Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations

Loukas A. Mistelis*

I. Introduction: Birthday Cake and Globalization

Reform of the national and international financial architecture, along with economic and political (democratic) development, is the paramount target of emerging economies and developing countries worldwide. Moreover, it is an ongoing process in regional or international economic integration arrangements.[1] It has been recently observed that the Asian financial crisis was not just a financial crisis. "It was a crisis of development by the phenomenon of global finance. Thus, it was a crisis of globalisation and of the markets at least and strategies of development."[2]

Economic reform is as desirable as a birthday cake with plenty of whipped cream, fancy icing, and many cherries as ornaments. This paper is concerned that this cake will collapse as much emphasis is put on the decoration of the cake rather than its base. In order to have

*Clive M. Schmitthoff Lecturer in International Commercial Law, Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London; LL.B. 1991, Athens, Greece; MLE *(magna cum laude)* 1992, Dr. Iuris *(summa cum laude)* 1998, Hanover, Germany. I am grateful to Marise Cremona for comment and criticism on an earlier version of this paper. Errors of fact, judgment, and taste are of course mine.

1. Organizations promoting regional international economic integration have as their main objective the economic development of their member states and the facilitation of commerce between them. This derives from their constituting treaties. *See, e.g.*, Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, Manila, July 25, 1998, and Joint Statement on East Asia Cooperation, Manila, Nov. 28, 1999, *at* http://www.aseansec.org (last visited Oct. 17, 2000); North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993); Treaty Establishing the African Economic Community, June 3, 1991, Preamble, 30 I.L.M. 1241. The African Economic Community is to be established in six stages over a span of thirty-four years; Treaty Establishing a Common Market, Mar. 26, 1991, U.N. Doc. A/46/155, *reprinted in* 30 I.L.M. 1041; Treaty of Amity and Co-operation in South East Asia, Feb. 24, 1976, 1025 U.N.T.S. 297; Treaty Establishing the European Economic Community, Mar. 25, 1957, Preamble and arts. 2, 3, 5, 249, 308, and 310, 258 U.N.T.S. 11 (1958), amended by Single European Act, 1987 O.J. (L 169) 1 (effective July 1, 1987); and objectives of the Development and Cooperation Department (EDECO).

2. Rubens Ricupero, Secretary-General of UNCTAD, Crisis of Development or Crisis of Globalized Markets?, Public Lecture at United Nations (WIDER) (Sept. 1, 1999).

a nutritious not just delicious cake, a good base is required. It is argued here that a sound legal system is the basis for economic reform.[3]

This article will focus on some *sine qua non* conditions of sound commercial law reform. First, it will look at the essential ingredients for a successful law reform, in particular, the importance of an economic constitution, and the advantages and pitfalls of regulation in the era of globalization (section II). Secondly, it will discuss the "privilege" of standard setting and the role of foreign technical assistance (section III). Special emphasis will be placed on the function of legal transplants and the reception of foreign law (section IV). Finally, it will highlight in passing some elements of commercial law reform (section V). The experience of the author relates to European legal systems and most of the recommendations are made with Central and Eastern European states in mind. This does not automatically disqualify their suitability for other regional or national legal reforms. It will be observed that while some issues are a matter of taste, and national variations of the main recipe are possible or even welcome, there are a number of ingredients that affect the nutrition factor of the legal and indeed the economic system (section VI).

The twentieth century can be characterized as the "century of transition." As a result of two world wars, two "worlds" were formed and a third joined them in the de-colonization decades of the 1960s and 1970s. The membership of the United Nations increased from fifty states in the 1950s to 188 states in the late 1990s. The established world order, with "east–west" and "north–south" divides, entered a period of transition in the 1990s with the collapse of the Soviet Union. This new period has been labeled "world disorder."[4] Those countries arising out of the remnants of the Soviet Union immediately confronted a number of serious political and economic problems. Each had to wrestle with issues of sovereignty and democracy, succession in international treaties, and, in some cases, civil war,[5] or other internal or international armed conflicts.[6]

Since the collapse of totalitarian political systems with planned economies and gradual introduction of "free market economies" in the countries of Central and Eastern Europe (CEE) and the former Soviet Union (FSU), law reform in the region has attracted the interest both of academic and practicing lawyers in the West. It has been rightly observed that there is a direct relationship between the legal framework and the attitude of the foreign investor.[7] A legal system that guarantees freedom of contract, protects property and proprietary rights, provides for an adequate regulation of secured transactions, and is further seen to give practical protection and remedies in the case of nonpayment of a debt, a

3. See the headlines of daily and financial press in Moldova following this simile/metaphor brought by the author during a meeting on economic reform held in Kishinev on August 24, 1995. *See, e.g., Ekonomichkeya reforma, kak tort, vsegda niemnozhko prioukrashena*, INDEPENDENT MOLDOVA, Aug. 25, 1995; *Slivochnii tort moldavskoii ekonomiki*, EKONOMICHKOE OBOZRENIE, Aug. 1995.

4. George Soros attached this label to our era during a discussion hosted by the Civic Education Project (CEP) and the Austrian Broadcasting Corporation (ORF) in Vienna in May 1995.

5. See the multifaceted discussion of the reforms in Kazakhstan in J. Robert Brown Jr., *Culture, Chaos and Capitalism: Privatization in Kazakhstan*, 19 U. PA. J. INT'L ECON. L. 909, 909–10 (1998). For a general account of law as a means of political transition, see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L. J. 2009 (1997).

6. Georgia, Moldova, and Tajikistan had to address civil wars immediately after independence. Conflicts in Chechnya and in the former Federal Republic of Yugoslavia attracted greater media attention.

7. *See* Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 6 (1995).

jurisdiction where the judicial system is fast and efficient, and where security is guaranteed is attractive both to local and international investors.[8] If the investor is not persuaded that the law gives real protection and remedies, then it becomes irrelevant and he will not invest. The establishment of a modern legal framework for regulation of commercial and economic activity is not only fundamental for the construction of a market economy but is also a precondition for a sustainable flow of foreign capital in the region.

The process of "wholesale" reception of Western legal institutions by the post-totalitarian states is a vivid illustration of worldwide liberal revolution. Thus, for instance, the postulate of approximation of economic and commercial laws, not only of the association countries of the CEE and the FSU that aspire to be full-fledged members of the European Union (EU), but also with those of the EU, is not only an economic necessity but has been transformed into an internationally binding obligation.[9]

Western lawyers observed that this is an era of globalization of law that will inevitably accompany the globalization of economy.[10] Globalization is foremost an economic process.[11] It is also a political event,[12] as evidenced by the spread of democratic principles and human rights among nations; many human rights violations are no longer treated as domestic affairs. "Globalization is causing, and being reinforced by, a world-wide convergence of economic and political values that portend a possible, though distant, future world in which human beings will look upon themselves as part of a single humane civilization comprised of a single human race."[13] Law has been important in managing the global economy and may gain importance with respect to political globalization.[14]

---

8. *See* John Head, *Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks*, 90 AM. J. INT'L L. 214 (1996).

9. *See, e.g.*, articles 67 and 68 of the Agreement between the EC and its Member States and Poland (1992), *in* 1993 O.J. (L 348). Similar provisions can be found in all association agreements of the EC with other CEE and FSU countries. Such approximation trends can be found also in the agreement of the EU with states that do not aspire to membership, for example, Asian FSU states.

10. According to John A. Spanogle, Jr.:

> Any business person can tell you that the Global Economy is here. The necessity is to produce wherever it is most advantageous, and then to market and compete all over the world, is hardly news to them. It does still seem to be news to much of the legal profession, however, and to many in legal education.

John A. Spanogle, Jr., *American Attorneys' Use of International and Comparative Legal Analysis in Everyday Practice*, 28 WAKE FOREST L. REV. 1, 1 (1993).

11. The origins of globalization can be traced back to the writings of Wendell Wilkie and the Club of Rome. These early formulations, however, occurred prior to the collapse of Bretton Woods and the development of the new global communication technology. *See* Gordon Walker & Mark Fox, *Globalization: An Analytical Framework*, 3 IND. J. GLOBAL LEGAL STUD. 375 (1996). "Globalization" should be distinguished from "internationalization," the guiding force of the twentieth century. *See* Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law: A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9 (1993).

12. In response to "fears of globalization" many nations have taken to defending their culture against foreign influence. Regarding such fears, see *The New Trade War*, THE ECONOMIST, Dec. 4, 1999; and *Letters to the Editor*, THE ECONOMIST, Dec. 18, 1999.

13. Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 429 (1997).

14. *See id.* at 479–84. The focus is on the rule of law, human rights, and the regulation of international trade. *See* Ernst-Joachim Mestmäcker, *Rechtsfragen einer Ordnung der Weltwirt-schaft*, *in* WOLFGANG HOLL & ULRICH KLINKE, INTERNATIONALES PRIVATRECHT INTERNATIONALES WIRTSCHAFTSRECHT, 25–36 (1985); Klaus Peter Berger, *Einheitliche Rechtsstrukturen durch außergesetzliche Rechtsvereinheitlichung*, *in* JURISTEN-ZEITUNG 369 (1999); David P. Fidler, *Introduction*, 6 IND. J. GLOBAL LEGAL STUD. 421 (1999); Bruce A. Markell, *A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law*, 6 IND. J. GLOBAL LEGAL STUD. (1999); Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993).

II. Essential Ingredients for Successful Law Reform

A. Importance of an Economic Constitution

At a time of transition from illiberal rule to an open society, the constitutional framing of such a movement is essential to the transition itself and the maintenance of the desired result. It has been observed that the balance of powers and protection of human rights may sufficiently safeguard open society.[15] Hence, the constitution aims at the political organization of a state, the guarantee of fundamental rights and freedoms, and arguably the creation of a general environment in which both the state and the residents in it are living a good life.

The concept of constitutional legislation is closely connected with state sovereignty. In newly independent states, where national identity is the moving force behind the creation of a new state, a new constitution and an undisputed sovereignty are essential features of independence. Constitutional law has been regarded traditionally as a domestic law subject and, hence, it is difficult to argue that there are clearly defined standards. In the twentieth century, constitutional law is often seen in a comparative context. Consequently, constitutional law can be studied in an international legal setting and adjusted to an internationalized legal scholarship. Constitutional reforms and amendments in one country may inspire or indeed assist reforms in other countries.[16]

This paper does not wish to enter into any political theory or constitutional debate. Relevant for our purposes is the question of whether it is possible to set standards for a market economy's commercial activity. In other words, the issue is whether it is possible to create an economic constitution that will enhance financial development by setting standards for a market economy. This question must be answered in the affirmative. Arguably, for example, in the EU, an economic constitution has developed organically from the founding treaties. It is to be found in the four economic freedoms (free movement of goods, persons, capitals, and services) and the principle of nondiscrimination.

The United Nations and the Council of Europe in their instruments for the international protection of human rights imply an economic constitution, as well. Human rights are protected in a "democratic community" or in a "democratic regime."[17] It should be noted that both the UN and the Council of Europe aim at enhancing democracy in their member states. In addition, the principle of nondiscrimination and the right to property as well as the right to participate in economic activity create the necessary framework for a market

15. *See* Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century 215 (1991); Stephen Holmes, *The End of Decommunization*, 3 E. Eur. Const. Rev. 33 (1994); Susan Marks, *Guarding the Gates with Two Faces: International Law and Political Reconstruction*, E. Eur. Const. Rev. 457; Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 Am. U. Int'l L. Rev. 1335 (1999).

16. For example, the right to environment, which was first guaranteed in the Greek and Brazilian constitutions, inspired several other constitutional debates or reforms (i.e., Portugal, Italy, and Japan).

17. *See* Manfred Zuleeg, *Mißbrauch von Grundrechten vor dem Hintergrund demokratischer Strukturen in Europa*, *in* Der Mißbrauch von Grundrechten in der Demokratie 49 (Julia Iliopoulos-Strangas ed., 1989). This article discusses article 4 of the UN Covenant on Economic Social and Cultural Rights, article 5 of the UN Covenant on Civil and Political Rights, and articles 8–11 and 21–22 of the European Human Rights Convention. Concerning the notion of democracy in the European Human Rights Convention, see Phocion Vegleris, *Valeur et signification de la clause "dans une société démocratique" dans la Convention européenne des droits de l'homme*, 1 Les Droits de l'Homme—Human Rights, Rev. de droit int'l et comparé 219 (1968).

economy. The implied economic constitution aims at a market economy with a minimum social welfare, in that a minimum of social rights is guaranteed. Economic freedom and a minimum of social rights should be protected alike. It has to be added that the degree of social rights protection varies a great deal from country to country and it often takes the form of a declaration that a state will take further action to ensure the protection of social rights.

Arguably there is no "democracy" or "human rights" requirement in international economic integration arrangements. What needs protection is the economic freedom and the fundamental (constitutional) right to participate in commercial activity. Hence, an exercise of rights may raise questions of human rights, such as the principle of nondiscrimination and the right to property. In any event the Treaty on European Union has acknowledged democracy and human rights as constitutional principles of the Union, which are common to all member states.[18] It follows that respect for such fundamental principles is expected by all thirteen candidate states and any state that will pursue membership in the future.[19]

At least, at the level of regional economic integration, a market economy structure is essential. In a very protective environment, economic activity is restricted or distorted while the mere purpose of economic integration is the creation of an internal market. Whether the economic constitution of a regional economic integration can be limited to the creation of a market economy or should encompass respect for human rights and democratic principles should be addressed in a future scholarly study. It appears, however, that many elements of a market economy are closely associated with protection of fundamental freedoms in a democratic regime.

B. Advantages and Drawbacks of Regulation

Regulation of economic activity by way of legislation is linked with inherent problems. Regulation normally denotes state interference for the organization of trade and is more often used for the "public law aspects"[20] of commerce. In the second half of the twentieth century, trade regulation became a matter of international concern with the introduction of GATT and GATS[21] and more recently of the World Trade Organization. While regulation is not synonymous to harmonization, some experiences from regulatory attempts can draw useful conclusions for the harmonization process and vice versa. The main pitfall is

18. Article 6(1) of the Treaty on European Union reads as follows: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

19. *See* Europa, *Presidency Conclusions*, http://europa.eu.int/council/off/conclu/dec99/dec99_en.pdf (last visited Sept. 5, 2000). Relevant are the Millennium Declaration (Annex I) and the comment on human rights and Turkey in paragraph 12 of the Conclusions.

20. Some of the theoretical background can be found in John A. Spanogle Jr., *The Arrival of Private International Law*, 25 Geo. Wash. J. Int'l L. & Econ. 477 (1991). *See also* Ralph G. Steinhardt, *The Privatization of Public Law*, 25 Geo. Wash. J. Int'l L. & Econ. 523 (1991). Steinhardt states in the context of the public/private distinction in international law that the "distinction . . . can no longer be defended because the concerns, the actors, and the processes of 'public' international law have been expanded—'privatized'—in this century." *Id.* at 544. Conflicts law and international business transactions have become a staple of state-to-state relations, and nonstate or private actors have taken an increasing role in the articulation and enforcement of international standards. *Id.* at 543.

21. *See* Mary E. Footer, *The International Regulation of Trade in Services Following Completion of the Uruguay Round*, 29 Int'l Law. 453 (1995).

that international harmonization of commercial law, or indeed coordination of trade regulation in the form of international conventions, results from compromises, and the degree of unification is often restricted if not questionable.[22] It has also been observed that states do not always negotiate such treaties as equal partners, and issues of sovereignty may arise in the context of international trade regulation.[23] In any event, a new international law has emerged and questions of legitimacy, accountability, authority, and freedom in this new global legal order may arise.[24]

Traditionally, competition[25] and environment[26] are two areas of law for which regulation has been welcomed. In the last two decades, discussion about when regulation or legislative interference is needed has been revived in the context of harmonization of private and commercial law in the EU.[27]

Alternative means of soft harmonization of commercial law, such as codification of customary law or trade usages, were recommended.[28] Positive law is more predictable and creates legal certainty. However, statutory law is subject to interpretation by courts or administrative authorities often to the effect that law in action has little in common with law in books. Soft harmonization provides for a flexible and effective convergence of different legal systems. In any event, both trade regulation and international harmonization of commercial law are manifestations of the need for comparative law studies.[29] New comparative law is functional and, if properly used, produces remarkable results.

---

22. For balanced accounts of harmonization, see Roy Goode, *Reflections on the Harmonization of Commercial Law*, *in* COMMERCIAL LAW AND CONSUMER LAW. NATIONAL AND INTERNATIONAL DIMENSIONS 3, 24–27 (Ross Cranston & Royston Miles Goode eds., 1993); and Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 AM. J. COMP. L. 683 (1992). For a critical and stimulating account of harmonization, see Uriel Procaccia, *The Case Against Lex Mercatoria*, *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL LAW 87 (Jacob S. Ziegel ed., 1998).

23. See the stimulating historical note in Gary N. Horlick, *Sovereignty and International Trade Regulation*, 20 CAN.-U.S. L.J. 57 (1994). Discussing NAFTA and looking at historical treaties such as the Westphalia Treaty of 1648, he points outs that "when you look into the future, the question is not whether there will be more of this international 'cessation of sovereignty,' rather the question is 'how.' " *Id.* at 65. He further quotes Lord Wilbeforce's observation in the English Westinghouse case in 1978, in connection with the traditional (since 1945 in Alcoa) U.S. attempts to extend its sovereignty in antitrust areas, that frequently the policies being attacked are precisely the ones the host country is determined to defend.

24. See the stimulating essay by Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999).

25. *See* Barry J. Rodger & Angus MacCulloch, *Community Competition Law Enforcement Deregulation and Reregulation: The Commission, National Authorities and Private Enforcement*, 4 COLUMBIA J. EUR. L. 579 (1998). Rein Wesseling, *Subsidiarity in Community Antitrust Law: Setting the Rights Agenda*, 22 EUR. L. REV. 35 (1997) favors an eventual soft harmonization of the competition rules.

26. *See* DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE (1994); STEPHAN SCHMIDHEINY & FREDERICO J.L. ZORRAQUIN, FINANCING CHANGE: THE FINANCIAL COMMUNITY, ECO-EFFICIENCY, AND SUSTAINABLE DEVELOPMENT (1996); DAVID VOGEL, GREEN AND GLOBAL: A REVIEW OF TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATIONS IN A GLOBAL ECONOMY (1995); Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479 (1995).

27. *See* INTEGRATION THROUGH LAW (Mauro Cappelletti et al. eds., 1986); Hugh Collins, *The Voice of the Community in Private Law Discourse*, 3 EUR. L.J. 407 (1997); Matthias Reimann, *Towards a European Civil Code: Why Continental Jurists Should Consult their Transatlantic Colleagues*, 73 TUL. L. REV. 1337 (1999).

28. *See* Berger, *supra* note 14, *passim*; Oskar Hartwieg & Jens Grunert, Bedarf und Möglichkeiten provisorischer Eilverfügungen im Online-Handel, *at* http://www.rws-verlag.de/ (last visited Sept. 20, 2000).

29. *See* Berger, *supra* note 14; Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop its Own Agenda*, 46 AM. J. COMP. L. 637 (1998); and Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49 (1996).

III. "Privilege" of Standard Setting and Role of Technical Assistance

When policy makers and scholars think of global trade lawmaking, they generally think of treaties and declarations of states. The "public" or "hard law" model based on state rights and obligations has predominated. But alongside that effort, little remarked on by activists or academics, a system of "private" or "soft" standards and obligations is developing. This soft or private law model is initiated by and applicable to producers of goods and services rather than to states. "It appears that globalisation may not erode state power but may merely re-channel it."[30]

In fact, we experience the emergence of a new international law. International law, once the province of specialists concerned mostly with traditional public international law (how national governments deal with each other or with international organizations), "has become an important body of regulatory and commercial law directly affecting private lives and commercial transactions. Our legal culture, however, has not caught up with this transformation."[31] The emergence of a new body of rules has proceeded parallel to the continued development of what we traditionally have thought of as international law. The "new international law" is stemming from a collection of very different international agencies, such as the International Monetary Fund and the organs of the EU, or private self-constituting and ad hoc organizations, such as the working groups of the International Chamber of Commerce (ICC).[32] All these agencies employ many different processes in promulgating rules and standards that constrain individual actors more or less directly. This body of new international law is relatively permanent and independent of individual states, in that they are not subject to any ratification.

A. The Emergence of Formulating Agencies and the Means of Harmonization

A number of national agencies along with international (supranational, intergovernmental, or nongovernmental) organizations emerged in the last 100 years.[33] They are often referred to as formulating agencies,[34] a term that precisely describes one aspect of their activities but covers all new international law-making organizations. Most of them claim to be the international standard setters in that they possess either acquired expertise in legislative drafting or have international experience by virtue of their membership. They may even export modified successful domestic legislation.

A number of different means are employed for the harmonization or international regulation of commercial law. One adequate distinction is between hard law and private harmonization, or soft law. This paper understands as hard law international treaties or conventions or any form of national legislation. Uniform laws are of a hybrid nature, while model laws, restatements, legal guides, and model rules fall under the ambit of soft law.

30. Aseem Prakash, Book Review, 4 Ind. J. Global Legal Stud. 575, 575 (1997).

31. Stephan, *supra* note 24, at 1555.

32. *See id.* at 1563.

33. See the links of the website of the Centre for Commercial Law Studies, University of London, *at* http://www.ccls.edu/ccls.html (last visited Sept. 20, 2000), and the best international trade law website maintained by Ralph Amissah, *Lex Mercatoria*, *at* http://www.lexmercatoria.net (last visited Sept. 20, 2000).

34. *See* Clive M. Schmitthoff, *The Law of International Trade*, *in* Commercial Law in a Changing Economic Climate 18, 24 (2d ed. 1981).

Few international organizations are entrusted with the task of harmonizing aspects of commercial law and they actually use both hard and soft law means. These organizations are the United Nations Commission on International Trade Law (UNCITRAL),[35] the International Institute for the Unification of Private Law (UNIDROIT),[36] and the Hague Conference on Private International Law.[37] Recently, the World Trade Organization (WTO)[38] joined this group.

Most regional international economic integration organizations entail an element of harmonization of law: ASEAN,[39] EC,[40] MERCOSUR,[41] North American Free Trade Association (NAFTA),[42] Organization of American States (OAS),[43] and Organization for African Unity (OAU).[44] In the case of the EC, approximation of laws covers the lengthy list of aspirant member states. Regional organizations use both private and public means.

Further, a number of nongovernmental international mercantile organizations or professional associations attempt to unify and harmonize commercial law. Among the most successful are the ICC,[45] the International Law Association (ILA),[46] the International Bar Association (IBA),[47] and the Comité Maritime International (CMI). Nongovernmental organizations or professional associations often promulgate model laws, model rules, standard contracts, or draft conventions.

Finally, several other international organizations, such as the World Bank,[48] the European Bank for Reconstruction and Development (EBRD),[49] and the International Monetary Fund (IMF),[50] demonstrated in a number of endeavors their interest in being involved in the lawmaking process or at least in the standard-setting. In principle, neither the World Bank nor the EBRD nor the IMF has any power to legislate and, hence, standard-setting is the appropriate form of involvement.

Inevitably there are at least two competing strategies in the harmonization of international commercial law on a worldwide basis: (i) the "global" conventions proposed by international organizations and (ii) the regional agreements drafted by regional organizations. The goals of such regional conventions often derive from quite different motivations, but often produce agreements that concern the same subject matter as the global conventions.[51]

35. *See* United Nations at Vienna, *at* http://www.un.or.at/ (last visited Sept. 2, 2000).

36. International Institute for the Unification of Private Law, *at* http://www.unidroit.org (last visited Sept. 2, 2000).

37. Hague Conference on Private International Law, *at* http://www.hcch.net (last visited Sept. 2, 2000).

38. World Trade Organization, *at* http://www.wto.org (last visited Sept. 2, 2000).

39. Association of Southeast Asian Nations, *at* http://www.aseansec.org (last visited Sept. 2, 2000).

40. Europa, *at* http://europa.eu.int (last visited Sept. 2, 2000). Harmonization of private law (e.g., contract law) is only recently on the EU agenda. *See, e.g.*, new article 65 EC.

41. Embassy of Uruguay, *MERCOSUR* (last visited Sept. 2, 2000) *at* http://www.embassy.org/uruguay/econ/mercosur/.

42. NAFTA Secretariat, *at* http://www.nafta-sec-alena.org/english/nafta/ (last visited Sept. 2, 2000).

43. Organization of American States, *at* http://www.oas.org/ (last visited Sept. 2, 2000).

44. Organization of African Unity, *at* http://www.undp.org/popin/oau/oauhome.htm (last visited Sept. 2, 2000).

45. International Chamber of Commerce, *at* http://www.iccwbo.org (last visited Sept. 2, 2000).

46. International Law Association, *at* http://www.ila-hq.org (last visited Sept. 2, 2000).

47. International Bar Association, *at* http://www.ibanet.org (last visited Sept. 2, 2000).

48. The World Bank Group, *at* http://www.worldbank.org (last visited Sept. 2, 2000).

49. European Bank for Reconstruction and Development, *at* http://www.ebrd.org (last visited Sept. 2, 2000).

50. International Monetary Fund, *at* http://www.imf.org (last visited Sept. 2, 2000).

51. *See* Spanogle, *supra* note 20, at 483–86.

In principle, the conflict between harmonization initiated by intergovernmental organizations and nongovernmental organizations may not be as acute, provided that lobbyists from one side and state functionaries on the other side communicate clearly the interests they represent and that the necessary compromises are made.

B. The Role of Foreign Technical Assistance

Several governmental (or government-funded) agencies, such as USAID,[52] the American Bar Association Central and Eastern European Law Initiative,[53] the British Know How Fund (KHF), the German Technical Co-operation (GTZ),[54] the French Inter-ministerial Mission for Central and Eastern Europe (MICECO), the Dutch government's Centre for the Co-operation with Eastern Europe, and large private foundations[55] have established substantial programs to extend legal assistance and offer legal advice abroad.[56] Several foreign technical assistance organizations, for instance, entered into agreements with CEE and FSU countries and secured consulting contracts for their experts. Elizabeth A. Summers[57] reports that U.S. expertise was material to collateral law reform in the Kyrgyz Republic,[58] Bulgaria,[59] Poland,[60] Russia, Kazakhstan, and Armenia.[61] Institutional Reform and the In-

52. *See* Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. Pa. J. Int'l Econ. L. 179 (1999).

53. *See id.* at 188–89; Keith B. Norman, *Our Greatest Export: The Rule of Law*, 60 Ala. Law. 150 (1999). ABA-CEELI is a USAID-funded project.

54. The KHF and the GTZ have taken the view that assistance coming from one country is improper if there is uniform or model law prepared by an international organization. GTZ appointed the author of this article as an expert to work with the drafting committee in Moldova and made it possible that the expert works closely with the European Bank for Reconstruction and Development (EBRD) to achieve the drafting of a law that meets international standards. Similarly, the KHF will assist in harmonization/law reform to EU standards.

55. Such as the German Stiftung für internationale rechtliche Zusammenarbeit, the Zentrum für internationale and europäische rechtliche Zusammenarbeit, Cologne, Germany, and the Center for the Economic Analysis of Law, Washington, D.C.

56. Large, multipurpose philanthropic foundations have been an important part of the picture as well. For example, the Ford Foundation, the Robert-Bosch Foundation, the Open-Society Institute (with the Constitutional and Legislative Policy Institute), and the Civic Education Project (CEP) have provided considerable funding for law-related projects. CEP and the University of Cambridge organized the first Moot Court for law students from CEE and FSU. The Moot Court is now in its sixth year.

57. *See* Elizabeth A. Summers, *Recent Secured Transactions Law Reform in the Newly Independent States and Central and Eastern Europe*, 23 Rev. Cent. E. Eur. L. 177 (1997).

58. *Id.* at 190–93. The USAID-funded Center for Institutional Reform and the Informal Sector (IRIS) at the University of Maryland, College Park, "managed the drafting process and participated in the development process." *Id.* at 190.

59. *Id.* at 193–95. "IRIS coordinated the drafting . . . and provided foreign expert commentary." *Id.* at 193.

60. *Id.* at 195–97. "IRIS provided coordination assistance and regular input from a U.S. commercial law expert. . . . At a conference in March 1997 held to introduce the new law, the majority of attendees were from banks." *Id.* at 195. It is worth mentioning that most IRIS (in particular, Alan Welsh) or other U.S. experts (in particular, Harry Sigman) who participated at the conference were very critical of the law. The proceedings of the conference were circulated after the meetings but have yet to be published.

61. *Id.*p at 198–202. "IRIS provided technical support and facilitated the participation of Professors Robert S. Summers and James J. White. . . . IRIS also organized lectures and workshops for the legal and business communities . . . " *Id.* at 1999. Russia, Kazakhstan, and Armenia incorporated secured transactions provisions in their civil codes. The civil codes are largely based on a model civil code prepared by the Scientific-Consultative Center for Private Law in conjunction with the Inter-parliamentary Assembly of the Commonwealth of Independent States. The Model Civil Code was prepared by Dutch, German, Russian, and CIS experts.

formal Sector (IRIS) provided considerable amounts of money and many experts and was involved (not exclusively) in the drafting of six laws in the region.

In defining their overall aims, virtually all foreign legal advice and aid programs explicitly have sought to promote the development of some or all of the following: the rule of law, legal and institutional requisites of sustainable democracy, and legal and institutional frameworks for economic markets. More specifically the principal goals include "economic restructuring" and "democratic transition"; the subsidiary goals include fostering the rule of law, civil society, "checks and balances" in government structures, legal accountability of the executive power, the free flow of information about the government, privatization of state-owned assets, and market-compatible law reforms.[62] USAID's "rule of law" project for the FSU region has set forth a set of ends that include enhancing the capacity and accountability of judicial systems, increasing access to justice, promoting protection for due process values, and supporting the development of market-oriented commercial law.[63] The KHF and the GTZ have set similar goals. The KHF has trained many judges and civil servants from CEE and FSU countries in EC law and judicial administration[64] while the GTZ has been more actively involved in legislative drafting[65] and administrative (local government) reform.

In principle, foreign technical (legal) assistance may be instrumental at the phase at which a newly independent state attempts to re-orient its legal system and its legal profession with a view to reforming the state and establishing the rule of law. The assumption is that foreign experts, most often subcontractors of international development agencies, have no vested interest in any particular result but the rule of law and merely function as catalysts for developments that emerge from the regeneration of law in the host country. Further, they can transfer ideas and knowledge deriving from the positive or negative experiences a legal system has made with regard to a statute as such or its application before courts.

Regrettably, however, many emerging states have occasionally experienced the services of opinionated and expensive foreign experts who attempted to export their legal system or their understanding of it without any concerns as to its compatibility with the system of the host country.

Incidents of competition between foreign experts from different countries or from different agencies of the same country have also been seen in the recent years. This is often due to lack of international or local coordination. Hence, confusion of the host country experts is the natural result. Experts from the same country or from different countries who speak, however, diametrically different views as to what is "right" or "wrong" with respect to one legal issue can be of questionable assistance to their host countries. Further, foreign experts usually have little or no knowledge of the existing legal system of the host state and so give inappropriate or unhelpful advice. As a result of either competition between foreign experts, lack of knowledge, or academic arrogance, voices against reform were strengthened and little or no reform was motivated by foreign presence.

Recipients of technical assistance are interested in the conceptual framework and some statutory variants; they are able to choose and produce their own national variation that

62. *See* deLisle, *supra* note 52, at 185–86.

63. *See* Keith B. Norman, *Our Greatest Export: The Rule of Law*, 60 ALA. LAW. 150 (1999).

64. For instance, training sessions were held in Poland, Romania, Slovenia, and Ukraine.

65. For instance, GTZ provided assistance for the drafting of civil codes or specialized "private law" statutes in Hungary, Moldova, Poland, Russia, and Ukraine.

meets better their domestic needs. It seems appropriate that such coordination is left to international organizations, provided that they will do it effectively, rather than to a potential self-constraint or willingness of foreign technical assistance.

Foreign technical assistance can play a vital role in assisting the development of a modern commercial law system in emerging markets. This can only be achieved if both foreign and local experts take part in the law reform process with an open mind and if the foreign model is not merely imposed from outside. This element has been described as the "human factor" in implementing new legal systems.[66] Every legal system, even the most sophisticated and developed Western one, can be improved and the impetus in newly independent or emerging markets can offer remarkable ideas to traditional systems. Both the reform impetus and the reception of diverse foreign legal concepts and ideas can be beneficial to any system in need of reform.

IV. Reception of Foreign Law and Function of Legal Transplants

Beginning in 1991, Eastern Europe began the unprecedented effort of lawmaking on a grand scale.

Almost overnight and at the request of their people and/or international organizations, former communist countries had to disassemble their political, economic, and legal institutions, which were based on centrally planned economies, to erect market-based democracies. Large sections of their old legal systems were now obsolete. The legislatures, however, were in most cases not free to form law and policy, as an "author is free to write a novel."[67] The legal establishment of the communist era held influential posts and had contacts in the East and the West. They were *ex officio* called to lead reform efforts. In addition to them, foreign technical assistance arrived with ideas for "legal surgery" or reception of foreign law. A great number of foreign concepts (e.g., negotiable instruments of credit security devices) were introduced as if they were legal transplants to replace malfunctioning organs.

Comparative law[68] was employed to decide either compatibility of foreign legal concepts or the merits of foreign legal systems and to provide an anthology of foreign legal ideas. Modern comparative legal methodology deals with legal transplants and reception of foreign law.

The debate surrounding the theory of legal transplants has an almost unique beginning. In 1974 Alan Watson[69] and Otto Kahn-Freund,[70] in unrelated works, presented competing

66. *See* Kirsten Storin Doty, *Economic Legal Reforms as a Necessary Means for Eastern European Transition into the Twenty-First Century*, 33 INT'L LAW. 189, 196–97 (1999).

67. *Id.* at 195, n.57–78.

68. For the functions and aims of comparative law, see KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 13–31 (Tony Weir trans., 3d ed. 1998), with further references. *See also* THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES, AND THE ENGLISH LAW IN THE EVE OF 21ST CENTURY (Basil S. Markesinis ed., 1994).

69. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993). This book was not the first time he had considered the question of legal transplants. Many of his historically based writings, beginning in the 1960s, contain the seeds of his theory that are fully explored in his 1974 book and subsequent works.

70. Otto Kahn-Freund, *On Use and Misuse of Comparative Law*, 37 MOD. L. REV. 1 (1974).

theories on the viability of legal transplants. The divergence of their views can be traced in the adoption of contrary propositions about the relationship between a state's law and its society.[71]

Watson's theory begins with the proposition that there is no inherent relationship between law and the society in which it operates. He believes that law is largely autonomous, with a life of its own.[72] Watson states that law develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over lawmaking, and they observed the apparent merits that could be derived from it.[73]

Under Watson's theory, a legal rule is transplanted simply because it is a good idea. While Watson does not explicitly present a method to predict the viability of a proposed legal transplant, his writings provide guidance for such a method.[74] He has further identified several factors that he believes must be considered to determine if the conditions are ripe for legal change by transplantation.[75]

Kahn-Freund's disagreements with Watson begin with Watson's proposition that there is no inherent relationship between a state's law and its society. He claims that laws must not be separated from their purpose or from the circumstances in which they are made.[76] Kahn-Freund argues "we cannot take for granted that rules or institutions are transplantable"[77] and believes that "there are degrees of transferability."[78] Ewald summarizes Kahn-Freund's theory: "legal institutions may be more-or-less embedded in a nation's life, and therefore more-or-less readily transplantable from one legal system to another; but nevertheless at one end of the spectrum law is so deeply embedded that transplantation is in effect impossible."[79]

Kahn-Freund identified a two-step process to determine the viability of a proposed transplant. The first step is to determine the relationship between the legal rule to be transplanted and the socio-political structure of the donor state.[80] The second step involves comparing the socio-political environment of the donor and receiving state.[81]

---

71. See the discussion in William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995); and Steven J. Heim, *Predicting Legal Transplants: The Case of Servitudes in the Russian Federation*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 187, 192–97 (1996);.

72. Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 313–14 and 321 (1978). "There is no exact, fixed, close, complete, or necessary correlation between social, economic, or political circumstances and a system of rules of private law." *Id.*; *see* Edward M. Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. 1, 2 (citing ALAN WATSON, SOCIETY AND LEGAL CHANGE (1977)).

73. Watson, *supra* note 72, at 315.

74. Eric Stein, *Uses, Misuses and Non-uses of Comparative Law*, 72 Nw. U.L. REV. 198, 202 (1977); Alan Watson, *Legal Transplants and Law Reform*, 92 LAW. Q. REV. 79, 82 (1976).

75. He lists nine factors that are relevant: pressure force, opposition force, transplant bias, discretion factor, generality factor, societal inertia, felt-needs, source of law, and law-shaping lawyers. *See* Watson, *supra* note 72, at 322.

76. Kahn-Freund, *supra* note 70, at 27. Ewald labels this theory the mirror theory of law and argues that it does not constitute a single theory, but a class of theories that hold that there is a causal link between law and some aspect of society. Ewald, *supra* note 71, at 492.

77. Kahn-Freund, *supra* note 70, at 27.

78. *Id.* at 6.

79. Ewald, *supra* note 71, at 495.

80. *See* Kahn-Freund, *supra* note 70, at 18. Three factors should be considered: (1) the macro-political structure of the donor state (democracy or dictatorship?); (2) the distribution of power within the political system; and (3) the role played by organized interests. *See id.* at 11–13.

81. *See id.* at 12.

There is agreement, however, that the phrase "legal transplants" refers to the movement of legal norms or specific laws from one state to another during the process of law-making or legal reform.[82] However, as a consequence of these conflicting propositions, their theories clash not only over how to evaluate the viability of a proposed legal transplant, but also over the general conclusions that can be reached about the usefulness of legal transplants as a tool of comparative scholars. Other scholars debate nearly every aspect of the legal transplant theory.[83]

The study of legal transplants has been revived since the collapse of totalitarian rule.[84] It is not, however, a new topic. The issue of reception of foreign law has a considerable history and a remarkable topicality.[85] As states around the globe implement dramatic political and economic changes in response to external and internal developments, their legal systems must be radically altered.[86] In making these changes, legislators determine whether the borrowing of foreign law is feasible and if the international harmonization of a particular set of laws is viable. The argument is strong that there is no need for legislators to struggle to reinvent the wheel when others have dealt with the same issues.[87] This argument is further supported by the fact that states are under pressure in the increasing interdependent world to create uniformity in law.[88]

It cannot be stressed too often that the development of regional trading blocks is one example of this trend.[89] In an international law environment, national variations are discussed and the convergence of legal systems through harmonization is attempted. Often, this process will imply the reception of foreign law or indeed legal transplants.[90]

V. Main Elements of Commercial Law Reform

Commercial law reform varies between jurisdictions and there is a great deal of significant difference, even among Western countries. For instance, the merits of the codification of

82. *See* Stein, *supra* note 74, at 198.

83. *See generally* R. B. SEIDMAN, STATE, LAW AND DEVELOPMENT (1978); Jack A. Hiller, *Language, Law, Sports and Culture; The Transferability or Non-Transferability of Words, Lifestyles, and Attitudes Through Law*, 12 VAL. U.L. REV. 433 (1978).

84. *See* Gianmaria Ajani, *Transfer of Legal Systems from the Point of View of the "Export Countries," in* ULRICH DROBNIG, SYSTEMTRANSFORMATION IN MITTEL- UND OSTEUROPA UND IHRE FOLGEN FÜR BANKEN, BÖRSEN UND KREDITSICHERHEITEN 37 (1998); Richard M. Buxbaum, *Western Legal Support of Law-Reform and Codification Efforts of the Countries of the Former Socialist Bloc as Seen from the United States' Viewpoint, in* DROBNIG, *supra*, at 53–67; Stanisław Sołtysiński, *Transfer of Legal Systems as Seen from the "Import Countries": A View from Warsaw, in* DROBNIG, *supra*, at 70–82; Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93–117 (1995); Markell, *supra* note 14; Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3–19 (1994).

85. *See* Chryssapho Tsouca, *L'amalgame de systèmes divers et les systèmes en transition: L'importation et l'exportation de modèles juridiques*, REV. HELL. D. INT'L (RHDI) 9–36 (1998). She makes extensive references to the reception of Roman law, *id.* at 16–17, foreign law and the Greek legal system, *id.* at 17–18, and the creation of the modern Japanese law, *id.* at 18–21. For the way the Roman law influenced modern legal systems, see PETER STEIN, THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS (1988).

86. For discussions regarding the need for legal change in CEE and FSU, see Thomas W. Waelde & James Gunderson, *Legislative Reform in Transition Economies; Western Transplants—A Short Cut to Social Market Status?* 43 INT'L & COMP. L. Q. 347 (1994).

87. *See id.* at 368.

88. *See* Heim, *supra* note 71, at 189 n.12; Mattei, *supra* note 84.

89. *See* discussion *supra* Parts II and III.

90. For example in the context of the EU, the Brussels Convention provides for jurisdictional provisions for trusts, which arguably are not known in all member states of the EC. Similarly, the Product Liability Directive introduced an objective liability that was previously unknown to French law.

commercial law in the form of a real code are controversial. Further, it is questionable whether public and private law rules may be combined in one single legislative text. In any event, it is now a phase in legal history when legal certainty and predictability are virtues. It has been observed that with increased certainty comes increased competition.[91]

The EBRD attempted to set standards for the assessment of investment laws,[92] commercial laws,[93] and law reform in general.[94] The example of secured transactions legislation was recently discussed elsewhere.[95] Banking and financial law reform was also discussed recently.[96]

It has been submitted that "Western-style commercial law is, or will soon be, sweeping the world."[97] Moreover, "commercial law reform, in keeping with international harmonisation, signals not only legal and economic certainty, but also commitment to the rule of law more generally. Such signals attract global capital and produce benefits for the domestic economy."[98] Any attempt to delimit the borders of a comprehensive commercial law reform would require an extensive survey and the length of a monographic work. This endeavor is left for future scholarly research.

VI. Conclusion and Digression: Everything a Matter of Taste?

In this new era of global economy it remains to be seen what the reaction of global capital markets to continuing differences in commercial law systems will be. Currently, it appears that this "capital market shopping" and the risk-taking relating to that were beneficial to some global players. However, the need for certainty and predictability, or indeed uniformity, is topical. Convergence of legal systems or harmonization of commercial law will, in the long run, stabilize and strengthen national economies and will create a healthy competitive environment.

The choice is whether we will opt for a globalization of commercial and financial law, or a gradual convergence of legal regimes through legal and institutional transplants, or an international harmonization through hard or soft law.

Arguably this is not the first era of globalization of law. Medieval *lex mercatoria*[99] and *ius communis* were genuine global legal rules. As a matter of taste, it is submitted that there are

91. *See* Markell, *supra* note 14, at 502.

92. *EBRD Ranks Foreign Investment Laws*, FIN. TIMES E. EURO. BUS. L., Dec. 1996, at 6–7. Assessment criteria were the extensiveness and the effectiveness of legal rules.

93. *EBRD Ranks Commercial Laws*, FIN. TIMES E. EURO. BUS. L., Nov. 1997, at 2–3. The extensiveness and effectiveness criteria were employed. Extensiveness of legal rules covered rules on pledge, bankruptcy and company formation, and governance.

94. In 1998, the EBRD conducted a survey to establish the contribution of law to fostering investment in the EBRD's countries of operation. The extensiveness and effectiveness criteria were again employed, the survey was however more comprehensive. Part I covered pledge law, company law, and bankruptcy while Part II covered financial institutions and capital markets regulation.

95. *See* Loukas A. Mistelis, *The EBRD Model Law on Secured Transactions and Its Impact on Collateral Law Reform in Central and Eastern Europe and the Former Soviet Union*, 5 PARKER SCH. J. EAST. EUR. L. 455 (1998).

96. *See* Timothy A. Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 14 AM. U. INT'L L. REV. 1571 (1999).

97. Markell, *supra* note 14, at 510.

98. *Id.* at 504.

99. *See* Schmitthoff, *supra* note 34.

a number of good reasons why globalization of law (i.e., an introduction of a legal system binding all over the world) is related with shortcomings. The main question linked with such a potential development is who will dictate authoritatively what the "best law" is? If it is to be an international organization, which one? There are also matters of democratic accountability associated with the legislative process as well as national or regional interests. It may be the case that for a certain transitional period the interest of a state is to have a protective or liberal policy. Undoubtedly, with the globalization of economy, we will experience more cross-border activities, and, with the emergence of electronic commerce, lawyers will be faced with transactions that cannot be easily localized. To the extent that the modern economy is a natural development, regulators should not interfere in anticipation of problems. Technology is faster than legislative procedures and legislators should interfere only to correct or amend insufficient existing laws.

In comparative law jargon, convergence of legal regimes is defined as the phenomenon of similar solutions in different legal systems.[100] Convergence is a natural phenomenon and is often filtered by the relevant cultural or historical backgrounds. Legislators look at the neighboring cooking pots, taste different dishes, and select what suits them best. Convergence is voluntary and based on persuasion and/or chance and prestige.[101] The supply of new models is either in the form of indirect influence through the activity of formulating agencies or in the form of approximation of laws through association with the EU[102] or other organizations of regional economic integration.

The merits and drawbacks of the third model, international harmonization through hard and soft law, have been discussed extensively in the last twenty years.[103] *Lex mercatoria*[104] is an effort to standardize commercial terms and practices across international borders. It brings more certainty to cross-border transactions and helps increase international economic activity that benefits the economies involved. It is incomplete, as it covers only areas where businesspersons feel there is a need for uniformity, and is virtually global. It is submitted that this soft law harmonization is more effective than other models and functional when needed.

The question posed in the beginning awaits an answer. What are the essential ingredients of a commercial law reform that is nutritious and beneficial for the state that prepared it? Irrespective of various flavors that may be added to satisfy regional needs or tastes, this paper has pointed out that rule of law principles, democracy, and respect for human rights create the necessary healthy environment for economic activity. As far as the way specific trade regulations or codification of commercial law should look is concerned, this paper does not take any side. No domestic legal system is perfect or exportable as a whole. Harmonization is more effective, if it is voluntary and based on soft law options. Convergence is functional, and legal transplants useful, if they are compatible with the rest of the legal body in the recipient country. This is not, however, a question of compatibility with the local society. Voluntary convergence and inspiration from foreign ideas, foreign legal concepts, and carefully selected legal transplants can guarantee a commercial law framework that will assist economic development. At least, in the context of international transactions, this trend has been recorded and must be welcome.

100. *See* Mattei, *supra* note 84, at 5.

101. *See* Ajani, *supra* note 84.

102. *See id.* at 110–115 with further references concerning CEE and FSU states.

103. *See supra* notes 22 and 34.

104. *See* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF LEX MERCATORIA (1998).