century by a disappearance of the traditional *jus commune* which had developed in the field of international commercial law over centuries; the engine behind this process was the drive toward the nationalisation of the law, an outcome of converging political, philosophical and cultural developments dominant in this period . . . [T]his nationalisation of international commercial law has in its core been preserved ever since, and the past and current efforts at unification by international agencies may, in the historical context, be seen as attempts to modify, in a limited manner, the adverse affects which the extreme emphasis upon national laws in international commercial legal relations has had upon the flow of trade between states. (Dolzer, 1982: 62)

These initiatives form part of what is referred to in international legal literature as the "unification movement," although, as will be discussed, both unification and harmonization are involved (David, 1972 a). The unification movement is an integral although neglected aspect of the juridification of commerce and the globalizing processes that are reconfiguring state–society relations both locally and globally. Legal unification is part of world order and global structuration processes in that it is an essential aspect of "*how* the global system has been and continues to be *made*" (Robertson, 1992: 53). It is a constitutive element of what Roland Robertson (ibid., 54) refers to as "movements and organizations concerned with the patterning and/or the unification of the world as a whole." Initially conceived of as a strategy of international cooperation in the late nineteenth century, unification is evolving into a strategy of international competition consistent with

the move from the welfare to the competition state. As Philip Cerny observes:

> [t]he state is no longer in a position anywhere to pursue the general welfare as if it were a domestic problem. As the world economy is characterized by increasing interpenetration and the crystallization of transnational markets and structures, the state itself is having to act more and more like a market player, that shapes its policies to promote, control, and maximize returns from market forces in an international setting. (1990: 230)

The movement is blurring the distinction between public and private authority because states in their public capacities are negotiating laws that govern commercial transactions which have traditionally been regarded as private by liberal theories of international political economy and of international law, while private actors are increasingly participating in the settlement of matters that were previously regarded as part of the public domain.[7] The blurring of the public/private distinction has important implications for understanding the relationship between the new law merchant and world order. Indeed, the growing ambiguity of regulatory authority over international trade is an integral aspect of the reconfiguration of political authority that is accompanying the crisis of late capitalist societies. As Robert Cox notes:

> [t]he key criterion today is competitiveness; and derived from that are universal imperatives of deregulation, privatization, and the restriction of public intervention in economic processes. Neoliberalism is transforming states from being buffers between external economic forces and the domestic economy into agencies for adapting domestic economies to the global economy. (1995: 39)

Today, law-creation, dispute resolution, and enforcement in international commerce are regulated by the mercatocracy. This elite association of transnational merchants, private lawyers and their associations, government officials, and representatives of international organizations are engaged in unifying, harmonizing, and, importantly, globalizing private international trade law. The mercatocracy constitutes a transnationalized social force, what Cox (1987: 359) describes as a "transnational

[7] For example, states are engaged in unifying the laws governing the international sale of goods, agency relations, banking and financial documents, transport documents, insurance documents and practices, and a growing list of "private" law matters. Inversely, private actors are increasingly engaged in the settlement through privatized international commercial arbitration of disputes that were formerly regarded as matters of mandatory national law, justiciable in national courts of law. See Cutler (2002 b).

managerial class" that is characterized by "awareness of a common concern to maintain the system that enables the class to remain dominant." As he further (ibid., 359–60) notes, this class is not limited to the managers of multi- and transnational corporations, but also includes government officials and representatives of international organizations and specialized business groups and experts. The mercatocracy is able to exercise near hegemonic influence through its material links to transnational capital, its monopoly of expert knowledge and thought structures, and its controlling influence in the institutional framework of the new law merchant order.[8] The influence is thus material, ideological, and institutional and provides an instance of what Stephen Gill (1995 a) refers to as "disciplinary neoliberalism" and a "new constitutionalism." As he notes, this

> [n]ew constitutionalism confers privileged rights of citizenship and representation on corporate capital, whilst constraining the democratisation process that has involved struggles for representation for hundreds of years. Central, therefore, to new constitutionalism is the imposition of discipline on public institutions, partly to prevent national interference with the property rights and entry and exit options of holders of mobile capital with regard to particular political jurisdictions. (ibid., 413)

Moreover, this new constitutionalism is unfolding in the context of the "hyperliberal state" which is "an ally of capital" (Cox, 1987: 347) and is taking the "neo" out of liberalism, in "that it seems to envisage a return to nineteenth-century economic liberalism and a rejection of the neoliberal attempt to adapt economic liberalism to the sociopolitical reactions that classical liberalism produced" (Cox, 1996 b: 199). The hyperliberal state assists in the restructuring of productive relations by creating the conditions that make possible the further expansion of capital through the disciplining of societies into the acceptance of market ideology and the primacy of the private sphere.

This renewed assertion of the "primacy of the private" coincided with the advent of the competition state and a "shift in structural power from national political actors to those state actors and nonstate actors who might be described as *gatekeepers* of the interface between transnational markets and structures, on the one hand, and 'nationalized social identity' (and nation-state resources), on the other" (Cerny, 1990: 233–4;

[8] For hegemonic knowledge structures see Gramsci (1971); Cox (1996 a); and Strange (1995 a).

see also, Cox, 1996 b: 201). As is addressed below, this structural shift is manifested in corporate legal preferences for nonbinding "soft law" over binding "hard law," the devolution of the authority to create and to enforce commercial norms on the private sphere (through the increasing emphasis on merchant autonomy as the operative substantive norm), and the increasing legitimacy of private arbitration. Soft law provides normative guidance, but remains largely optional, while private arbitration offers the security of enforceable agreements and avoids interference from national courts or policy makers. These preferences are expressed in the modern unification movement and form essential components of disciplinary neoliberal restructuring.

As part of the effort to create a modern *jus commune*, the unification movement originated during what Roland Robertson (1992) refers to as the "take-off" period of globalization from 1870–1925:

> "Take-off" here refers to a period during which the increasingly manifest globalizing tendencies of previous periods and places gave way to a single, inexorable form centred upon the four reference points, and thus constraints, of national societies, generic individuals (but with a masculine bias), a single "international society," an increasingly singular, but not unified conception of humankind. (59)

The discourse of the unification movement echoes the views of those who like Robertson regard globalization as operating not just materially, but ideologically, at the level of culture, civilization, and international society. For legal scholars such as René David (1972 a), the restoration of the tradition of the *jus commune* was regarded very much as a civilizing and globalizing antidote to the vagaries of legal positivism and legal nationalism. The global unification of commercial law came to signify progress to higher and better forms of business civilization. Moreover, the expansion of the movement beyond its European origins to embrace the Anglo-American business communities and, ultimately, to include African, Asian, and other non-Western states was heralded as portentous of great things. The ultimate achievement would be the creation of an international commercial code replacing national standards with a global common law.

The unification movement has made significant progress in restoring the universality of international commercial law and practice. Indeed, it has been observed that "we are discovering the international horizon" in commercial law and furnishing the basis for the "first common law of the world" (Schmitthoff, 1961: 152–3). Others note that it

"may be said without exaggeration that the revitalization of the ancient *lex mercatoria* in the process of creating a new uniform commercial code for world trade should be recognized as a major accomplishment in this century" (Gabor, 1986: 697). Significantly, unification efforts are reasserting many of the values embodied in the medieval law merchant. Substantive norms emphasize merchant autonomy in creating contractual rights and duties, while procedural norms emphasize speed and informality. In addition, today a renewed emphasis is placed on the primacy of liberal, capitalist values. Proponents of the new law merchant, predominantly representatives of Western industrialized state and corporate interests, stress the self-disciplining abilities and capacities of merchants (see Trakman, 1983; Benson 1988–89; Cremades and Plehn, 1984). In asserting, either explicitly or implicitly, that the purpose of commercial regulation is to facilitate economic exchange, they believe that the best way to achieve efficiency and certainty is to give maximum scope to the principles of merchant autonomy, freedom of contract, and private dispute settlement (arbitration) and to recognize the fundamental role played by commercial custom. The following justification of merchant autonomy as the operative principle in the legal regulation of international commercial transactions is fairly representative of the views of proponents of the new law merchant:

> What merchants do in international trade is the result of what they have learned to do, what other merchants in similar positions have done in the past and what merchants should continue to do in the future in the interests of economic survival and the just allocation of resources. The legal regulation of such business activity can only truly advance when the law reflects upon, indeed embodies, merchant values. To create law in disregard of the context in which international commerce operates is to deplete the self-sufficiency of the merchant regime; it is to create a legal system in a vacuum at the expense of the practical necessities of business.
>
> Freedom to transact is a necessary component in the evolution of international business. Merchants engaged in world trade do have the facilities to overcome trade barriers threatening their business affairs. Commercial practices facilitate their daily enterprises. Trade conventions delineate the permissibility of their business habits; while customs codify their trade adventures. (Trakman, 1983: 97)

This position is advanced with about as much evangelical zeal as the "new political economy" and utilitarianism were advanced by their proponents in the nineteenth century. While recognizing the legitimate

interests that states have in regulating international commercial activities, they emphasize that such regulation should be permissive, suppletive, and facultative. Moreover, although national public policy concerns are recognized as establishing valid limits to the principle of freedom of contract, it is argued that such limits should be sensitive to the international dimension of transactions (Sono, 1988: 485) and the furtherance of international comity.[9] As mandatory rules, they should be regarded as "exceptions from and restrictions of the general principle which is still that of freedom of contracting, i.e., optional law" (ibid.). Proponents emphasize the ability of merchants to manage their own affairs under self-regulating and delocalized contracts that establish the rights, obligations, and remedies of the parties and that designate the applicable law and dispute settlement procedures. They argue that freedom of contract is "a delegation by the state to the individual of the power to enter into binding contracts" wherein "parties are free to define their contractual relationship subject to certain limits and procedures" and they assert the need to maximize and expand this freedom as "essential" to the development of a "non-national New Lex Mercatoria" (Cremades and Plehn, 1984: 328). Central to this expansion of merchant autonomy are self-regulating contracts and merchant custom. Private arbitration is equally important for independent dispute settlement.

The expansion of merchant autonomy is presented as fully consistent with maximizing efficiencies and competitiveness in the face of globalization. It is also an essential aspect of disciplinary neoliberalism and the new constitutionalism of the primacy of the private sphere:

> The age of independence, or even interdependence, has already gone and we are now in the age of interpenetration, where national boundaries lose their meaning. For a global legal order to be established to govern business transactions "ignorant" of national boundaries, such a legal order must first free the business world from the dogmas that heretofore have shaped the traditional local orders. This is the road for the restoration of *lex mercatoria*, in the same manner as it existed in the medieval age, at a global dimension in relation to the so-called "international" transactions. (Sono, 1988: 485)

[9] Comity in international law has been defined in terms of reciprocity, courtesy, politeness, goodwill between sovereigns, moral necessity, or expediency and is invoked to explain why courts enforce or apply the decisions of foreign courts or limit their own jurisdiction in the face of a competing foreign jurisdiction. See Paul (1991: 2–3). For an excellent review of the role of public policy in the application of conflict of laws rules in common and civil law jurisdictions and the view that national courts should exercise restraint in rejecting foreign law on public policy grounds see Murphy (1981).

However, although proponents of the new law merchant invoke images of the medieval trading world in order to sustain their faith in the self-regulating abilities of the merchant community, as we have seen, there are crucial distinctions between the contemporary and the medieval orders. Clearly, in terms of the sheer volume of overseas transactions alone we are talking about profoundly different conditions. More to the point, however, are the differences in the political economies of the two periods. As has been emphasized before, in the medieval trading world merchants engaged in foreign trade were autonomous by virtue of the absence of political authorities desirous or capable of disciplining their activities. Local political authorities did exercise very general control in granting trade charters, providing for the safe-conduct of merchants, and securing the peace of the markets and fairs. However, the laws governing commercial exchange emerged from the customs generated by the merchant community, while dispute settlement was an entirely private engagement amongst merchants. In contrast, today merchant autonomy operates with the full support of state authorities. The privileging of private commercial regulation is being promoted and enforced by states, which function in an alliance with corporate actors as a part of the broader mercatocracy. The privileging of the private sphere is thus also an integral part of the process whereby the state is reemerging as a "commodifying agent," "a role which it was often seen to play in the emergence of capitalism itself in the postfeudal period and the years of mercantilism" (Cerny, 1990: 23). In efforts to adjust to conditions of late capitalism, political authorities are reconfiguring the relationships between politics and economics; between the public and the private spheres. National regulatory authority is being delegated to or being assumed by private groups and institutions. In some cases, national governments are delegating authority to intergovernmental institutions. These diverse actors constitute a mercatocracy: a relatively autonomous business class that operates nationally and transnationally within a framework of shared language and norms. The emergence of this transnational mercatocracy is linked to contemporary developments that are more generally associated with transformations in the capitalist mode of production. The globalization and transnationalization of productive relations and advent of flexible patterns of accumulation are contributing to significant restructuring in state–society relations. The restructuring of production processes, associated with new patterns of accumulation, brings "an end to the social contract that was the linchpin of postwar historic blocs" (Cox, 1989: 47). In some

instances national regulatory authority is weakening as decisions over the disposition of capital resources are made increasingly by transnational corporate actors.[10] The discipline exercised by domestic public policy processes and by organized labor is eroding as capital goes global (Gill, 1995 a and b; Gill and Law, 1988). Instead, disciplinary neoliberalism holds out the private regulation of commerce as the most progressive method for managing globalization, for achieving international competitiveness, and for securing justice in international commercial relations. The mercatocracy unites private and public authorities committed to the expansion of capitalism through further disembedding international commerce from national, social, and democratic controls and reembedding it in the private sphere. It advances neoliberal ideology and contributes to a blurring of the distinction between public and private authority. The alliance of public and private actors reasserts the efficacy of merchant custom as a source of legal norms, favors the adoption of soft over hard law and private arbitration over adjudication in national courts of law. Moreover, belief in the self-sufficiency and autonomy of the law merchant system reinscribes the autonomous "legal subject" and the tendency to legal formalism, identified in earlier chapters with the dominant theories of international relations and law, as the dominant ideological and juridical underpinnings of the emerging world order. Treating law as an objectified system that exists out "there" thus embodies important ideological commitments and profound normative implications. The discussion will now consider law-creation and the alliance between public and private authorities in the unification movement, before reviewing the history of the unification movement.

Law-Creation: Unification Through Public and Private Authorities

The contemporary phase in the development of the law merchant exhibits considerable pluralism in law-creation, both as to the subjects and the sources of law. A multiplicity of actors, public and private, individual, institutional, and corporate are involved in the creation and unification of private international trade law. In addition, a plurality of new sources of law are emerging. Before considering new developments in law-creation, it will be helpful to consider very briefly the nature of legal

[10] See generally, Ruggie (1994; 1995 a); Strange (1995 a); and Picciotto (1988).

unification undertakings, for this relates to the role that legal unification plays in establishing the juridical conditions for global capitalism.

While the terms unification and harmonization are used almost interchangeably by trade experts, they do have different meanings. A review of these differences reveals that unification and harmonization represent different strategies pursued by public and private actors for the purpose of facilitating the expansion of capitalism. They also represent varying degrees of juridification and legal discipline.

The unification of trade law may be defined as "the process by which conflicting rules of two or more systems of national laws applicable to the same international legal transaction are replaced by a single rule."[11] Unification differs from harmonization in that "the 'unification' of law, or the adoption of uniform laws, is harmonization with a zero margin" of difference (Leebron, 1995: 7–8). Whereas unification contemplates the replacement of multiple and different rules with a single uniform rule, harmonization contemplates the move to greater similarity, but not necessarily to unity or identity. The margin of harmonized laws can therefore range from a zero margin of complete unification, which admits no differentiation from agreed-upon standards, to broad and tolerated deviations from the norm. Viewed this way, unification is simply a subset or type of harmonization that has no margin of difference in law. Harmonization thus suggests the possibility of different degrees of similarity.[12] This view also suggests that as a strategy of cooperation, harmonization may be less ambitious and potentially less limiting on the domestic autonomy of the participants, be they states or merchants:

> Harmonization can be loosely defined as making the regulatory requirements or governmental policies of different jurisdictions identical, or at least more similar. It is one response to the problems arising from regulatory differences among political units, and potentially one

[11] See the United Nations Report, "Unification of the Law of International Trade: Note by the Secretariat" (1968–73: 13); and see Cutler (1999 b).

[12] Leebron (1995: 8) identifies different forms of harmonization, including the harmonization of rules, of governmental policy objectives, of principles, and of institutional structures and procedures. He also notes that even unification may not achieve a zero margin of difference if it is not accompanied by institutional and procedural unification: "Zero margin harmonization has been adopted only in certain regulatory and political contexts. Even uniform laws, if they are not accompanied by harmonization of institutions, effectively allow differences in implementation and effects. One can reject the idea that all countries must adopt the same standards while still seeking to narrow differences. Thus in many instances margins of tolerance are implicitly or explicitly allowed. In the latter case both a 'ceiling' and a 'floor' might be set, but more often harmonization programs only require that all countries accept some minimum."

> form of inter-governmental co-operation. The term harmonization is often used not only to refer to this result, but also to the process for achieving greater similarity.
>
> ...
>
> a particular harmonization claim might require one or more of these forms of harmonization [rules, government policy objectives, principles, institutions, and procedures] or be addressed by alternative forms. These forms entail different types of compromise, and at different governmental or inter-governmental levels. They vary in their continued tolerance of difference, and hence in allowing societies to reflect their own social choices. (Leebron, 1995: 3–4 and 7)

Both unification and harmonization may be achieved through the adoption of hard law sources in the form of multilateral agreements or soft law sources, including model law, standard contracts, and contract guides, or general statements of principles. The legal status of unified law therefore turns upon the legal status of the unifier, as well as upon the method of unification chosen, and involves both subjects and sources doctrines.

Subjects of transnational merchant law

Today a multiplicity of organizations and actors are participants in the unification of commercial law.[13] The diversity of agencies involved in law-creation is so significant that as Rudolph Dolzer (1982: 62) observes, "so far no scheme of scientific classification has been found which would allow classification of all existing bodies into a few categories." It is, however, common to differentiate between intergovernmental, or public, and nongovernmental, or private, agencies and organizations (Schmitthoff, 1982: 27–9). The main intergovernmental organizations are the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law and the International Maritime Organization (IMO). The main nongovernmental organizations are the International Chamber of Commerce (ICC), the International Law Association (ILA), and the Comité Maritime International (CMI).[14]

[13] For a full discussion of these various agencies see Cutler (1992).

[14] This list of formulating agencies is not exhaustive. The United Nations Conference on International Trade and Development (UNCTAD) has adopted codes of relevance to international commercial law, including the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, the UNCTAD Code of Conduct for Liner Conferences. UNCTAD is also working on a Code of Conduct on

It is important to recall our discussion of the doctrine of international legal personality and the differing capacities of participants in the creation of international law. As Hugh Kindred et al. (1993) note:

> [i]nternational law applies to certain entities as "subjects" of international law. These entities have legal personality – that is, a capacity similar to an individual person in domestic law, to enter into legal relations and to create the consequent rights and duties attached to that capacity. Without this capacity an entity will be unable to maintain any claims. International law itself determines who shall have legal personality and not all entities possess the same personality. (11)

They further note that:

> [u]ntil the twentieth century the prevailing view was that only states could possess international legal personality. This view was due mainly to the fact that the concept of the state had predominated in the international system and the question of personality had been regarded as belonging exclusively to this domain. Thus, entities other than states could have no standing on the international scene. (Ibid.)

The general rule that only states have full and original personality as subjects under the law has already been discussed. This means that only states, in their capacity as legitimate public authorities, may generate binding hard law. While a number of developments in the areas of international human rights law, the law governing international organizations, and international economic law have carved out some space for nonstate entities such as individuals, international organizations, and transnational corporations to function under international law, their formal capacities in law-creation remain severely limited in comparison to those of states (see Cutler, 2001 a). However, upon closer inspection of the participants involved in the unification movement and in creating merchant law, it becomes evident that the formal incapacity of private individuals and corporations has not actually limited their active participation in law-creation. In fact, as will become evident, the

the Transfer of Technology, a model contract for marine hull insurance, and rules protecting industrial property (for an overview of UNCTAD's continuing work, see online http://www.unctad.org/). The United Nations Industrial Development Organization (UNIDO), established in 1966 as an organ of the General Assembly, is working on the development of model contracts for specific industries, while the World Bank and the International Monetary Fund (IMF) have established Guidelines for Procurement under World Bank Loans and IDA Credits that establish standards for contracting. The International Maritime Organization (IMO), formerly the International Maritime Consultative Organization (IMCO), has also been active in the unification of maritime law. For fuller discussion of these agencies, see Dolzer (1982) and David (1972 a).

growing asymmetry or disjuncture between the formal legal status of private participants and their actual, political significance is growing more acute, portending a crisis of legitimacy. In order to develop this analysis it is first necessary to consider the lawmaking process in greater detail.

The doctrine of international legal personality confines the lawmaking role to states and their representatives. Accordingly, when a private organization such as the International Chamber of Commerce (ICC) undertakes a unification initiative, it must turn to national governments to formulate its work into law. States must either convene an international conference to conduct negotiations on a multilateral treaty on the subject or otherwise give legal effect to the unification initiative developed by the private organization. Typically, national members of the ICC will brief their governments on the nature of the unification initiative and the latter will then turn to consult with both public and private domestic interests that are affected by the initiative. These interested parties undertake research into the matter, consult with other professionals, and provide their governments with their views on the rules, treaties, or laws they prefer to have implemented. In many cases, their views are directly adopted by their governments. Indeed, a review of the major unification initiatives undertaken to date discloses the absolute centrality of private business associations, banks, insurance companies, accountants, and international lawyers in the formulation of unified commercial law.[15] This suggests that while private associations may lack formal legal personality as subjects of the law (*de jure*), they do in fact exercise considerable influence and operate as *de facto* subjects of the law (see Cutler, 2001 a). Moreover, this influence is growing with the deepening of juridified, pluralized, and privatized commercial relations and thus merits closer examination.

As noted in Chapter 2, the international legal status of transnational corporations, which are probably the most visible private global actors today, has been likened to the status of the individual under international law. Both are "objects" and not "subjects" of the law: they have no original rights or liabilities at international law; the only rights or

[15] Canadian unification efforts in the areas of international commercial arbitration were driven by the private sector and aided by government bureaucrats who favored legal unification. In the United States, the unification of international sales law was pursued after successful national unification efforts and was spearheaded by lawyers, the American Bar Association, and other professionals who had supported national efforts to remove barriers to the mobility of capital. See Cutler (1992; 1999 b; 2001 b).

liabilities they possess are derivative as nationals of a state, under the principles governing nationality.[16] Moreover, such rights or liabilities can only be asserted or assumed by the state on behalf of the individual or the transnational corporation.[17] The result is the "invisibility" of the transnational corporation under international law, as corporate power and responsibility is filtered through the authority of the state.

Notwithstanding their legal "invisibility," transnational corporations and private business associations are exercising significant influence on the creation of international commercial law through a variety of means. The influence exercised by lawyers, bankers, accountants, and other business professionals on the development of transnational legal norms through "the routine repetition of myriads of transnational contractual relations" is one such example (Santos, 1995: 290).[18] The harmonization and unification resulting from standardized contractual relationships and from general principles established through mercantile customs are major contributors to the unification movement and form an increasingly important aspect of the juridification of international commercial relations as well.[19] They are also a significant source of privatized legal relations, for these contracts and principles are most often created and articulated in a delocalized legal setting where privately negotiated arrangements obtain.[20]

Relatedly, private actors participate in the creation of international law in the establishment of customs that subsequently acquire the status of customary law through repeat usage. Very important unification initiatives have emerged this way. The ICC's success in unifying

[16] As noted in Chapter 2, n. 51, nationality is defined by Gerhard von Glahn (1996: 147) as "the bond that unites individuals with a given state, that identifies them as members of that entity, that enables them to claim its protection, and that also subjects them to the performance of such duties as their state may impose on them."

[17] There are some exceptions to the limited personality of individuals and private corporations, which might suggest some movement in legal practice that has yet to be reflected in legal theory. Notable exceptions include the status of individuals before the European Court and the status of private transnational corporations that have entered into contracts with states which are 'internationalized' by provisions that bring the contract under the purview of public international law. On the individual, see the references cited in Chapter 2, n. 52. Concerning transnational corporations, see Johns (1994).

[18] For the lawmaking role of transnational corporations, see Muchlinski (1997) and Robé (1997). For the specialized role of corporate contractual networks in the regulation of business, see Picciotto (1999 a) and for the significance of corporate regulatory networks, see Picciotto (1996) and Braithwaite and Drahos (2000).

[19] See Schmitthoff (1968) and Wiener (1999: ch. 7).

[20] Indeed, this attribute is often what leads legal theorists to conclude that the law merchant is an autonomous and self-sufficient order. See Wiener (1999: ch. 7).

the terms of trade (*Incoterms*) and the development of widely accepted customs governing Documentary Credits are initiatives that emerged as customary international law (see Rowe, 1982).

Another important example of corporate subjectivity lies in the role that business enterprises, banks, insurance companies, and the like play in international unification negotiations. As a general rule, only states are the formal participants in international negotiations. However, there has been considerable expansion of corporate representation, particularly in the United Nations system regarding the creation of public international law (Charney, 1983: 750–1). In the International Labour Organization, representatives of business and labor participate and vote independently of national governments, while in the Organization for Cooperation and Economic Development (OECD) business and labor are able to enter into formal negotiations (ibid.). A similar trend is evident in the negotiation of private international law, where often the highly technical nature of the negotiations dictate considerable input from lawyers, accountants, bankers, insurers, and the like. As Allan Farnsworth (1995), a trade lawyer assisting the United States at UNCITRAL and at UNIDROIT, has observed about the role of technical expertise:

> [t]o a considerable extent, the representative often has to rely on his or her own understanding of the subject matter. I recall once being told by the State Department that I should have "instructions" from the Department for an UNCITRAL meeting. When I asked who would provide them, I was told to my surprise that I would. So I prepared a draft and sent it to Washington. As I sat in my assigned place at UNCITRAL's opening session, an attendant handed me an important-looking envelope. It contained my instructions – my draft verbatim signed "Kissinger." (93–4)

Indeed, Yves Dezalay (1995: 2) argues that the "market for expertise in national and international regulation is . . . going through an unquestionable boom. These experts have never been so much in demand: whether to circumvent existing devices or to build new ones. This dual role gives them a strategic position" in the competition amongst regulators for control over regulatory processes.

Relatedly, as discussed in Chapter 2, the proliferation of privatized domestic regulatory regimes amongst business enterprises constitutes a potentially very significant source of privatized international legal regulation, particularly if they are adopted by national legislatures as

self-regulatory regimes often are.[21] National regulatory standards can be important in determining the outcomes of international regulatory efforts, as is evident in the influence that nationally unified sales law in the United States had on the global unification of sales law. The influence of privatized regimes can, of course, flow the other way, as in the case of the Concordats of the Basle Committee on Banking Regulation and Supervisory Practices, which provided the basis for the harmonization of domestic banking laws in Europe and the United States (Wiener, 1999: ch. 2).

Possibly the most significant accretion of corporate personality, however, is evident in the area of dispute resolution. While the doctrine of international legal personality identifies states as the proper subjects of legal rights and duties, thus forcing private actors to work through the agency of the state in the pursuit of claims under international law, increasingly corporations are being granted direct access to forums for dispute settlement (see Cutler, 2001 a; 2000 a; Tollefson, 2002). Corporations have legal standing to pursue claims in the European Economic Community and the European Coal and Steel Community (Arzt and Lukashak, 1998: 167). The International Bank for Reconstruction and Development (World Bank) has created an international tribunal, the International Centre for the Settlement of Investment Disputes (ICSID), that hears investment disputes between states and foreign corporations. The proliferation of bilateral investment treaties that provide access to dispute settlement in the delocalized setting of ICSID (see Cutler 2000 a: 60) and that expand corporate rights by prescribing standards of treatment of corporations, protecting them from expropriation without compensation, and granting corporations the right to take legal actions against states, constitute significant accretions of corporate legal personality.[22] Both corporations and individuals have legal standing in the Iran–United States Claims Tribunal, which was created to hear disputes arising from the Gulf War, while the Hague Permanent Court of Arbitration has amended its rules to attract more business by hearing claims of nonstate parties (Malanczuk, 1997: 101 and 294).

[21] See the UN report, *Development of Guidelines on the Role and Social Responsibilities of the Private Sector* (2000).

[22] Bilateral investment treaties create legal agreements between two states whereby each promises to observe a certain set of standards of treatment in dealings with foreign investors. They are intended to protect foreign investors and, when they are used in conjunction with an agreement to submit disputes to ICSID, provide corporations with significant authority to enforce their legal rights against host states. See generally, Muchlinski (1995: 617).

Significant, as well, are the Canada–US Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA), both of which provide binding dispute settlement for corporations in delocalized settings (see Castel, 1989: Eden, 1996; Malanczuk, 1997; Tollefson, 2002). It is noteworthy that the OECD's failed initiative to create a Multilateral Agreement on Investment (MAI) also would have provided direct legal access for private parties (Engering, 1996: 156–7).

These examples of *de facto* corporate subjectivity reflect an expansion of corporate authority in law-creation that is consistent with the more general trend in business culture and ideology. Changes in national business culture and ideology are emphasizing the deregulation and reregulation of corporate activity and the declining "corporate control" function of states that characterized earlier efforts to regulate transnational corporations (Muchlinski, 1995: 9–11). As Jan Scholte (1997: 442–3) notes: "states have played an indispensable enabling role in the globalization of capital . . . governments have facilitated global firms' operations and profits with suitably constructed property guarantees, currency regulations, tax regimes, labour laws and police protection." Moreover, corporations are gaining important rights under innovative uses of domestic human rights legislation, such as the Canadian Charter of Rights and Freedoms and the United States Bill of Rights (Tollefson, 1993; Mayer, 1990).

Stephen Gill (1995 a: 413) places these developments in the context of "disciplinary neoliberalism" and a "new constitutionalism" that expand the rights of capital while constraining democratic elements. However, international legal theory appears to be slow to react to the expansion of corporate authority. This development is effecting a shift in authority structures, recasting state and corporate authority and control. In some cases the political authority of states is being challenged and modified in a manner that enhances corporate power. This is evident in the broadly permissive nature of the principles that are being articulated as the *grundnorms* for commercial law and in the unprecedented expansion of private international commercial arbitration. In other cases, corporations are working with states in corporatist associations and enhancing state authority and control.[23] This reflects the dialectical nature of the localizing and delocalizing roles of law and the tensions between social

[23] The working relationship between national courts and nationally-based corporations that do business or have subsidiaries abroad is evident in their efforts to limit the rights of foreign litigants, seeking to take advantage of liberal American products liability laws, to litigate in the United States. See Ismail (1991). For a disturbing view of the appropriateness

forces committed to national capital accumulation and those committed to transnational capital accumulation.

While there appears to be a great deal of recognition of the enhanced power and authority of transnational corporations, it is unaccompanied by commensurate efforts to regulate them:

> The obvious importance of private corporate activities to the international legal system is yet to be accommodated in legal theory, which still equates them with the individual. As participants, certain multinational enterprises control resources more extensive than many states, and their decisions contribute to the shaping of the political structure of national and international regimes. As put by one observer, "the international combine has wrested the substance of sovereignty from the so-called sovereign state." Their effective power permits them to negotiate and agree as equals with governments.
>
> (Kindred, et al., 1993, 50, notes omitted)

In many matters, international law is silent. There is no binding and general international commercial code governing the practices of transnational corporations. Most matters are dealt with under national systems of corporate and conflict of laws principles, which even corporate lawyers agree are inadequate (Notes of Cases, 1984).

Numerous efforts by international organizations, regional organizations, and business and industry associations have produced guidelines, codes, recommendations, and other "soft law" norms in the attempt to regulate the activities of transnational corporations.[24] It was hoped that the Draft Code of Conduct produced by the Commission on Transnational Corporations[25] would be a major contribution to the development of a regulatory framework, but a consensus over the Draft was never achieved. Other failed efforts "affirm rather than challenge the assumption that it is a state's prerogative to deal with TNCs

of the decision to deny the litigants in the Bhopal disaster their day in a US court, see Seward (1987).

[24] Johns (1994: 897, nn. 21 and 22) identifies ECOSOC (Economic and Social Council), the European Union, the ICC, the World Bank, OECD, UNCTAD, UNFAO (UN Food and Agriculture Organization), ICFTU (International Confederation of Trade Unions), Japanese Business Council, and the Japanese MITI (Ministry of International Trade and Industry) Council on Industrial Structure as institutions that have attempted to regulate TNCs (transnational corporations).

[25] The Commission was created in 1974 by ECOSOC and given the mandate to prepare a code of conduct for governments and TNCs. Drafts were produced in 1978, 1983, 1988, and 1990. Consensus over the draft was never achieved and in 1992 the United Nations Centre on Transnational Corporations, Secretariat to the Commission, was dismantled and its functions were transferred to a new Transnational Corporations Management Division within ECOSOC.

[transnational corporations] through its national legal systems" (Johns, 1994: 899).

This state of affairs poses a major normative problem of ensuring corporate accountability, for accountability, like subjectivity, is filtered through the lens of state sovereignty. There is no guarantee that a state will assume responsibility for the actions of corporations having its nationality. Often the place of nationality is only remotely connected to corporate operations, functioning in many cases as a tax haven.[26] As the United Nations Centre on Transnational Corporations observed: "[a] number of factors ... conspire to make purely national control systems variously evadible, inefficient, incomplete, unenforceable, exploitable, or negotiable ... with respect to transnational corporations."[27] One solution is the recognition of the transnational corporation as a legal subject, bearing rights and responsibilities directly under international law. However, this faces major problems in states' unwillingness to "relinquish their traditionally dominant position in international law, or to acknowledge the effectiveness of law in the absence of a sovereign" (Johns, 1994: 900).[28]

Arguably, students of international political economy are more tuned into the increasing significance of transnational corporations. However, while few analysts would go so far as to declare transnational corporations to be "invisible" in terms of their political significance, there is a dominant tendency to regard corporate power as ultimately linked to and conditioned by state power. This is particularly evident in the comment by Stephen Krasner (1995: 279) that "it is states or polities that structure the basic environment within which transnationals must function: the nature of the legal system; the specification of legitimate organizational forms ... the determination of acceptable modes of political action."[29]

Some analysts address the question of the significance of transnational corporations in terms of their relative autonomy of state influence and control, arguing that the "footloose and fancy-free" corporation is

[26] For an interesting analysis of measures taken by the Australian authorities to prevent the manipulation of the Australian tax system so as to shield corporate profits from taxation by integrating the profits of offshore subsidiary corporations with the profits of the Australian-based parent company, see Azzi (1994).

[27] Quoted in Johns (1994: 896).

[28] See Cutler (1999 c and 2001 a) for fuller discussions of the problems in recognizing corporate personality under international law.

[29] Note, however, as does the volume's editor (Risse-Kappen, 1995 a: 281), that the various selections in the volume illustrate the oversimplification of the "state-centred" versus "society-centred" approach to the significance of transnational corporations.

but a myth. They focus on the continuing influence of national business culture and ideology on transnational corporate behavior[30] and the continuing links to states through incorporation, taxation, corporate filing and reporting requirements, securities regulation, and the like. Indeed, Detlev Vagts (1970: 787–8) argues that for a "truly non-national, autonomous entity" a corporation would have to meet five requirements: no country of incorporation; widely dispersed business activities across different states; multinational distribution of shareholders; internationalization of management; and declining national claims to the extraterritorial application of domestic laws. Arguably, many corporations meet the second, third, and fourth criteria. However, there is no mechanism for international incorporation and the extraterritorial application of laws continues to be practiced by states such as the United States. It must be noted, though, that the emphasis on the formal legal links between corporations and states overlooks the extent to which corporations can be operating *de facto* more autonomously through manipulating the laws governing nationality of corporations, through the reluctance of states to take on their claims, and through novel corporate arrangements that do not involve incorporation of the transnational enterprise (e.g., contractual arrangements) (see generally, Muchlinski, 1995). In some cases, new corporate forms are emerging as a response to processes of economic globalization. Susan Strange (1994: 26) observes that the proliferation of interfirm relationships, such as "partnerships, production-sharing arrangements, collaborative research and networking…have begun to blur the identity and indirectly undermine the authority of the state." Corporate mergers, acquisitions, strategic alliances, and networking between firms add further complexities. She notes that when "partners in the network operate and are registered in several countries, it is impossible even to guess the 'nationality' of the whole network. Yet much media comment and much academic analysis still assume that each transnational corporation has a national identity and that governments can identify and then support their own national champion."[31]

We have seen that, in theory, corporations cannot be authoritative because, as private actors, they lack international legal personality. They do not possess identity as "subjects" of the law. Under international law, their activities are by definition nonauthoritative; they only become so

[30] See Keller and Pauly (1997); Pauly and Reich (1997); and Hirst (1997).
[31] Strange here cites the work of Michalet (1991).

when a state assumes responsibility for their actions or enforces their claims. However, emphasis on the legal aspects of corporate personality risks a formalism that mistakes the legal form for the actual conduct and practices of corporations and of states. It also risks obscuring how corporations use their nationality to avoid or evade responsibility. For example, corporations can manipulate the rules governing nationality and use their corporate status strategically to shield themselves against liability coming from the actions of foreign subsidiaries, foreign shareholders and creditors, and injured third parties, such as consumers. The intensification of interjurisdictional competition for incorporations is producing a "race to the bottom" as jurisdictions engage in the competitive deregulation of corporate standards (Blackburn, 1994; D. Charny, 1991) and narrow the scope of state responsibility. The problem is particularly acute in the case of rules of corporate nationality and conflict of laws that allow corporations to use their subsidiaries as shields against liability for environmental disasters, hazardous waste disposal, or wrongs suffered by foreign shareholders (Notes, 1986; Ismail, 1991).

In terms of enforcing corporate claims, states are not compelled to take on the claims of their national corporations. The problem of statelessness is very real when a state is unwilling to intervene on behalf of a corporation or when a state is unable to act for a corporation because the rules governing nationality have not been met (Staker, 1990: 159). The latter situation arises when business enterprises incorporate in jurisdictions for tax or other reasons of convenience but the rules of nationality require a *genuine link* between the corporation and the place of incorporation. In such cases, the incorporating state would not be in a position to protect the corporation (ibid.).

In addition, emphasis on the continuing influence of national corporate culture and ideology overlooks the extent to which these norms are changing in response to a globalizing corporate ideology and business culture. As the discussion has argued, this ideology and culture is being advanced by a global mercatocracy through the principles and practices of the modern law merchant. The modern law merchant is a central mechanism for the globalization of disciplinary neoliberal norms. Moreover, it is also a significant element in the pluralization of authority relations as a variety of nonstate actors, the most visible being transnational corporations, participates in the creation of international commercial law.

These considerations suggest that it is too simplistic to frame the problem in terms of corporate autonomy versus state control. The

relationships between states and corporations are very complex and are deeply implicated in more general processes of juridification, pluralization, and privatization. These processes are restructuring state–society relations through the general decline in the corporate control functions of states and the expansion of their role in facilitating and enabling corporate activities (see Muchlinski, 1995). In some instances, states are experiencing a loss of control in relation to corporations, whereas in others state enforcement of property and contract rights and the ability of states to shield corporations from liability are strengthening the enforcement powers of states. Indeed, corporations are clamoring to litigate in state jurisdictions, such as that of the United States, which offer handsome damage awards and well-developed procedural protections. Paradoxically, while corporations are central players in this restructuring process, linking global and local political economies, they remain invisible as "subjects." This *de jure* insignificance of corporations in the face of their *de facto* significance reflects a disjunction between legal theory and state practice, and raises the "problem of the subject," which is pursued in the final chapter after considering the sources of law and the history of the unification movement.

Sources of transnational merchant law

The enhanced privatization and pluralization of the legal practices surrounding subjects doctrine is also evident in the practices surrounding sources doctrine. The contemporary phase in the development of the law merchant is experiencing a proliferation of new legal sources. The highly personalized nature of legal regulation emanating from law firms and other professional associations, such as tax and accounting firms, is captured in the significance of their members as "merchants of norms" who are causing a "revolution from above" in their influence upon business regulation (Dezalay and Sugarman, 1995).[32] These professionals are able to shape and reregulate economic transactions in response to challenges posed by economic globalization, highlighting the enhanced significance of expert knowledge in the creation of business law.[33] This is also evident in the notable trend toward the increasing privatization of business regulation through transnational corporate networks,

[32] See also Bratton, McCahery, Picciotto, and Scott (1996).
[33] For the significance of expert knowledge in the expansion of privatized business regulation, see Dezalay and Sugarman (1995); Picciotto and Mayne (1999); and Cutler, Haufler, and Porter (1999 c: 333–76).

private corporate codes of conduct, and voluntary approaches to regulating corporations.[34]

A very significant development is the increasing reliance on "soft law," nonbinding, informal, and discretionary standards in the unification of international commercial law. It will be recalled that soft law consists of "instruments that are not legally binding though they affect the conduct of international relations by states and may lead to the development of new international law" and are called "soft" because "they are not directly enforceable in domestic courts or international tribunals" (Kindred, et al., 1993: 78).[35] "Soft law" contrasts with "hard law," such as treaties and customary international law, which were noted in Chapter 2 to constitute the primary sources of international law. The differentiation between hard and soft law suggests different degrees in the juridification of commerce that are associated with the legal status of the entity engaged in law-creation. Clearly, private organizations, such as the ICC, the CMI, and the ILA lack the requisite international legal personality to create hard law in the form of legally binding international conventions. They must rely on states to adopt their unification efforts in order to create binding laws. However, they can create soft law and influential norms that, though legally nonbinding, acquire binding force through the voluntary adoption by parties in their contracts or by their evolution into customary international law.[36] They thus can and do have a significant role in the creation of soft law and merchant custom. The ICC Incoterms, discussed below, are a good example of formally nonbinding model terms that have over time and through customary usage acquired the status of customary international law (Rowe, 1982).

[34] For an excellent overview of the nature and scope of private corporate codes of conduct utilized today to regulate corporate labor relations, environmental and social policies, human rights, pricing, fair trade, corruption, bribery, tobacco use, and animal welfare policies and practices see the UN report, *Development of Guidelines on the Role and Social Responsibilities of the Private Sector* (1999). See also, Kearney (1999) and Mayne (1999).
[35] An example of soft law is the UNCITRAL (United Nations Commission on International Trade) Model Law on International Commercial Arbitration, which has been voluntarily adopted by many states. Canada, for example, has implemented its terms in national law, affecting its transformation from soft to hard law. Other examples of soft law include the ICC (International Chamber of Commerce) trading terms, known as Incoterms that are given legal force by the voluntary incorporation in private contracts; the Helsinki Accords; and the OECD *Guidelines for Multinational Enterprises*. See also Seidl-Hohenveldern (1979). And see Schachter (1977) for a discussion of the influence that soft law can have, despite its legally nonbinding nature, and see Kennedy (1987 c) for a suggestive analysis of the nature of customary law.
[36] For a very good discussion of the role played by intentions in the creation of soft discipline, see Schachter (1977).

However, the private/soft and public/hard associations are imperfect. As mentioned above, privately generated soft laws may be transformed into hard law through the instrumentality of state practice and public entities such as states and international organizations do engage in the creation of soft law. Organizations with formal authority to bind member states sometimes opt for unification through voluntary codes and rules. Examples of this approach are the UNCITRAL Model Law on International Commercial Arbitration (see Hoellering, 1986) and UNIDROIT's Principles of International Commercial Contracts which unify the basic principles governing international commercial contracts (see Bonell, 1995; Farnsworth, 1995). The unification method chosen depends as much on the nature of the interests to be served through unification as it does on the legal capacities of the entities involved in the process. There is a tendency to associate harmonization with soft law and with less ambitious undertakings where agreement over harmonized standards comes relatively easily. In contrast, unification tends to be associated with hard law and with comprehensive and more exacting undertakings that are much harder to achieve. These tendencies are evident in the observation of one trade law expert that "[i]t is generally agreed that there is a need for harmonization of the private law rules that govern international transactions. There is less agreement as to the need for unification by means of multilateral treaties... [which will] be subject to only a single system" (Farnsworth, 1995: 83–4). These tendencies also reflect important assumptions about the objectives and purposes of unification. Most trade experts identify the objectives of unification and harmonization as the achievement of uniformity in commercial laws. The general presumption is that commercial activity will expand as a result of removing barriers generated by the legal uncertainty produced by multiple and different national standards (see Patterson, 1986: 266 n. 7). The unpredictability, inconvenience, and costs generated by uncertainty as to the legal rules that will be applied under different national systems of commercial and conflict laws are most commonly cited as the practical reasons for unification (Sturley, 1987: 731 nn. 7–11). Unification of commercial law is regarded as contributing to reduction of the costs of doing business.

> Non-uniformity of substantive legal rules imposes transaction costs on businesses engaged in international trade. A business that wishes to know if it has entered into an enforceable contract with a foreign trading partner, for example, must first go through a choice-of-law analysis [i.e., conflict of laws analysis] to determine which country's laws govern contract formation. The business must then construe the applicable substantive legal rules, which well may be the rules of the foreign legal system. Both steps in this analysis are difficult and may involve greater risk of error than is present in a purely domestic transaction.
>
> To reduce these transaction costs one could unify either the choice-of-law rules [conflict rules] or the substantive legal rules themselves. (Winship, 1988: 533–4)

Unification is said to produce important efficiencies. The unification of private international trade law is referred to by some students of harmonization as the harmonization of "jurisdictional interface," which enables those from multiple jurisdictions to communicate with each other. This makes international contracting easier and helps to avoid uncertainty and to reduce transactions costs. "Multilateral interface regimes reduce the costs of international transactions in many cases by achieving economies of scale for all transactions" (Leebron, 1995: 15). A review of the history of the unification movement reveals the importance that participants have attached to efficiency concerns. It also illustrates the trend away from unification through binding international treaties and towards unification through "soft law," voluntary statements of principle, model laws, and rules.

History of the Unification Movement

As noted in Chapter 4, during the medieval phase of the law merchant uniformity was achieved through the universality of merchant customs and the unifying influence of private dispute settlement norms and procedures. Merchants devised instruments and transactions that were enforceable only in private merchant courts, which operated more like private arbitrations than like courts of law. Justice was administered swiftly; procedural and evidentiary informality were the rule; and juries of merchants sat in judgment on the cases. Merchant customs could be used to prove the law before the merchant jurors, who issued judgments and even imposed penalties on the spot in the form of declarations of bankruptcy and market exclusion. During the second period of nationalization, there was a substantial erosion of uniformity as states became involved in the regulation of international commerce. Indeed, the consolidation of states marked a change in both the ability and the willingness of political authorities to regulate international commercial transactions. States engaged in state building expanded their authority over international commerce and incorporated the law merchant

into domestic commercial law, juridifying commercial relations. By the end of this phase, significant differences in national commercial laws emerged, giving rise to contemporary efforts to unify national commercial and conflict laws.

It is important to note that the earliest modern unification efforts were self-regulatory initiatives undertaken almost exclusively by private merchant associations in the late nineteenth century. For example, the Hamburg Bourse for Corn Traders, the Bremen Cotton Bourse, the Silk Association of America, and the London Corn Trade Association were important in generating uniform commercial norms. These associations "were initiated by the business communities themselves with the aim of establishing norms to be adopted voluntarily by all members" (Dolzer, 1982: 62). At about the same time, the International Law Association (ILA),[37] a private body created in 1873, was founded for the purpose of unifying private and public international law. Another private body, the Comité Maritime International, was created in 1897 for the purpose of unifying private maritime law. Later, in the twentieth century, the International Chamber of Commerce (ICC) was founded as a private French association of national chambers of commerce and engaged in a number of projects aimed at unifying international commercial law. These associations have been generally very successful in articulating standards of broad application. Indeed, private associations have initiated some of the most significant unification efforts. However, as we noted earlier, their status as private associations limits their unification efforts to the creation of nonbinding and soft law, unless the laws develop into customary international law or are subsequently codified by states into binding conventions or adopted as law by the contracting parties.

The ICC undertook the unification of trade terms in the 1920s and produced a set of rules in 1936. They were revised in 1953, 1980, 1990, and 2000 in response to technological changes in transportation and changes in documentary procedures. Incoterms are designed as a set of uniform rules governing transportation costs and liabilities that may be adopted by parties through incorporation into their contracts. They are designed to facilitate exchange by providing greater certainty as to the parties' rights and obligations under the different terms. The voluntary application of Incoterms reflects the principle of freedom of contract,

[37] The ILA was originally named "The institution for the reform and codification of the *jus gentium*," but its name was changed in 1895 to reflect its involvement in private, as well as, public international law. See David (1972 a: 151–2) and Dolzer (1982).

for the parties are free to select the term deemed appropriate in the circumstances. As a private association, the ICC clearly lacks international legal personality and is thus incapable of creating norms of a mandatory nature. However, reliance on Incoterms has become so common and generalized that many regard them as having acquired the status of customary international law (see Ramberg, 1982: 146; Rowe, 1982). This is particularly so for European trade where they are applied to sales transactions in the absence of voluntary incorporation by contracting parties.[38]

In contrast to the work of the ICC and Incoterms, unification efforts for bills of lading, bills of exchange, promissory notes, and letters of credit, while initiated by private associations were subsequently taken over by intergovernmental associations, which produced binding laws in the form of international conventions. The ILA undertook the unification of bills of lading and bills of exchange, while the ICC initiated efforts to unify letters of credit. These initiatives were later taken up by intergovernmental organizations and formed the basis for the negotiation of binding international conventions, which will be considered shortly.

Governments became involved in the unification movement late in the nineteenth century, primarily through the Hague Conference on Private International Law, which although created in 1893, only attained status as an international organization in 1955. This was the first intergovernmental body to undertake the unification of commercial law and its main focus has been unifying conflict of laws rules.[39] It has been

[38] Incoterms 1980 provided rules for fourteen trade terms. Uniform rules are provided for the more traditional trade terms, such as cif (cost, insurance, and freight), fob (free on board), and c & f (cost and freight), and new additions have been made to reflect container and multimodal transport techniques and new forms for documenting sales transactions, such as the shipped-on-board bill of lading. Subsequent revisions of Incoterms in 1990 and 2000 have further adapted them to modern trade (see Ramberg, 1982: 146; 2000; Honnold, 1982). While Incoterms go a long way in unifying the standards governing transport costs and liabilities, their usage is not yet universal. In the United States, for example, many merchants continue to rely on the American Foreign Trade Definitions, which, though substantially similar to the Incoterms, are regarded as generally more favorable to exporters. There does, however, appear to be some movement in the United States towards reliance on Incoterms. See Berman and Kaufman (1978: 229), Ramberg (1982: 151) and see the ICC web page http://www.iccwbo.org/ for its contemporary areas of work, including regulating corruption, arbitration, banking, competition, intellectual property, taxation, trade, investment, and E-business.

[39] The Hague Conference on Private International Law is an intergovernmental organization established by treaty to "work for the progressive unification of the rules of private international law." It has forty-three members, predominantly industrialized states, including Canada, and most European states, the United States, Australia, Japan, China,

active in unifying trade law in areas relating to conflict rules and procedural matters, but has not made much contribution to the unification of substantive rules of law. Moreover, in its early days, the Hague Conference functioned more as a regional than a global organization. Membership was largely confined to European states and the texts it produced reflected civilian legal traditions.

During the interwar period, the Economic Committee of the League of Nations undertook the unification of limited commercial subjects, mainly dealing with financial and credit transactions. Government involvement in unification increased with the creation of the International Institute for the Unification of Private Law (UNIDROIT), which was formed in 1926 within the framework of the League of Nations and engaged in the unification of certain areas of commercial law.[40] However, as in the case of the Hague Conference, unification undertakings were

Argentina, and Venezuela, and meets in plenary sessions every four years to prepare conventions and to establish future work. Between sessions, Special Commissions meet to prepare draft conventions. The Hague Conference works toward the unification of the conflict of laws rules relating to a number of commercial law matters. With regard to international trade law its main unification efforts concern the enforcement of foreign judgments, the international sale of goods, and procedural matters. See Reese (1985); Droz and Dyer (1981); Gabor (1986). For a review of the methods, objectives, and early work of the Hague Conference, see Castel (1967) and also Dolzer (1982) and Honnold (1995) for its more recent initiatives. See the Hague Conference on Private International Law's web page http://hcch.net/e/ where the following areas of work are identified: jurisdiction and foreign judgments relating to civil and commercial matters, indirectly held securities, and E-commerce.

[40] UNIDROIT was established in 1926 on the basis of a bilateral agreement between the Italian government and the League of Nations. UNIDROIT separated from the League in 1935, following the withdrawal of Italy from the League. In 1940 it was reestablished as an independent intergovernmental organization by a multilateral treaty, the UNIDROIT Statute. Since then it has entered into cooperation with a number of international organizations, including the United Nations. UNIDROIT has a membership of some fifty-seven countries, including most Western European states, some Eastern European states, and a number of African and Asian states. UNIDROIT has worked on the unification of a number of commercial law subjects, including the international sale of goods, international agency, validity of sales contracts, rules of road and waterway, recognition and enforcement of arbitral awards, bills of exchange, intellectual property, leasing, factoring, warehousing, garaging, the law of contract and powers of attorney, a code on international trade law, the law of franchising, security interests in mobile equipment, and the regulation of stolen and illegally exported cultural objects. UNIDROIT is presently working on a revision of the Principles of International Commercial Contracts, extending them to additional topics, including agency, assignment of debts, and limitation of actions. Recent initiatives are discussed in a regular publication prepared by UNIDROIT, *UNIDROIT Proceedings and Papers*. See also the UNIDROIT web page http://www.unidroit.org/ where the following areas of work are identified: international interests in mobile equipment, franchising, transnational civil procedure, and transnational capital market transactions. For the history of the organization and its work, see generally, Monaco (1977); Bonell (1978); Matteucci (1977).

primarily regional in scope and civilian in character and did not attract broad support outside Europe.

Significant global intergovernmental involvement in the unification of commercial law really only occurred after the Second World War. Indeed, one of the distinguishing characteristics of the modern law merchant is the proliferation of intergovernmental agencies involved in the unification of commercial law and claiming the representation of most of the economic and legal systems of the world. It is central to consider the context in which global intergovernmental cooperation emerged.

As noted above, a significant limitation to the success of early unification efforts was their regional and civil law character. The Hague Conference on Private International Law and UNIDROIT were for some time limited in membership to European states and to those who shared the civil law tradition. As a result, their early unification projects were not greeted with much enthusiasm by common law jurisdictions. The United States, for example, only became involved in both organizations in the 1960s. Because of the essentially European and civilian nature of their unification efforts, their texts and conventions did not receive broad acceptance outside Europe. Common law states, less developed states, and states with centrally planned economies objected that their interests and legal systems were not adequately represented.

The creation of the United Nations and its network of specialized agencies after the Second World War provided the first truly global institutional context for the unification movement. In addition, the principles and practices of "embedded liberalism," under the leadership of the United States, provided the broader normative framework for the movement (Ruggie, 1982). This involved the preference for rules that facilitate international commercial activity through the reduction of transaction costs, but that provide necessary protections for domestic commercial interests. Such rules inform the various organs engaged in unification under the auspices of the United Nations. The mandate of the UN General Assembly includes the unification of commercial law under its duties regarding the progressive development and codification of international law and under its competence to promote international economic cooperation.[41] The General Assembly established a number of bodies and specialized agencies engaged directly or indirectly in the unification of commercial law. The International Maritime Organization (IMO), created as a specialized agency in 1948, but entering into force in

[41] The Charter of the United Nations, Articles 13. 1 (a) and (b).

1958, has engaged in a number of projects unifying private maritime law. The United Nations Conference on Trade and Development (UNCTAD) was created as an organ of the General Assembly in 1964 and has engaged in a number of projects involving the unification of law, as too has the United Nations Industrial Development Organization (UNIDO), which was established in 1966 as an organ of the General Assembly and acquired status as a specialized agency in 1983.

However, the main global forum for the unification of commercial law was provided with the creation of the United Nations Commission on International Trade Law (UNCITRAL) in 1966.[42] UNCITRAL was given a mandate to "further the progressive harmonization and unification of the law of international trade" (ibid.). This mandate includes, *inter alia*, the preparation or promotion of international conventions, model laws, and uniform laws, and the promotion of codification and wider acceptance of international trade terms, customs, and practices.[43] UNCITRAL was created in response to observations made in a report to the General Assembly by Clive Schmitthoff, who is regarded as the "conceptual father" of UNCITRAL (Herrmann, 1982: 36), concerning the lack of coordination amongst organizations engaged in unifying trade law. Schmitthoff also observed that unification efforts failed to achieve universal application owing to both the lack of participation of the developing and centrally planned economies and the European and civil law basis of earlier initiatives. UNCITRAL was thus created with a view to representing the principal economic and legal systems of the world and the developed and developing countries. Membership in the organization is designed to represent all major legal systems in the world and states of various levels of development, including both planned and market economies.[44]

[42] UNCITRAL was established by the General Assembly Resolution 2205 (21) (1966) and became operative in 1968.

[43] UNCITRAL has engaged in a number of unification efforts, including the unification of the laws governing: the international sale of goods and related transactions; the international transport of goods; international commercial arbitration and conciliation; public procurement; construction contracts; international payments; electronic commerce; and cross-border insolvency. UNCITRAL publishes the *UNCITRAL Yearbook* annually which provides a good source for information on its unification efforts. See also Cutler (1992). See UNCITRAL's web page http://www.uncitral.org/ for a good summary of contemporary areas of work, including privately financed infrastructure projects, arbitration, transport law, insolvency law, security interests, and electronic commerce.

[44] The membership scheme is regional and membership rotates. Initially, UNCITRAL membership included twenty-nine states: seven African; five Asian; four Eastern European; five Latin American; eight Western European, and "other states." Canada, Australia,

The attempt to broaden participation in legal unification beyond its original European basis reflects a number of important developments. UNCITRAL was created at a time when demands for a New International Economic Order were being articulated by the countries emerging out of colonial pasts. Calls from the less developed world and also from socialist countries for a greater voice in the creation of international economic law, while dominant in UNCTAD, were also heard in UNCITRAL. As part of its program of work, UNCITRAL inherited some unification efforts that had previously not met with great success. For example, the laws governing maritime transport had been identified by UNCTAD when it initially convened in 1964, prior to the creation of UNCITRAL, as in need of significant reform by developing states who claimed that the existing laws favored powerful private associations of marine insurers and underwriters, shipping liner conferences, and cartels.[45] While UNCTAD was given the mandate of addressing the international trade concerns of the developing countries and had identified a number of areas in need of reform,[46] it had not been terribly successful in generating texts that were acceptable to most developed states. Indeed, as Edgar Gold (1981: 28) notes, the demand in UNCTAD for international regulation of bills of lading, marine insurance, charter-parties, shipowners' liabilities, and flags of convenience, all parts of what was generally regarded as a "private industry," "astonished" the major maritime states, who perceived it as a direct attack on the " 'law merchant,' Adam Smith, the Protestant ethic, and free enterprise." The leading maritime states were successful in blocking significant developments in UNCTAD and as part of a renewed effort to further isolate what they regarded as the domain of private authority, had the matter of shipping legislation deftly transferred to the newly created UNCITRAL, a body heralded as appropriately technical, neutral, and apolitical in operation and thus more appropriate for the resolution of deeply divisive issues in shipping legislation. The developing states opposed this transfer, but were unsuccessful. UNCITRAL, in consultation with UNCTAD, produced a

and the United States qualify as other states. In 1973 membership expanded to thirty-six states with the addition of: two African; two Asian; and one additional Eastern European, Western European, and Latin American state. See "Working Methods of the Commission: Note by the Secretariat" (1988).

[45] See generally, Cutler (1999 c) for a detailed examination of the private interests that have historically defined maritime transport laws and for the conflicting interests of less developed and other states.

[46] For example, the unilateral fixing of freight rates, discriminatory practices of shipping conferences, inadequacy of existing shipping services, and inequities in existing shipping legislation.

set of rules governing bills of lading that are more accommodating of states' development concerns than were either of the earlier unification initiatives (the Hague Rules and the Hague–Visby Rules). However, so few states have adopted the new rules that most of world trade continues to be governed by the earlier rules that are said to favor the interests of shipowners.[47]

The creation of UNCITRAL thus marked the attempt to create a global trade organization that would be both representative in nature and integrative of the previously fragmentary and unsuccessful, largely regional unification efforts. It also marked the real beginnings of the involvement of the United States in the unification movement. Indeed, the United States has become a leader in the movement and today exercises considerable influence over the nature and content of regime standards. Prior to the creation of UNCITRAL, the attitude of the United States was "one of indifference towards all efforts at international cooperation in private commercial matters" (Lansing, 1980: 270–1). This indifference was born out of a preference for judge-made or common law, ignorance of the civil law, and the belief that civilian efforts at unification could not accommodate common law conceptions and theories. In addition, the perception that the unification of private law was unnecessary and the existence of limitations on the treaty-making power of the executive in matters of private law also posed obstacles to the cooperation of the United States (ibid.).

Success in domestic unification efforts undertaken in the creation of the US Uniform Commercial Code (UCC) generated a change in attitude in the United States regarding the merits and possibilities of unifying commercial law. In 1963 the US Congress authorized the executive to join international organizations engaged in the harmonization and unification of private law and membership in the Hague Conference, and UNIDROIT followed (see Pfund and Taft, 1986). Congress was responding to a recognition of extraordinary increases in the volume of world trade and commerce and to the concern that unification efforts in Europe would proceed with or without the participation of the United States. As one Commissioner on Uniform State Laws said in a statement before Congress:

> [w]e must enter into the problems of great unification in fields of law touching social intercourse and business activity at a time when we can get the viewpoint of the United States heard in the original drafting,

[47] See generally, Cutler (1999 c) and Gold (1981).

> not at the time it is considered for final adoption. It is in the preparatory stages that there is an opportunity to weave into it the basic problems that we face in the United States and upon which the commissioners [on Uniform State Laws] have been working for years.[48]

Moreover, with the creation of UNCITRAL and the adoption of its program of work that spanned significant and varied areas of commercial activity, the United States was prompted to reassess its attitude towards international unification. Concern was expressed that if American representatives did not take the work of UNCITRAL seriously, they would be faced with the development of standards that were unrepresentative of their interests. The United States thus began participating in UNCITRAL in earnest, adopting a leadership and, in some cases, a dominant role. Other states, including Great Britain and Canada, also began to take greater interest in the unification movement with the creation of UNCITRAL.

The significant influence of the United States on the unification movement is particularly evident in the unification of international sales law. The United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention), negotiated under the auspices of UNCITRAL and which came into effect in 1988, is generally regarded as one of the most "successful" unification initiatives ever undertaken.[49] By 1992 the Vienna Sales Convention was in force in thirty-four states from every region in the world, indicating "substantially world-wide acceptance" (Honnold, 1995: 1038). By 1997, it was in force in forty-nine states and described as "a hallmark in international law" (Giannuzzi, 1997: 991). Moreover, the Vienna Sales Convention is regarded as very much a replica of the domestic commercial law of the United States Uniform Commercial Code. The United States not only exercised leadership in the negotiation of the Vienna Sales Convention, but was able to tailor the provisions to US commercial norms and practices. American trade experts Allan Farnsworth and John Honnold both exercised leadership roles in the negotiations. Honnold represented the United States at the Vienna Sales Conference where the Convention was negotiated and was head of the UNCITRAL Secretariat during the drafting of the Vienna Sales Convention. The success of the United States delegation led a US State Department official to conclude that the Vienna Sales Convention "resembles [the UCC] more than the law of

[48] Joe Barrett, Commissioner for Arkansas, cited in Pfund and Taft (1986: 671, n. 1).
[49] For this assessment see Farnsworth (1995); Bonell (1995); Honnold (1995).

any other country."[50] While developing states did articulate demands for a more development-oriented sales law, they were generally unsuccessful in promoting notions of substantive equity in contracting. They were successful in blunting, though not displacing the rule of "open price" in cases of contractual underspecification, which they argued favored exporters and worked against them in rising markets.[51] "Such contract prices would tend to be the sellers' prices and, as is well known, while the prices of raw materials exported by the developing countries are generally fixed in the commodity markets of the developed world, the prices of manufactured goods are usually determined by the manufacturers themselves" (Date-Bah, 1981: 28).[52] Developing countries were also able to negotiate extended time periods for rejecting defective goods. Developed countries wanted strict treatment of the notice periods for rejecting defective goods, while developing countries wanted accommodating standards that were more sensitive to their development needs. Here too developing countries managed to soften, but not displace the rules promoted by the developed world.[53]

Another area dividing states in the negotiation of the Vienna Sales Convention was the status to be accorded merchant customs and trade usages. While more will be said on this issue below, socialist and developing states opposed the inclusion of trade usages and customs because "those usages were settled primarily by industrialized nations and [were] likely to reflect the interests of those countries. In contrast, countries like the United States and Great Britain place[d] prime emphasis on regularly observed trade usages, which are said to increase mercantile flexibility, and thereby, economic efficiency" (Garro, 1989: 476–7). As the trade expert Allan Farnsworth (1979: 465–6) comments, "[g]enerally, developed countries like usages. Most usages seem to be made in London, whether in the grain or cocoa trade, for example. Developing countries, on the other hand, tend to regard usages as neocolonialist. They cannot understand why usages of, let us say, the cocoa trade should be made

[50] Peter Pfund, Assistant Legal Advisor for Private International Law, US Department of State, cited in Patterson (1986: n. 55) and see Honnold (1984).

[51] Developing countries, socialist countries, and some civil law countries opposed the practice of open price contracts, while the United States favored a minimum regulation of price specificity. Developing states argued that open price contracts work against their interests in light of the unfavorable terms of trade for raw materials, in contrast with the rising prices of manufactured goods. See Garro (1989: 463).

[52] See also, Rosett (1984).

[53] See Goldstajn (1981: 76); Jones (1989: 497–500); Patterson (1986: 283–94); and Garro (1989: 469–73) for fuller discussion of the conflicting interests of developed and developing states.

in London."[54] The Soviet delegate to the Vienna Conference objected that "usages [are] often devices established by monopolies and it would be wrong to recognize their priority over the law," while the delegate from Yugoslavia stated that trade usage "has been formed by a restricted group of countries ... whose position did not express worldwide opinion" (Bainbridge, 1984: 641). Despite these objections, the Vienna Sales Convention recognizes the binding force of commercial custom.[55]

A review of UNCITRAL's most significant unification efforts reflects a tendency in the early years to unify through binding international treaties, such as the Convention on the Limitation Period in the International Sale of Goods (New York, 1974); the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978); the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention, Vienna, 1980); the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991).

Recent unification efforts have focussed more on unification through model laws, such as the Model Law on Procurement of Goods, Construction, and Services (1993), Model Law on International Commercial Arbitration (1985), and Model Law on Electronic Commerce (1996). UNIDROIT's very successful Principles of International Commercial Contracts also reflect the trend to unify through voluntary, soft law.[56]

While trade experts offer practical and efficiency-related considerations to account for the preference for voluntary soft unification efforts,[57] deeper structural and distributional influences are also at work. These influences stem from attempts by states and private commercial actors to adjust to changing terms of international competition which are generated by contemporary developments in the capitalist mode of

[54] See also, Boka (1964: 227–40).

[55] The Vienna Sales Convention embodies a compromise on the legal status of commercial usage which goes part way in recognizing the objections of socialist and developing states. However, it clearly indicates the growing legitimacy of unformulated custom as a source of law and adopts a test of custom very close to that adopted in the Uniform Commercial Code (UCC) of the United States, which emphasizes behavior over intent and arguably works in favor of the major trading states and corporations. See Garro (1989: 479–80) and Date-Bah (1981: 45) for discussion of the debates over the legal status of usage. See also Farnsworth (1984: 81–9) for a good comparison of the Vienna Sales Convention and the UCC.

[56] See also the unification initiatives listed in note 60 below.

[57] See the Introduction to UNIDROIT's Principles of International Commercial Contracts for the stated preference for unification through less exacting and less time-consuming soft law.

production. The globalization of production and finance and privatization of many economic sectors and activities have created new opportunities and incentives, influencing the terms of commercial competition. States are responding in a variety of ways. Cerny (1990: 205) notes that the social and economic roles of states are changing "in the attempt to respond to, and to shape and control, growing international economic interpenetration and the transnational structures to which it gives rise." States have shifted from macroeconomic to microeconomic interventionism, which is reflected in deregulation, and have altered the focus of their industrial policies in the pursuit of "competitive advantage"over "comparative advantage." The policy shift also translates into politics that no longer revolve around national welfare concerns, but that are increasingly geared to "the promotion of enterprise, innovation and profitability in both private and public sectors" (ibid., 205; and see Cerny, 1997: 260).

The shift in focus from comparative to competitive advantage is evident in contemporary developments in the unification movement.[58] As Leebron notes:

> [r]ecently, claims for harmonization of national laws and policies have been closely linked to claims for "fair trade." The scholarly literature has begun to embrace the notion that harmonization is the mechanism by which unfair differences in legal and other regimes are eliminated, and the level playing field, the metaphoric symbol of fairness, is restored. Harmonization in this sense is the Procrustean response to international trade, a response fundamentally at odds with the theory of comparative advantage that has justified liberal trading policies since the early nineteenth century.
>
> (1995: 1)

Leebron here recollects the myth of Procrustes. This classical figure was known to tie to his bed errant travelers crossing his path. Measuring the wanderers, he would stretch those too short and cut bits off those too long. Leebron vividly depicts the potential artificiality and problematic nature of standards. More to the point, though, is that contemporary harmonization and unification represent part of the compromise of embedded liberalism struck by states to secure domestic welfare in the face of the exigencies of increasing globalization. This compromise has, however, come undone. This is reflected in the shift in emphasis from unification policies aimed at creating binding, comprehensive, and equitable

[58] For an interesting exploration of "unification as a product of competition and conflict," see Dezalay and Garth (1996: vii).

terms of competition to those aimed at leaving the terms of competition to private negotiation and agreement. It is also evident in the reassertions of merchant custom as the preeminent method for creating law and of arbitration as the preferred method of dispute resolution. While the first unification efforts were regional and in some cases sectorally specific, later activities involving UNCITRAL and other actors were more global, multilateral, and comprehensive. The Vienna Sales Convention probably represents the high watermark for comprehensive global unification. Since then, however, initiatives are increasingly fragmented, sectorally focussed, and soft in application. The growing trend in the use of soft law sources and voluntary or nonbinding arrangements, such as UNIDROIT's recent restatement of Principles of International Commercial Contracts, signals the increasing salience of the private ordering of commercial relations that grants maximum scope to merchant autonomy and flexibility. The drafters of the Principles addressed their underlying rationale:

> Efforts towards the international unification of law have hitherto essentially taken the form of binding instruments, such as supranational legislation or international conventions, or of model laws. Since these instruments often risk remaining little more than dead letter and tend to be fragmentary in character, calls are increasingly being made for recourse to non-legislative means of unification or harmonisation of law.
>
> Some of these calls are for the further development of what is termed "international commercial custom," for example, through model clauses and contracts formulated by the interested business circles on the basis of current trade practices and relating to specific types of transactions or particular aspects thereof.
>
> Others go even further and advocate the elaboration of an international statement of general principles of contract law.
>
> UNIDROIT's initiative for the elaboration of "Principles of International Commercial Contracts" goes in that direction.
>
> (UNIDROIT, 1994, Introduction)

This initiative was premised upon great faith in the ability of private ordering to solve many of the problems facing international commercial actors. Indeed, the Principles are recognized as embodying a "change in paradigm in international commercial law" in the "privatization" of legal unification and harmonization (Berger, 1997: 951). The international business community has enthusiastically embraced the Principles, which have been translated into eight languages in addition to the five official versions and have already been referred to in international arbitral awards (Bonell, 1995: 62).

Merchant custom is being held out as the source of law most consistent with the goal of private ordering. Important efficiencies and economies are said to flow from the adoption of merchant custom as a source of law in comparison to negotiated international conventions:[59]

> Experience has shown that the development of uniform rules of international trade by practice is much more efficient and far-reaching than the unification of commercial law by means of international conventions. The technical process of the formation of a custom is already in itself more flexible and easier to carry out than the conclusion of an international convention which in this domain – where necessarily a modification of national law is involved – is inconceivable outside the context of ratification procedures . . . And since the modification of particular legal rules which one wants to alter in order to achieve uniformity in the law of international trade, in many instances, involves an attack on some general principles of national law of which the rules form part, the already considerable obstacles become insurmountable because, although one is only concerned with commercial law, one must rise from the level of particular rules to that of the general theory of law.
> (Kopelmanas, 1964: 118–26)

As noted above, Western developed states tend to favor unification through custom for it is regarded as more flexible, adaptable, easier to achieve, and, ultimately, more efficient.[60] However, not all are in

[59] Schmitthoff (1964 a: 16) identifies legislation and custom as the two main sources of international economic law. International legislation may be created by the adoption by states of a multilateral convention or the formulation of a model law, which is then adopted by states through the enactment of municipal legislation fashioned upon the model law. In contrast, international commercial custom "consists of commercial practices, usages or standards which are so widely used that businessmen engaged in international trade expect their contracting parties to conform with them and which are formulated by international agencies . . . or international trade associations." Schmitthoff (ibid.) further notes that the main difference between the two sources is that international legislation applies "by virtue of the authority of the national sovereign," while international custom is "founded on the autonomy of the will of the parties who adopt it as the regime applicable to the individual transaction in hand."

[60] There is a distinction between formulated and unformulated customary law. Formulated customary law comprises customs that have been formally and deliberately articulated by formulating agencies such as the ICC. Examples are the ICC Incoterms, the ICC Uniform Customs and Practice for Documentary Credits, the Code of International Factoring Customs, the ICC Uniform Rules for a Combined Transport Document, and the York–Antwerp Rules in the General Average. Unformulated custom, in contrast, is constituted by practices that are in common usage, such as marine insurance certificates, but that have not been deliberately or formally articulated by formulating agencies. Schmitthoff (1964 a: 23) refers to the former as formulated international custom and the latter as unformulated commercial usage. While formulated international custom has unquestionably gained legitimacy as a source of law, as is evidenced by the widespread use of Incoterms and other standards developed by nongovernmental formulating agencies, the

agreement about the merits of customary law and the sufficiency of private ordering in achieving efficiencies or fairness in international commercial relations. Developing states tend to prefer unification through hard law, for the convention process at least guarantees some rules governing access and transparency (Sempasa, 1992). Moreover, while customary law is arguably more adaptable, its distributional impact often remains obscure. For example, Alan Cafruny (1987: 58 and 261) argues that certain trade terms have functioned for developing states as barriers to entry into the bulk trading market, but there has been little challenge to the distributional consequences of the terms of trade because of their highly technical nature. The United Kingdom was able to build its merchant marine through an informed and selective use of different trade terms that were then dictated to trade partners on the basis of commercial power and influence.[61] This suggests that the distributional consequences can be very significant. It also raises a related problem of long-term contracting and standard form contracts whose distributional consequences may be obscure to the parties who must deal on a take-it-or-leave-it basis.[62] Typically, asymmetrical relations are built right into such contracts, but this is obscured by their technical nature, their general acceptance, and the frequency of their use.

There are also important distributional consequences flowing from soft law.[63] Soft law norms respond to perceptions of intensified competition and the sense that some players are cheating and that the playing field is not so level. They allow room to move and to cheat if necessary.[64] However, soft law norms probably benefit only those businesses that are

legitimacy of unformulated custom remains controversial. As Honnold (1991: 147) observes, "[g]overnments have sometimes viewed such custom as inconsistent with their sovereignty and with principles on which their regimes were based." Garro (1989: 476–7) notes that this controversy emerged over the status of custom in the Vienna Sales Convention, where developed states, such as the United States and the United Kingdom, placed "prime emphasis on regularly observed trade usages, which are said thereby to increase mercantile flexibility, and thereby, efficiency."

[61] Cafruny argues that the trade term fob (free on board) creates a barrier to the entry of developing countries into bulk trading. Under this term, the importer chooses the shipowner to transport the goods. In contrast, under the cif term (cost, insurance, and freight) the exporter selects the vessel. Britain expanded its merchant marine by contracting the sale of coal cif and the import of cotton, fob. In both cases, British shipowners were selected.

[62] Standard form contracts are also known as contracts of adhesion and are widely used in international commerce, particularly in maritime transport and insurance. See Eörsi (1977).

[63] See generally, Abbott and Snidal (2000).

[64] Cutler (1999 b). Scheuerman (1999 and 2001) notes how discretionary law serves the more powerful social and economic interests which are in a position to exploit vague and open-ended norms.

large and dispersed enough to carry the risks generated by uncertain standards. Hard law norms, in contrast, regulate the terms of competition more closely and visibly, probably benefiting smaller businesses which face high transaction costs in collecting information about national rule differences. This suggests that there are distributional consequences to the method of unification or harmonization chosen.

Significantly, the distributional consequences of different sources of law transcend private commercial interests and impact on state interests and competitiveness. Arguably, the ability of the United States to tailor international sales law to its liking gives US-based traders a competitive edge over other less influential states. It also suggests that transaction-cost analysis of the incentives to unify potentially obscures the distributional issues involved and overstates the mutuality of benefits flowing from the unification process.

Santos (1995: 290) associates hard legal regulation or the "iron cage mode" with legal relations where there is a great asymmetry in power relations because coercive regulation is needed to temper the overwhelming power differentials of the parties. In contrast, he notes that the soft "rubber cage mode" of legal regulation tends to characterize relations between relatively equal parties where there is less need of the coercive function of the law. However, he also identifies a trend in the development of capitalist legality in peripheral states toward the increasing soft, voluntary, informal, and discretionary regulation of legal relations. This informality creates the appearance of consensual legal relations but, in actuality, represses dissent. The appearance of mutually agreed outcomes through informal arbitration and conciliation both "disarm and neutralize" dissent "through mechanisms of trivialization and integration" (Santos, 1982 a: 253).

> Informalization thus means powerlessness. It will help to stabilize social relations since no dramatic changes can be expected from institutions or settings that must be oriented to consensus and harmony because of the limits on their coercive powers.
>
> Many disputes that are intended to be processed by the new informal settings share two characteristics: There are structural differences in the social power of the parties, and they occur repeatedly. Landlord–tenant and merchant–consumer disputes are examples. In such cases mediation or arbitration becomes repressive because the setting lacks coercive power to neutralize the power differences between the parties. Repressive mediation leads to repressive consensus, which, I submit, will more and more characterize the exercise of capitalist state power.
>
> (Ibid., 260–1)

In a similar vein, the increasing informality and personalized nature of law merchant discipline assists in locking peripheral states into neoliberal market disciplines by disarming them and neutralizing their dissent. Arguably, major conflicts of interest are much more visible in formal negotiations of hard treaty law where the scope of concessions granted by the more powerful states are obvious. In contrast, soft discipline is by definition unenforceable and, as a result, even the most generous concessions may in actuality be quite meaningless.

Criticisms of private initiatives to unify and harmonize international commercial law are being voiced by those who question how representational private initiatives can be.[65] Some challenge the dominant view that UNCITRAL's success in unifying a number of areas of law can be attributed to its ability to accommodate a variety of different interests and to arrive at acceptable compromises between often incompatible rules (Garro, 1989: Patterson, 1986). For example, concessions made to less-developing states in the negotiation of the Vienna Sales Convention were marginal (Patterson, 1986). Michael Bonell (1995), a legal consultant to UNIDROIT, in evaluating the success of the negotiations over the Vienna Sales Convention notes that:

> due to the differences in legal tradition and at times, even more significantly, in the social and economic structure prevalent in the States participating in the negotiations, some issues had to be excluded at the outset from the scope of the envisaged instrument, while with respect to a number of other items the conflicting views could only be overcome by compromise solutions leaving matters more or less undecided.
>
> (64)

The sales regime emerged very much a product of the developed world with a strong American imprint. Bonell contrasts the outcome of the unification of sales law with unification efforts leading to UNIDROIT's Principles. He observes (ibid., 66) that "it was precisely because the negotiations leading up to CISG [Vienna Sales Convention] had so amply demonstrated that this Convention was the maximum that could be achieved at the legislative level," that UNIDROIT abandoned "the idea of a binding instrument" and decided instead "to take another road for its own project." The road they chose was unification through soft law. While the drafters of UNIDROIT's Principles pride themselves on the incorporation of norms reflecting the needs of less-developed states, one must bear in mind the status of the Principles as soft law. As Ignaz

[65] See Farnsworth (1995) for a review of some of these criticisms.

Seidl-Hohenveldern (1979: 193) observes "the market-economy industrialized States have shown their willingness to accept a good number of the Third World demands on principle, provided that these rules merely become 'soft law.'" Critics of the soft law approach argue that conventions of mandatory application offer better protection for parties with weaker bargaining power. While recognizing that merchant autonomy and freedom of contract remain "articles of faith" for merchants, there are those who identify a growing need to protect weaker parties from those exercising monopolistic or quasi-monopolistic economic power (Matteucci, 1960: 138). Some argue that unrestricted reliance on merchant autonomy and freedom of contract are unacceptable foundations for the unification of commercial law.

> Many vital questions are at stake, ranging from the reconciliation of common and continental law to the protection of the weaker party and the satisfactory regulation of transactions between parties from different social and economic systems or from developed and underdeveloped countries, and it would be irrational madness to leave the legal responses to these problems to an uncontrolled *laissez-faire* in a world of perpetual strife. It is a fact that the economic and political matters involved in international trade transactions considerably exceed the narrow margins of private interests which are often – and mistakenly – understood to be the only concerns in the private law regulation of international commercial issues. (Naón, 1982: 91)

Moreover, the distinctions between accommodation, compromise, and domination are often difficult to draw when the disputes turn on legal technicalities whose greater political and distributional significance probably escape all save for commercial law experts. The significance of legal expertise in the unification movement was noted earlier. While legal experts played a central role in the negotiation and drafting of UNIDROIT's Principles,[66] they too dispute the political or distributional significance of commercial law. A number of such experts attribute the success of the unification movement to precisely the "apolitical" nature of international commercial law. Clive Schmitthoff (1982), a leading scholar of international commercial law, has argued that the success of the unification movement turns on its apolitical nature and the resulting appeal of its laws to all parties involved in international commerce. Others, who refer to the harmonization of private commercial law as "jurisdictional interface harmonization," question the normative

[66] See Bonell (1995: 66) and see above.

content and distributional impact of the unification movement (Leebron, 1995: 3, n. 10). They regard the process as a "value-neutral" engagement and, thus, of unquestionable suitability for private regulation. The view that privatized law-creation is the most appropriate means to regulate international commerce is also evident in the matter of dispute settlement. Significant, as well, is a related trend toward the increasing informal, personalized, and discretionary nature of dispute resolution.

Dispute Settlement: The Privileging of the Private

The commitment to the privatization of international commercial transactions is most pronounced in the preeminence of private methods of dispute resolution. Today the settlement of commercial disputes through private arbitration is the norm. Indeed, there has been such a tremendous expansion in both institutional and normative structures facilitating arbitration that most trade experts would agree that private arbitration has eclipsed national adjudication as the preferred method for resolving international commercial disputes.[67] This is resulting in considerable pluralism in dispute settlement mechanisms, as well:[68]

> For many years it was fashionable to say that international commercial arbitration had come of age. That is no longer an appropriate observation. By now it has entered a mature and sophisticated middle age. Both the crises and illusions of youth are past, and in the eyes of businessmen (although not necessarily their lawyers) the creature has developed an identity and ability to solve problems that match the needs of the critical role it plays in world commerce today. (Graving, 1989: 319–20)

The trend towards increased recourse to private arbitration is being encouraged by states which are participating as part of the mercatocracy in creating uniform and mandatory rules that provide for the recognition and enforcement of foreign arbitral awards. States are adopting

[67] See Berman and Kaufman (1978); Carbonneau (1984 and 1990); Aksen (1984 and 1990); Dezalay and Garth (1996).

[68] According to Aksen (1990: 287) "in today's world dispute resolution will invariably be arbitration." Dezalay and Garth (1996: 6) note that over the past twenty-five years or so international commercial arbitration has become the accepted method for resolving international commercial disputes and they note the dramatic increase in the caseload of arbitration institutions, such as the ICC facilities. According to a 1992 report they cite (ibid., 6, n. 2), some 120 arbitration institutions are identified in the world. For a list of arbitration services, see Asser Institute (1988).

legislation that curtails the power of national courts and policy makers to intervene in private arbitrations and that limits the ability of judicial authorities to set aside arbitration awards. This is expanding and privileging private methods of dispute resolution. Curiously, national government officials are participating in the expansion of the private sphere and the neutralization and insulation of international commercial concerns from public policy review. However, this insulation is incomplete, for state authority over the enforcement of private settlements has been strengthened as states undertake the binding commitment to enforce foreign arbitral awards. State authority has thus been curtailed in the settlement of substantive commercial legal issues and disputes, but expanded in the enforcement of the final awards. Indeed, state intervention to legitimize and to expand the practice of private arbitration has been instrumental in bringing about the growth of private dispute settlement. This intervention is, in turn, consistent with neoliberal discipline and the new constitutionalism that are recreating states as market participants. The move to the competition state and policies aimed at securing a competitive advantage in international commercial relations is evident in state support for the creation of a multilateral framework creating a mandatory regime for the recognition and enforcement of foreign arbitral awards. It is also evident in state adoption of national legislation that creates the necessary institutional structures and procedural rules for the conduct of international arbitrations. The underlying rationale is clearly the perception that arbitration is more efficient, more neutral, and more reliable than adjudication in national courts. Indeed, the arbitration community is like a private "club" that prides itself on its efficiency and its unique ability to deal with the exigencies of international commercial competition (Dezalay and Garth, 1996) and to relieve the burdens of increasingly overloaded national judicial systems. Central to the success of this "club" is the operation of large law firms and lawyers trained in the "virtue" of arbitration.[69] They are the "organic intellectuals" who work to disseminate the arbitration ethos locally, through national government and business circles, and globally, through the operations of multinational law firms, international business associations, such as the ICC, and globalized arbitration practices. Even developing states, although initially wary of liberalizing their dispute resolution processes through the adoption of denationalized

[69] See Dezalay and Garth (1996) for the role of lawyers and huge law firms in internationalizing the rule of law through the practice of arbitration.

arbitration law and services, are joining the club, albeit as junior and not quite equal members.[70]

The reassertion of arbitration as the preferred method for settling commercial disputes reflects the growing importance that is being given to the privatization of commercial relations, reinscribing in the very fabric of national and global laws liberal mythology concerning the natural or organic, neutral or apolitical, consensual, efficient, and, hence, superior nature of private regulation. Private arbitration is regarded as the most natural means for resolving international commercial disputes for it gives maximum scope to the autonomous "legal subject" through the principles of freedom of contract and the autonomy of the contracting parties. "Arbitration is almost exclusively a creature of contract. The parties determine the content of the contractual agreement, and any requirement to arbitrate is dependent upon and subject to the will of the parties in almost all respects" (Buchanan, 1988: 512). The parties to the arbitration agreement are free to choose the law to be applied and the procedures to be adopted in the settlement of disputes and to designate the arbitrator.[71] It is generally believed that the informality in the procedures adopted by arbitrations and the ability to select arbitrators with technical expertise contribute to more expeditious and less expensive dispute settlement. This is said to produce significant efficiencies over adjudication in national courts of law.[72] Moreover, as agreements to arbitrate are based on the consent of the parties, it is believed that they are more likely to be respected than judgments imposed by national courts (Smit, 1986). Merchants who have agreed to binding arbitration are unlikely to refuse to accept the arbitral award.

The neoliberal commitment to the privatization of dispute settlement procedures is being embraced by developed and developing states alike and by formerly planned economies that are participating in the

[70] For a positive evaluation of the impact of ICC arbitration on developing countries, see Naón (1993). For a less sanguine view, see Dezalay and Garth (1996: chs. 11, 12, and 13) where it is argued that the reception of international commercial arbitration law and practices reproduces core–periphery relations in developing countries. De Entería (1990: 391, n. 5) notes the reluctance of many Latin American states to open up commercial dispute resolution processes to international standards. And see Sempasa (1992) for the concerns that African states have with international commercial arbitration.

[71] In a survey conducted by the American Arbitration Association respondents indicated that the identity of the arbitrator was the most important factor in arbitration. The integrity, impartiality, linguistic ability, and technical knowledge of the arbitrator were regarded as critical considerations in the choice of arbitrators. See Coulson (1982).

[72] For discussion of the greater efficiency of arbitration in dispute settlement see Bagner (1982); Smit (1986); Graving (1989).

globalization of arbitration law and practices.[73] This is facilitated by the operation of multinational law firms operating globally in the transmission of the arbitration ethos throughout the world. Moreover, the compelling practical incentives for private arbitration become even more so when they are combined with the development of an institutional and procedural context for facilitating arbitration proceedings and enforcing their awards. This institutional context is generally regarded to be a result of efforts undertaken to unify arbitration law so as to address the uncertainty, inefficiency, and parochialism produced by national adjudication in the second phase in the development of the law merchant. It was noted earlier in this chapter that there was a proliferation of private associations engaged in international arbitration in the early part of the twentieth century. While there are "literally hundreds of institutions" engaged in commercial arbitration throughout the world, the ICC Court of Arbitration, created in 1923, is today the most successful of the arbitration associations (Graving, 1989: 328).[74] In terms of the volume of cases it hears and its use by states with different legal traditions, of various levels of development, and with both market and nonmarket economies it is considered the "premier institution" for international arbitration in the world. Developed and developing states and market and nonmarket economies have regular recourse to ICC arbitration.[75] The ICC Court of Arbitration developed from a predominantly Western institution in the 1920s to one of worldwide scope.[76]

The American Arbitration Association, formed in 1926, is the second most heavily utilized institution for international arbitration and it utilizes a number of different rules governing different types of commercial transaction (Graving, 1989: 336–42). The London Court of Arbitration, originally the London Chamber of Arbitration, was founded in the late nineteenth century and operates under its own set of rules. Though it was once a popular venue for arbitration, it declined in popularity in the late 1970s as a result of the imposition by the courts of procedural obstacles to arbitration. Legislative reforms have since increased its popularity and today it hears about one-half of the cases heard by the American Arbitration Association and about one-tenth of those heard

[73] See Naón (1993); Craig (1995); Yakovlev (1996); Liu and Lourie (1995).
[74] For a comprehensive list of arbitration institutions, see Asser Institute (1988); and McClendon (1993).
[75] See Derains (1981); Bannicke (1985); and Naón (1993).
[76] In 1987 one-third of ICC arbitrations involved developing states, while one-sixth were state-controlled entities (Graving 1989: 331).

by the ICC Court of Arbitration (ibid., 344). The efforts of these and other arbitration institutions[77] did not, however, displace adjudication by national courts. Nor did they offset the trend toward the increasing fragmentation and diversity of national commercial arbitration laws, which generated efforts to unify arbitration law.

Intergovernmental efforts to unify arbitration law began under the League of Nations, producing two largely unsuccessful conventions.[78] These conventions did not attract much support outside Europe for it was felt that they were too limited in aim and objective (see David, 1972 a: 130–3). The ICC produced a draft convention on arbitration in 1954, but work was subsequently taken over by the Economic and Social Council of the United Nations, which produced the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The New York Convention imposes on states party to the convention the mandatory obligation of enforcing arbitral awards and recognizing and enforcing foreign awards. It is in force in some 119 states, including the major trading states.[79] The New York Convention assists in the settlement of international commercial disputes by placing mandatory enforcement obligations on states. In theory, states retain some control over the arbitration process in that they can affect procedures and substantive law through the imposition of public policy considerations. However, in practice, the courts are interpreting such limitations very liberally in deference to the principles of international comity.[80] As Mark Buchanan (1988: 513) notes, while "public policy provides states with a tool for external constraint upon the relative freedom of the members of the international business

[77] Other notable arbitration institutions include the Stockholm Chamber of Commerce, which provides the venue for the settlement of East–West commercial disputes. Switzerland, as well, provided the locale for many arbitrations. Other institutions that engage in international commercial arbitration include the International Centre for the Settlement of Investment Disputes, the Indian Council of Arbitrators, the Japanese Commercial Arbitration Association, the CMEA (Council for Mutual Economic Assistance), the EU, the China International Economic and Trade Arbitration Commission, and the Inter-American Commercial Arbitration Commission. See Sauders (1979) for a more extensive list of arbitration institutions. It should also be noted that arbitrations are conducted under the dispute settlement procedures of the North American Free Trade Agreement (NAFTA), the Free Trade Agreement (Can–US) (FTA), and the World Intellectual Property Organization (WIPO).
[78] The Protocol on Arbitration Clauses (1923), while the Convention on the Execution of Foreign Arbitral Awards (1927) provided conditions governing the enforcement of awards.
[79] Adherents include the United States, Japan, Great Britain, Germany, Canada, the Russian Federation, France, Monaco, India, Israel, and Egypt.
[80] See the discussion of comity in this chapter, n. 9.

community," "it can also provide the mechanism for freeing international commercial transactions from the stringent requirements of the domestic law of the forum state or foreign states."[81] Others, too, note that the public policy exception to the enforcement of awards is significant only in theory and not in practice.[82]

Indeed, there has been a general decline in judicial hostility to arbitration, initiated by developments in domestic dispute settlement practices. In the United States a shift in the court's attitude towards arbitration occurred after the enactment of domestic arbitration law in the 1920s. This marked a change in public policy concerning arbitration. The courts came to differentiate between domestic and international arbitrations, applying considerably more restraint in intervening into the latter (Buchanan, 1988). In the United Kingdom judicial attitudes also shifted in response to domestic legislation that imposed limits to judicial intervention in arbitral proceedings; however, there is still resistance to the complete acceptance of arbitration.[83] Similar developments occurred in France, although the policy shift was initiated by the courts and not the legislature (Carbonneau, 1984: 53–7). Carbonneau elsewhere observes that subsequent legislative enactments have rendered France one of the most hospitable forums for enforcing arbitration awards (Buchanan, 1988: 528).

> Developments in the legal systems of England, the United States, and France evidence a clear "rehabilitation" of arbitration as a parallel process of resolving domestic disputes. The redefinition of the judicial role in arbitration was central to the reevaluation in each country. Rather than a competitive relationship, the various domestic arbitration laws mandated collaboration between the judicial arbitral processes, with the public process lending its assistance of its coercive jurisdictional authority where necessary. In England, this phenomenon principally involved a lessening of judicial review powers... In the United States and France, the legislation expressly established a cooperative interrelationship between the courts and the arbitral tribunals.
>
> (Carbonneau, 1984: 57–8)

[81] Buchanan (1988) notes that public policy considerations may include matters of morality, conscionability, economic policy, and professional conduct. He reviews the domestic treatment of international arbitration in a number of countries and finds a liberal approach to the recognition and enforcement of international arbitral awards in the United States, Argentina, and France. This is less so for Egypt, where traditional values and legal rules provide obstacles to arbitration. Brazil, not a party to the New York Convention, has not been a hospitable forum for enforcing awards. He was unable to assess the situation in the former Soviet Union, which, though a party to the convention, had entertained no judicial proceedings to enforce foreign awards. For a contrary view on the situation in Egypt, see Enein (1986).

[82] So concludes De Enterría (1990) in a survey of US and Spanish practices.

[83] See Carbonneau (1984: 40–5) for a review of the English position.

A number of other countries are showing a greater willingness to recognize and enforce foreign arbitral awards. The New York Convention was brought into force in the People's Republic of China in 1987, in Algeria in 1989, and in Canada in 1986.[84] Many other states modernized their arbitration laws in the 1980s, creating legal environments that are more hospitable to arbitration.[85]

The shifts in domestic policies concerning arbitration clearly were a response to the tremendous growth in commercial transactions and the unprecedented expansion in commercial litigation (see generally, Carbonneau, 1984; 1990). Domestic courts were simply unable to respond adequately to the increased volume of commercial cases and to the increasing complexity of commercial transactions. In addition, most states recognized the economic benefits that would flow from improved enforcement. For many states modernization was also prompted by unification initiatives undertaken by UNCITRAL. The unification of arbitration law was made part of UNCITRAL's program of work when the Commission was initially created. The Commission adopted the UNCITRAL Arbitration Rules in 1976 after "extensive consultation with arbitral institutions and centres of international arbitration."[86] These rules have achieved "world-wide recognition and application, primarily due to the text's reliance upon the principle of party autonomy and purposeful consideration and incorporation of international consensus and opinion" (Weiss, 1986: 372). The rules may be invoked in arbitrations held by the ICC Court of Arbitration, the London Court of Arbitration, and the American Arbitration Association. UNCITRAL also produced uniform rules on conciliation after consultation with the ICC and the International Council for Commercial Arbitration (ICCA), which is a private association of arbitration experts from some thirty countries (Dore, 1983: 340).[87] Like the arbitration rules, the conciliation rules are voluntary in application. However, the conciliation rules

[84] See Lecuyer-Thieffry and Thieffry (1990: 578–9). And see Graving (1989: 373–6).

[85] Including, Italy, Belgium, the Netherlands, Switzerland, Australia, Nigeria, Cyprus, Dijibouti, and Spain. See Lecuyer-Thieffry (1990: 579).

[86] *Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session*, UN Doc. A/Conf. 31/17.

[87] And see Freedberg (1995).

do not involve adversarial proceedings and do not produce binding awards.[88]

UNCITRAL's most ambitious undertaking in the area of arbitration, however, is the Model Law on International Commercial Arbitration, adopted in 1985.[89] The model law embodies the principle of merchant autonomy in the freedom it accords parties to "tailor the 'rules of the game' to their specific needs" (Hoellering, 1986: 327). For example, the parties are free to specify arbitrable subject-matter and to choose institutionalized arbitration and rules, the procedures governing the conduct of arbitrations, and the applicable law. Party autonomy is also reflected in the strict limits placed on judicial intervention into the arbitration process. The "approach of the model law, which allows limited prompt recourse to the court during arbitral proceedings, but simultaneously permits the arbitration to go forward, represents a balance between the potential for delay through dilatory tactics of a recalcitrant party, and the futility and high costs of arbitral proceedings in which the award is ultimately set aside by the court" (ibid., 331). In tandem with the New York Convention, the model law provides a comprehensive regime for the settlement and enforcement of international commercial disputes.[90]

This regime expands the private sphere considerably, delocalizing transactions by narrowing the potential for judicial and public policy interventions. This is effecting a profound transformation of relations between public and private regulatory authority. In the United States, for example, disputes governed by mandatory legislation, such as disputes over antitrust and competition laws and policies, consumer and environmental protection laws, and intellectual property and securities laws and regulations, are being held to be arbitrable subject-matter, thus removing their resolution from the judicial realm and placing it in the privatized and delocalized realm of international commercial

[88] UNCITRAL Conciliation Rules, UN Doc. A/Conf. 35/' 17, reprinted in *International Legal Materials (ILM)* 20 (1981), pp. 300–6.
[89] UN Doc. A/ Conf. A/40/17. For the background to the drafting of the arbitration rules and the model law see Broches (1987).
[90] Many states have adopted or are considering the adoption of the UNCITRAL Arbitration Rules and the Model Law. Canadian jurisdictions have enacted legislation bringing the rules and model law into effect, while some states in the United States have enacted the Model Law. Bulgaria, Cyprus, Egypt, Hong Kong, Hungary, Germany, India, Singapore, Great Britain, Kenya, Mexico, and New Zealand have brought the Model Law into effect, while the Netherlands has enacted legislation based upon the Model Law. See Cutler (1992); Potter (1989). UNCITRAL produces case law involving the Model Law called Case Law on UNCITRAL Legal Texts (CLOUT).

arbitration. This expansion of arbitrable subject-matter, when combined with the secretive, closed, and highly discretionary and informal nature of international commercial arbitration, forms a powerful challenge to democratically accountable institutions. Unlike in judicial proceedings where judges are bound to produce judgments and reasons and have a duty to admit interested parties as interveners, private arbitrations are conducted in secret with no publication requirement or rights of public access. This privacy is fundamentally antithetical to the rule of law (Scheuerman, 1999 and 2000) and marks a substantial departure from the judicialized nature of dispute settlement in the second phase in the development of the law merchant. The ability of private parties to evade the application of mandatory national antitrust, taxation, securities, consumer protection, environmental, and intellectual property legislation or to have their rights and duties determined in private, when combined with the general problem of holding transnational corporations accountable under international law, are formidable accretions of corporate power and authority (see Tollefson, 2002). Moreover, "the very purpose of most mandatory economic regulation legislation is to constrain private commercial activity in ways believed to be essential to the greater public good" (McConnaughay, 1999: 495). The private arbitration of such mandatory regulations infuses the private sphere with public functions, raising crucial problems of the distinction between judicial and arbitral functions and important concerns about democratic accountability. While judges operate as part of the public sphere and are duty-bound to protect unrepresented public interests, private arbitrators are not: their duties go to resolving the differences of the parties before them. As one international arbitration lawyer notes:

> [t]he object of a modern, progressive arbitral regime is to minimize judicial interference with the arbitral process. But a municipal system is the means by which any given polity implements its rules in the context of private disputes. If those disputes are taken out of the judicial system and the courts are commanded not to interfere with the process or results unless there are fundamental departures from fair process, how may the polity ensure adherence to applicable private and public law? Furthermore, how can the municipal polity monitor the formation and execution of legal rules affecting its economic, social, and political interests? A private forum whose rulings will be enforced by municipal courts without substantive review may result in some loss of control over the implementation of private and public rules of law.
>
> (Donovan, 1995: 649)

He notes that many Latin American states reluctantly adopted modern arbitration laws and practices in the 1980s and 1990s as a component of economic liberalization and argues that developments in legal practice threaten to compromise their regulatory abilities in the areas of competition and securities laws.[91] Paradoxically, these are states who once resisted international commercial arbitration as "one element of a broader program of European and American economic imperialism."[92] African states have also reluctantly adopted modern arbitration law but have taken exception to the formulation of arbitration law through model law as opposed to through the negotiation of an international convention. They argue that the treaty-making process provides for transparency and participation in lawmaking, leveling the playing field somewhat for less powerful African states (Sempasa, 1992).

Concerns over the limited representation of weaker trading partners in the creation of international commercial law also extend into the institutional practices of international commercial arbitration. Commercial participants from developing states characterize international commercial arbitration as a private club that limits entry to participants from the developed world, raising concerns about legal imperialism and neocolonialism (Silbey, 1997; Sempasa, 1992; Abbott; 1976). Moreover, privatized dispute settlement is a highly informalized, discretionary, and personalized system that relies primarily upon the judgment of private arbitrators. The emphasis on procedural informality and the ability of arbitrators to remain flexible and responsive to changing economic conditions and mercantile practices widens the possibilities for discretionary decision making by replacing rules and procedures with personalized judgment. To the extent that the commercial customs and practices invoked represent those of the dominant Western trading states, the problems of legal imperialism are intensified. For example, transnational corporations had an overwhelming influence on the creation of international commercial arbitration law and institutions, while "[e]ssentially, the Western industrialized world's view of the arbitral process is embodied in the rules of practice of arbitral institutions, nongovernmental organizations such as the ICC, national nongovernmental arbitral

[91] Canadians became acutely aware of the abilities of foreign corporations to undermine domestic legislative and policy measures to protect the environment when the Canadian Government was ordered to pay $19.5 million to settle a claim brought by Ethyl Corp. in 1998 and arbitrated privately under chapter 11 of NAFTA. See Tollefson (2002) for the impact of NAFTA disciplines on domestic public policy processes.

[92] Donovan (1995: 650); Abbott (1976).

agencies like the AAA [American Arbitration Association] and the various national and transnational trade systems."[93] Indeed, Santos (1995: 292–3) argues that the modern law merchant does not represent a globalization of legal culture, at all, but rather a *globalization of localized* US commercial culture and practices through the dominance of US-based multinational corporate practices and law.[94]

The integration of peripheral and semiperipheral states into the arbitration world is recasting them as competition states as well. They too exhibit the curious mix of private and public authority: private authority settles substantive disputes, but public authorities undertake to enforce their settlements. In some cases this produces rather anomalous results, as in the case of China where the law merchant is mixing with two very localizing influences: Chinese capitalism and Chinese modernization. Both give priority to state policy, tradition, culture, and *quanxi* relationships over legality. *Quanxi* is a highly personalized system of familial, clan, and friendship networks regulating social and economic relations and mediates the interface of foreign and domestic practices. As Santos (1995: 294) notes, "[t]o the extent that partners in international transactions resort to *quanxi* to obtain or intensify business predictability and security, we may say the *lex mercatoria* is being quanxified. In other words, in China *lex mercatoria* and the old Confucian dimensions of Chinese legal culture interpenetrate."

The reinscription of free-market principles as the norms for dispute settlement and enforcement is an integral component of global disciplinary neoliberal restructuring. Indeed, the increasing reliance on soft, discretionary standards and privatized international commercial arbitration is strengthening private institutions and processes, whilst weakening mechanisms that work toward participation and democratic accountability. These transformations in law-creation and dispute settlement are in turn linked to transformations in both global and local political economies associated with the advent of the "competition state," the transnationalization of capital, and processes of flexible accumulation. These transformations are crucial to the juridification of commerce and the expansion of privatized commercial law for they provide the ideological and material foundations for the unification movement and for the increasing plurality of law-creating sources and subjects and of

[93] Professor Wilner, quoted in Sempasa (1992: 392, n. 17).

[94] See also Sempasa (1992: 407–9) for the rejection by the African countries of the modern law merchant as a neutral and universal legal order.

dispute settlement processes. The privatization of law-creation and dispute settlement, in turn, rests upon a set of assumptions concerning the apolitical nature of private international trade law. It also reflects the operation of liberal mythology concerning the natural, neutral, consensual, efficient, and just nature of private regulation. This embodies a particular understanding of the conditions of political authority in the global political economy, to which attention will now turn.

Unification and global authority

On the one hand, the increasing reliance on soft, discretionary, informal, and highly personalized systems of justice in international commerce characterizes juridified, pluralized, and privatized international commercial relations. On the other, juridified commercial relations also take the form of hard law, such as the FTA, NAFTA, and GATT/WTO disciplines, that bite deeply into domestic social, political, and legal orders. This illustrates the dialectical nature of juridification, pluralization, and privatization. These processes are fueled by the mythological notion that private international trade is an apolitical domain and they embody an understanding of political authority premised upon distinctions between public and private authority, politics and economics, and domestic and international law. While the privileging of private regulation under the new law merchant is politicizing private law by infusing it with public purposes, its proponents still cling to the public/private law distinction as a natural and inevitable state of affairs.[95] However, this book has argued that the distinction is not reflective of either an organic or an inevitable separation, but is an analytical construct that evolved with the emergence of the bourgeois state as an essential component of its material, ideological, and institutional foundations. Indeed, as noted earlier, the separations of public and private domains and of political and economic activities are central to the constitution of capitalist productive relations and are "structural requirement[s] for the reproduction of capitalist societies" (Hirsch, 1995: 271; Wood, 1995). These separations are premised upon liberal mythology about the natural, neutral, consensual, and efficient nature of private regulatory arrangements (Cutler, 1995). It will be recalled that the first myth is that the private ordering of economic relations is consistent with natural and normal economic processes and draws on the liberal belief and faith in the natural and organic character of market behavior. The second

[95] See Chapters 2 and 3 and Cutler (2000 b).

myth posits the neutral and apolitical nature of private activity. Under liberalism, private relations are associated with the domain of neutral economic activities, while the public activities are associated with the domain of politics. Liberal-inspired contract law embodies and reproduces the public/private separation by associating the private sphere with neutral and objective processes of resource allocation. Contract law is endowed with objective foundations and "has the appearance of being self-contained, apolitical, and inexorable" (Horwitz, 1975: 252) as it regulates transactions among participants – autonomous "legal subjects" – who are deemed to be of equal bargaining power. The law of the self-regulating contract facilitates exchange and ensures procedural fairness, but does not question the substantive fairness of a transaction, for that would impair its self-regulating characteristics. Moreover, inquiry into the substantive fairness of a contract is precisely what the distinction ensures will not take place, because it "arose to establish the objective nature of the market and to neutralize and hence diffuse the political and redistributional potential of the law" (ibid.: 254). The third liberal myth concerns the consensual and noncoercive nature of private exchange and flows directly from the view that markets are natural in origin, neutral in result, and, hence, consensual in operation. The fourth myth posits the inherent efficiency of private regulatory arrangements. Private regulation is regarded as producing greater efficiencies by reducing transaction costs and achieving greater economies. Liberal myths thus present the private regulation and ordering of international commerce as producing the best-of-all-possible-worlds.

These myths are today being revived by public and private authorities who together form a global mercatocracy united by its commitment to the superiority of privatization through merchant law and practice. Merchant autonomy in establishing the terms of self-regulating contracts and private dispute settlement through arbitration directly links global competitiveness with the enhanced power of the private sphere. Disciplinary neoliberalism assists in the growth of private power and authority through commitments to deregulation and privatization. The growing efficacy of private ordering is regarded by trade experts as the most appropriate and successful way to compete globally. Interestingly, state authority remains essential for the enforcement of commercial agreements. However, this is achieved in a hands-off way by enforcing the awards and judgments of private arbitral authorities. State authority remains central, but its role has changed, confirming the view that globalization "does not involve some sort of linear process of the

withering away of the state as a bureaucratic power structure; indeed, paradoxically, in a globalizing world states play a crucial role as stabilizers and enforcers of the rules and practices of 'global' society" (Cerny, 1997: 257–8).

The unification movement is an integral element of the reconfiguration of public and private authorities that is resulting from these developments. Critics have condemned legal unification efforts for privileging First World, private, corporate interests (Scheuerman, 1999; Sempasa, 1992; Eörsi, 1977; Patterson, 1986; Santos, 1995; McConnaughay, 1999). These criticisms echo those made about the growing power of private lawmaking groups evident in the unification of domestic commercial law in the United States (Patchel, 1993; Schwartz and Scott, 1995; Kronstein, 1963). The underrepresentation of the interests of domestic consumer groups and the lack of concern for smaller businesses raise many of the same distributional and market-access concerns identified by critics of international unification who document the underrepresentation of the interests of less-developed states (Patterson, 1986). The global unification movement privileges the private sphere, delocalizing and privatizing law and justice. In so doing, it facilitates the further denationalization of capital and the disembedding of commercial activities from governmental and social controls.

Unification thus operates as a corporate strategy designed to assist the reconfiguration of authority in the global political economy in line with the disciplinary neoliberal agenda. This agenda functions to secure the interests of transnational corporations and associated governmental interests, whilst eroding protections for locally based domestic corporations and states on the periphery of the global economy. The unification movement is an integral and an important aspect of globalization. Its significance confirms that globalization "is not a single process, but a complex mixture of processes, which often act in contradictory ways, producing conflicts, disjunctures and new forms of stratification" (Giddens, 1994 b: 22). But the rhetoric of unification represents these processes as progressive in terms of efficiency concerns and value-neutral in terms of normative or distributional concerns. Crucially, unification is described as "a significant step forward in the globalization of legal thinking."[96] A generous and benign interpretation of this description requires that one assume the existence of the underlying unity, stability, and neutrality

[96] This was said by Joseph Perillo (1994: 282) with specific reference to UNIDROIT's Principles.

of legal thought and practice. A more critical understanding recognizes that "law is nothing but a repetition of the relationship it posits between law and society. Rather than a stable domain which *relates* in some complicated way *to* society or political economy or class structure, law is simply the practice and argument about the relationship between something posited as law and something posited as society" (David Kennedy, 1988: 8). Legal unification, thus, repeats key movements in the global political economy and, in so doing, lends a sense of legitimacy to these processes as natural, progressive, and ultimately good.

The tendencies to legal formalism and to treating the law merchant as an autonomous and neutral legal order that simply exists out "there," disciplining international commercial relations, obscure the fundamentally political nature of legal discipline and its imbrication in the very fabric of productive relations. Legal formalism also obscures the ambiguity of both subject and sources doctrines. Doctrinally, both identify subjects and sources that cease to adequately define the fields of legal and political practice. Transnational corporations and other private business associations in fact function as legal subjects, while legal doctrine pronounces their "invisibility" as "subjects." Sources doctrine is similarly obfuscatory in its identification of legal sources that are in practice being eclipsed in significance by sources that are not recognized as instruments of law-creation. Privatized dispute settlement, in turn, infuses private activity with public purposes, eroding the foundations for accountability under the rule of law but, by virtue of self-disciplining distinctions between public and private activities and politics and economics, is neutralized or sanitized of public content and function. These tendencies reflect a profound disjunction and asymmetry between legal theory and state practice. While international legal doctrines identify and empower the state as the legal "subject" and state-based law as the legitimate source of law, practices in law-creation and dispute settlement are challenging this state-based order. New sources of nonstate law are emerging, while nonstate actors, such as transnational corporations, function as *de facto* subjects. Clearly, subject and sources doctrines are incoherent insofar as they bear only remote relevance to actual practices.

More significant than incoherence, however, is the legitimacy crisis facing international law. The disjunction between theory and practice is in actuality a reflection of a deeper disjunction between law and society that goes to the very heart of the constitution of political identity, subjectivity, and legitimacy in the global political economy. International

law is facing a profound legitimacy crisis, because its theory is so out of keeping with its practices. As is argued in the next chapter, all constitutional orders require some measure of correspondence between their theories and their practices and a profound disjunction of the two portends a crisis of legitimacy.

However, the hegemony of the mercatocracy is incomplete. The dialectical nature of processes of juridification, pluralization, and privatization, which is evident in tensions between globalizing and localizing tendencies, hard and soft regulation, and state and nonstate authority, suggest that there is room for contestation of the law merchant order. Indeed, social forces that are contesting the state-based order provide hope that the legitimacy crisis might be resolved in favor of a union of participatory and emancipatory legal practices and theories. Santos's (1995) insight that in China local cultural and religious practices are localizing or "quanxifying" the reception of the law merchant reveals cracks or holes in the hegemony of the law merchant and the mercatocracy. Competing claims to subjectivity coming from nonstate subjects and sources of law, moreover, suggest that there is room for progressive and emancipatory versions of the law. Claims to legal status from "invisibles," such as women, individuals, aboriginal, and indigenous people, reflect tension at the borders of legal subjectivity. Such claims raise the "problem of the subject" and hold promise for a new theory of international law. This new theory seeks to unify theory and practice through emancipatory praxis so as to better address the analytical, theoretical, and normative problems attending private power and global authority.

7 Conclusion
Transnational merchant law and global authority: a crisis of legitimacy

This chapter argues that fundamental reconfigurations of global power and authority are creating a legitimacy crisis in the global political economy. It makes the case for a new theory of international law that is both capable of addressing the analytical, theoretical, and ideological dimensions of this crisis and working towards its resolution. The chapter begins by positing the existence of a global constitutional order centered on Westphalian conceptions of authority and rule and argues that all such orders require some degree of fit between their principles and practices. A legitimacy crisis exists when there is a disjunction or asymmetry between theory and practice that becomes so great that it strains the foundations of the order. Processes of juridification, pluralization, and privatization are transforming structures of authority, "which implicitly challenges the old Westphalian assumption that a state is a state is a state" (Cox, 1993 a: 263) and related understandings about the "public" nature of authority that we have discussed. Traditional Westphalian-inspired assumptions about power and authority are argued to be incapable of providing contemporary understanding or locating the authority and historical effectivity of transnational merchant law. This is producing a growing disjunction between the theory and the practices of the Westphalian system. This disjunction suggests that the fields of international law and organization, which are generally regarded as repositories of our theoretical and empirical understanding about global authority and rule, are experiencing a crisis. This is particularly so with regard to dominant understandings of the nature of the relationship or nexus between international law and international relations. In both law and politics, conventional approaches tend to peripheralize the role of law in the global political order, thus obscuring a critical understanding