



5-10-2018

# The European Union, the Member States, and the Lex Mercatoria

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## Recommended Citation

Saputelli, Gabriella (2018) "The European Union, the Member States, and the Lex Mercatoria," *Notre Dame Journal of International & Comparative Law*: Vol. 8 : Iss. 2 , Article 3.

Available at: <https://scholarship.law.nd.edu/ndjicl/vol8/iss2/3>

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# The European Union, the Member States, and the Lex Mercatoria

## **Cover Page Footnote**

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# THE EUROPEAN UNION, THE MEMBER STATES, AND THE *LEX MERCATORIA*

GABRIELLA SAPUTELLI\*

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## I. GLOBALIZATION AND THE NEW *LEX MERCATORIA*

The globalization and internationalization of the economy<sup>1</sup> entail a need for unified laws.<sup>2</sup> In a globalized market, the interactions between businesses and people from different states require that international trade be governed by uniform rules. This unification of legal systems is achieved in a variety of ways.

One method is the process of *conventional uniformization*, which recognizes the preeminent role of the state, albeit in a relationship of interstate cooperation.

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<sup>1</sup> On the history of globalization, see JÜRGEN OSTERHAMMEL & NIELS P. PETERSSON, *GLOBALIZATION: A SHORT HISTORY*, (Dona Geyer trans., 2009). There is a vast literature on globalization. See, e.g., ULRICH BECK, *CHE COS’È LA GLOBALIZZAZIONE: RISCHI E PROSPETTIVE DELLA SOCIETÀ PLANETARIA* (1999); IAN CLARK, *GLOBALIZATION AND FRAGMENTATION: INTERNATIONAL RELATIONS IN THE TWENTIETH CENTURY* (1997) (discussing the history and impact of globalization); ANTHONY GIDDENS, *EUROPE IN THE GLOBAL AGE* (2006); DAVID HELD, *GOVERNARE LA GLOBALIZZAZIONE: UN’ALTERNATIVA DEMOCRATICA AL MONDO UNIPOLARE* (2005); AMARTYA K. SEN, *GLOBALIZZAZIONE E LIBERTÀ* (G. Bono trans., 2003); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002); JOSEPH E. STIGLITZ, *GLOBALIZZAZIONE* (2011); JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* (2006); JOSEPH E. STIGLITZ ET AL., *THE ECONOMIC ROLE OF THE STATE* (Arnold Heertje ed., 1989).

<sup>2</sup> See for example, SABINO CASSESE, *LO SPAZIO GIURIDICO GLOBALE* (2003); MARCO D’ALBERTI, *POTERI PUBBLICI, MERCATI E GLOBALIZZAZIONE* (2008); YVES DEZALAY, *I MERCANTI DEL DIRITTO* (1997); NATALINO IRTI, *L’ORDINE GIURIDICO DEL MERCATO* (1998); FRANCESCO GALGANO & FABRIZIO MARRELLA, *DIRITTO E PRASSI DEL COMMERCIO INTERNAZIONALE* (2010); FRANCESCO GALGANO, *LA GLOBALIZZAZIONE NELLO SPECCHIO DEL DIRITTO* (2005); MARIA ROSARIA FERRARESE, *DIRITTO SCONFINATO: INVENTIVA GIURIDICA E SPAZI NEL MONDO GLOBALE* (2006) [hereinafter FERRARESE, *DIRITTO SCONFINATO*]; MARIA ROSARIA FERRARESE, *LE ISTITUZIONI DELLA GLOBALIZZAZIONE: DIRITTO E DIRITTI NELLA SOCIETÀ TRANSNAZIONALE* (2000) [hereinafter FERRARESE, *LE ISTITUZIONI*], for a discussion of the effects of globalization on the unification of law.

Indeed, since states cannot regulate market globalization individually,<sup>3</sup> they delegate or transfer the production of laws to supranational entities.<sup>4</sup>

The rise of economic globalization has also encouraged forms of *spontaneous uniformization* via self-regulation, whereby rules are often drawn up directly by private entities involved in international trade, such as large corporations, law firms, and banks—sometimes including “contractual customs having international value”—which have their own dispute settlement mechanisms consisting mainly of arbitrators, but with whom national judges also interact.<sup>5</sup> These rules are obviously “transnational,”<sup>6</sup> and significantly affect the sources of law by challenging states’ monopoly on the production of laws and threatening the hierarchy of legal sources.

The *new lex mercatoria* is a synthetic expression that refers to this spontaneous production of law in the global market; it was first used during the 1960s in scientific circles, and eventually became commonly used, despite the lack of a univocal definition.<sup>7</sup> According to famous Italian legal scholar Francesco Galgano, the expression *new lex mercatoria* concerns the law created by the business community without the mediation of the legislative powers of states; it comprises rules that regulate the commercial relations that are established within the economic sphere of the markets in a uniform manner beyond the political units of states.<sup>8</sup>

<sup>3</sup> Until a few years ago the expression “crisis of the State” was commonly used. See, e.g., SABINO CASSESE, *LA CRISI DELLO STATO* (2002); Sabino Cassese, *L'erosione dello Stato: Una Vicenda Irreversibile?*, in *DALLO STATO MONOCLASSE ALLA GLOBALIZZAZIONE* 15 (Sabino Cassese & Giuseppe Guarino eds., 2000); SABINO CASSESE, *OLTRE LO STATO* (2nd ed. 2006).

<sup>4</sup> GALGANO & MARRELLA, *supra* note 2, at 42 (examining the institutions that work in the area of international and transnational commerce).

<sup>5</sup> See MICHAEL J. BONELL, *LE REGOLE OGGETTIVE DEL COMMERCIO INTERNAZIONALE* 3–20 (1976) (discussing law-making by economic actors interested in international commerce); FABRIZIO MARRELLA, *LA NUOVA LEX MERCATORIA, PRINCIPI UNIDROIT ED USI DEI CONTRATTI DEL COMMERCIO INTERNAZIONALE* 261 (2003) (discussing this distinction); René David, *Il Diritto del Commercio Internazionale: Un Nuovo Compito per i Legislatori Nazionali o una Nuova Lex Mercatoria?*, 22 *RIVISTA DI DIRITTO CIVILE* 577 (1976) (comparing the two ways of unifying the law).

<sup>6</sup> FERRARESE, *DIRITTO SCONFINATO*, *supra* note 2, at 34, 65 (defining transnational measures); FERRARESE, *LE ISTITUZIONI*, *supra* note 2, at 106 (discussing the difference between international and transnational).

<sup>7</sup> The two paradigmatic theses about the *lex mercatoria* are ascribable to Bertold Goldman and Clive Schmitthoff, who are considered the founding fathers of the modern concept of the *lex mercatoria*. Besides being instrumental in the revival of *lex mercatoria* speech, their reconstructions have played a very important role in the subsequent academic elaboration of international trade law and arbitration. See Berthold Goldman, *Lex Mercatoria*, 3 *FORUM INTERNATIONALE* 3, 3–7 (1983); Clive Schmitthoff, *The Unification of the Law of International Trade*, *J. BUS. L.* 105, 105–09 (1968).

For an examination of the two theories, also identified with the two main approaches followed by the doctrine, see Nikitas E. Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law*, 71 *L. & CONTEMP. PROBS.* 169 (Summer 2008). See also *LEX MERCATORIA AND ARBITRATION* (Thomas E. Carbonneau ed., 1998) (discussing the origins and development of the theory of *lex mercatoria* in the literature, legislation, international conventions, and jurisprudence); FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* 207 (1992); ANTOINE KASSIS, *THÉORIE GÉNÉRALE DES USAGES DU COMMERCE: DROIT COMPARÉ, CONTRATS ET ARBITRAGE INTERNATIONAUX, LEX MERCATORIA* (1984); FILALI OSMAN, *LES PRINCIPES GÉNÉRAUX DE LA LEX MERCATORIA: CONTRIBUTION À L'ÉTUDE D'UN ORDRE JURIDIQUE ANATIONAL* (1992); *LEX MERCATORIA: ESSAYS ON INTERNATIONAL COMMERCIAL LAW IN HONOUR OF FRANCIS REYNOLDS* (Francis D. Rose ed., 2000).

<sup>8</sup> See FRANCESCO GALGANO, *LEX MERCATORIA: STORIA DEL DIRITTO COMMERCIALE* 219 (1993); Francesco Galgano, *The New Lex Mercatoria*, 2 *ANN. SURV. INT'L & COMP. L.* 99, 107–08 (1995).

In spite of the different evaluations of the sources of the *lex mercatoria*—which reflect the different ways in which it is perceived—the most commonly used reconstructions identify the following elements within the *lex mercatoria*<sup>9</sup>: (1) usage and practices of international trade; (2) uniform contractual models; (3) arbitration case law; and (4) general principles. The modalities whereby the *lex mercatoria* is formed evoke the characteristics of customary sources and raise questions about its role in contemporary State orders, specifically in trade relations, and with respect to their efficacy within the State.<sup>10</sup>

The terminology immediately evokes a comparison with the ancient (medieval) *lex mercatoria*,<sup>11</sup> even though more accepted literature considers such comparisons as possibly misleading in light of the contextual changes in the components of the *lex mercatoria* since medieval times.<sup>12</sup> For example, the

<sup>9</sup> For an analysis of the sources of law of international trade law, specifically *lex mercatoria*, see JAN DALHUISEN, *DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW: INTRODUCTION—THE NEW LEX MERCATORIA AND ITS SOURCES* 137, 281 (4th ed. 2010); DE LY, *supra* note 7, at 207–316 (giving analysis of the sources of law of international trade, specifically *lex mercatoria*); GALGANO, *supra* note 2, at 58–59; MARRELLA, *supra* note 5; Michael J. Bonell, *Lex Mercatoria*, 9 DIGESTO DELLE DISCIPLINE PRIVATISTICHE: SEZIONE DIRITTO COMMERCIALE 11 (1993).

<sup>10</sup> See CUSTOMARY LAW AND ECONOMICS (Lisa Bernstein & Francesco Parisi eds., 2014); J. H. Dalhuisen, *Custom and its Revival in Transnational Private Law*, 18 DUKE J. COMP. & INT'L L. 339 (2008).

<sup>11</sup> The "lex mercatoria" (or law merchant) is an expression to indicate the law created by the merchant community in the late Middle Ages in order to integrate (or overcome) the application of the various local legal systems, which became inadequate as trade grew and developed. See W.A. BEWES, *THE ROMANCE OF THE LAW MERCHANT: BEING AN INTRODUCTION TO THE STUDY OF INTERNATIONAL AND COMMERCIAL LAW WITH SOME ACCOUNT OF THE COMMERCE AND FAIRS OF THE MIDDLE AGES* 8–9 (1998).

The first important book on the theme, entitled "*Consuetudo, vel, Lex Mercatoria, or, the Ancient Law Merchant*," was published in 1622 by an English merchant, Gerard Malynes, who wrote in the introduction: "I have entitled the book according to the ancient name of Lex mercatoria, and not jus mercatorum because it is a customary Law, approved by the Authority of all Kingdoms and Commonwealths, and not a Law established by the Sovereignty of any Prince, either in the first foundation, or in the continuance of time". This corpus of laws is subject to numerous studies and criticisms. See, e.g., DE LY, *supra* note 7, at 15–21; LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983); FROM LEX MERCATORIA TO COMMERCIAL LAW 53 (Vito Piergiorganni ed., 2005).

On the traditional theory of the medieval *lex mercatoria*, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF WESTERN LEGAL TRADITION* 333–56 (1983); WILLIAM MITCHELL, *ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* (1904); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); Francis M. Burdick, *What Is the Law Merchant?*, 2 COLUM. L. REV. 470 (1902).

The idea of a universal merchant law (produced, interpreted, and applied autonomously by the merchant class) has been included in many commercial law studies and has profoundly influenced the development of commercial law in the modern era. For a criticism of such theses, see Charles Donahue Jr., *Benvenuto Stracca's De Mercatura: Was there a Lex Mercatoria in Sixteenth-Century Italy*, in FROM LEX MERCATORIA TO COMMERCIAL LAW 70 (Vito Piergiorganni ed., 2005); Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT'L L. 21, 35–36 (2004); Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39, 56 (2004) [hereinafter Kadens, *Order Within Law*]; Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1160 (2012) [hereinafter Kadens, *Myth Customary Law Merchant*]; Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*, 21 AM. U. INT'L L. REV. 685, 690 (2006).

Some other historical reconstructions show that the role of local institutions and "authoritarian" law has been far from irrelevant or secondary in regulating trade. See Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990).

<sup>12</sup> See generally Adaora Okwor, *Lex Mercatoria as Transnational Commercial Law: Is the Lex Mercatoria Preferentially for the "Mercatocracy"?*, in THEORY AND PRACTICE OF HARMONISATION

ancient *lex mercatoria* preceded the advent of modern states, while the current *lex mercatoria* operates within a world characterized by the dominance of states,<sup>13</sup> with the function of going beyond fragmentation due to the political division of markets.<sup>14</sup>

Several authors point out that a distorted use is made of the medieval experience to legitimize modern aspirations to govern transnational trade autonomously and independently of any state conditioning:<sup>15</sup> in this context the terminology and comparison with the medieval *lex mercatoria* would legitimize the deregulation of the markets,<sup>16</sup> and replace the state regulation of international trade with transnational customary law.<sup>17</sup> What matters, therefore, is not what happened historically, but “what projections into the past align best with present circumstances and what constructions of the past are used to justify explanations of the present.”<sup>18</sup>

The crux of the issue, both in terms of the ancient and the *new lex mercatoria*, is not its existence, but the reconstruction of its nature and its relationship with the “official” system of law<sup>19</sup>: the criticisms against the traditional theses are that the ancient *lex mercatoria* was not completely autonomous of the official law, but was composed of a set of sources, procedures, and institutions, among which there was continuous competition and interchange.<sup>20</sup>

In this regard, the thesis of Michael J. Bonell seems to be quite realistic; he states that the economic forces engaged in international trade may have their own rules due to the fact that in this area states have largely waived the imposition of their legislation, granting individual economic operators wide powers of contractual autonomy and attributing effective quasi-legislation to

393 (Mads Andenas & Camilla Baasch Andersen eds., 2011) (comparing the new and the old *lex mercatoria*).

<sup>13</sup> See FERRARESE, LE ISTITUZIONI, *supra* note 2, at 149–50 (describing the differences in the economic and legal contexts that undermine a comparison between the “ancient” and the “new” *lex mercatoria*).

<sup>14</sup> See GALGANO, *supra* note 2, at 57 (emphasizing the fact that the new *lex mercatoria* affects the legal system of the State).

<sup>15</sup> Hatzimihail, *supra* note 7, at 169; Sachs, *supra* note 11, at 690 (arguing that the historical experience of medieval merchant law has been misunderstood and misused in order to legitimize “political ends”).

<sup>16</sup> Scholars of various disciplines have been clinging to the *lex mercatoria* story for decades as indisputable evidence that the private order can work. The use of *lex mercatoria* in the nineteenth and twentieth centuries would thus have a strong symbolic value to give historic legitimacy to economic and political theories about how law is or should be created. See Kadens, *Myth Customary Law Merchant*, *supra* note 11, at 1153.

<sup>17</sup> For years, historians have sought evidence of the existence of a mercantile legal system independent from state systems as a solution to the contemporary problems of international trade. The revival in the twentieth century of the *lex mercatoria* is thus linked to the attempt to conceive a system of this type as a solution to the legal problems created by cross-border trade and as replacement of complicated doctrines of “conflict of laws.” See Sachs, *supra* note 11, 688, 808, 811.

<sup>18</sup> Hatzimihail, *supra* note 7, at 173.

<sup>19</sup> Some scholars consider the *lex mercatoria*’s legal basis as being anchored to the state system (Schmitthoff is one of the supporters of this theory), while others qualify the *lex mercatoria* as a legal system independent of the state and international legal systems (Goldman is one of the supporters of this theory). Others consider the debate on the independence of the *lex mercatoria* to be irrelevant. See Goldman, *supra* note 7; Schmitthoff, *supra* note 7. See generally Peter J. Mazzacano, *The Lex Mercatoria as Autonomous Law*, 4 COMP. RES. L. & POL. ECON. 1 (2008).

<sup>20</sup> For a very useful analysis, see Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 454 (2007). See also Kadens, *Order Within Law*, *supra* note 11.

uses developed within their respective traffic areas. For this reason, the fate of *lex mercatoria* continues to depend on the smaller or larger space that States intend to confer on the power of self-regulation of individuals.<sup>21</sup>

## II. CRITICAL ASPECTS OF THE *LEX MERCATORIA* AND NEED FOR A “PUBLIC LAW DIMENSION”

The *lex mercatoria* has recently raised many doubts, because through this system of law, strong parties have imposed rules that are congenial to them, skirting around the principles of the rule of law—as they have been conceived in civil law systems—which are expressed in specific sources of law. The phenomena described present a series of negative effects in themselves<sup>22</sup> that do not remain confined to the international level, but have significant consequences for states, including tax issues regarding cross-border trade transactions and multinational companies, and citizens’ rights.

The recent financial crisis and the severe repercussions it has had on national systems—caused primarily by the financial market—has revealed the risks of deregulation and the need to recover a “public law dimension”<sup>23</sup> aimed at establishing private regulation, instead of a “global law without a State.”<sup>24</sup> This doctrine certainly advocates the reformulation of the hierarchical and vertical concepts of normativity in light of horizontal processes and mutual recognition, but also argues that fundamental rights and common interests should be taken into account, as stated in the principles of liberal-democratic constitutionalism.<sup>25</sup>

The demands for a re-evaluation of the public sphere and the reconciliation of particular interests with general interests certainly call into play the role of states and international organizations, and questions their position regarding the production of norms associated with globalization.

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<sup>21</sup> Bonell, *supra* note 9, at 16.

<sup>22</sup> Many doubts have been raised about the content and nature of *lex mercatoria*, which could be used by private powers to their own advantage. See, e.g., Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, 4 *ARB. INT’L* 86 (1988); D’ALBERTI, *supra* note 2, at 135 n.133 (the *lex mercatoria* is “structurally inclined” to favor big companies and the mercantile logic; i. International trade law clearly favours economic interests to the detriment of the public interest, social values, and human rights).

<sup>23</sup> Armin von Bogdandy & Sergio Dellavalle, *The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective*, 4 *TRANSNAT’L LEGAL THEORY* 59, 70–82 (2012).

<sup>24</sup> *Id.* at 74. By reviewing the main theories that historically have proposed the idea of a global order formed by private actors, these two scholars demonstrate that private law interactions have always taken place in a context of general interest and that the idea of common good has ensured the primacy of the rules of public law and institutions in case of conflict. Thus, modern theories differ widely from the foregoing, as they argue that a global order can develop solely on the self-regulated transnational activities of private actors and independently from public institutions. These theories, for the first time, support the idea of a social order without institutional or regulatory reference to a public sphere, a general interest, or an idea of common good. One of the most well-known theses, among the attempts to provide theoretical support to this idea, has been elaborated by Gunther Teubner using the conceptual premise of system theory. See Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed., 1997) (identifying in the *lex mercatoria* a legal autopoietic system capable of establishing a self-referential and global economic system that would be a *Global Law Without a State*).

<sup>25</sup> Bogdandy & Dellavalle, *supra* note 23, at 82.

The proliferation of supranational bodies and authorities having the function of governing the global economy<sup>26</sup> has, in recent years, stimulated a lively debate about global politics and the need to safeguard the rule of law in the globalized system (e.g., rights of participation, democracy, fundamental right protection).<sup>27</sup> It has become commonly recognized that even in a globalized context, states may still need to play a significant role in guaranteeing and protecting the rule of law, requiring the characteristics of constitutionalism, which may be accomplished directly through domestic law or indirectly through instruments of international law or forms of supranational associations, such as the European Union (EU).<sup>28</sup>

The real critical node arising from these considerations is therefore the 'attitude' of the bodies—states and intergovernmental organizations—that are the expression of the public dimension toward the *lex mercatoria*. This attitude may be identified by analyzing the sources of law, whereby it is possible to understand the effects of the *lex mercatoria* on states and its relationship with state law. Although this analyzation is not a formal question, it is highly demonstrative of, and strictly linked to, the rule of law, the democratic system, and the protection of rights.

The *lex mercatoria*'s influence on the legal orders of states has led other experts to maintain that its efficacy is partly the result of the open sovereignty of states, and partly depends on its transnational nature, which does not allow states to exercise any form of control over it. Some experts' assertions survive scrutiny from economic and sociological standpoints but, from a purely legal or constitutional standpoint, such statements require a dogmatic foundation in positive law. In a public or constitutional perspective, it is necessary to verify the efficacy attributed to this transnational law in states' constitutional systems by analyzing the openness of the new form of the democratic, pluralistic state *vis-à-vis* its various legal sources.<sup>29</sup>

The attitude of the European Union and its member states towards the *lex mercatoria*, is discussed in this paper through a public or constitutional law approach by analyzing the relationship between sources of law. In this way, it is possible to examine its impact on the rule of law, on the guarantee of democracy, and the protection of fundamental rights in the European context.

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<sup>26</sup> See SABINO CASSESE, CHI GOVERNA IL MONDO? 15 (2013) (analyzing the plurality of intergovernmental and non-governmental bodies operating in the supranational context).

<sup>27</sup> *Id.* These are the studies of 'global administrative law' to which many scholars have contributed. See *Global Administrative Law*, INST. FOR INT'L LAW & JUSTICE, <http://www.iilj.org/gal/> (last visited Apr. 2, 2018).

<sup>28</sup> See Natalino Irti, *Le Categorie Giuridiche della Globalizzazione*, 48 RIVISTA DI DRITTO CIVILE 625, 633 (2002) (supporting the fundamental role that states should play in a globalized context).

<sup>29</sup> See GABRIELLA SAPUTELLI, STATO, UNIONE EUROPEA E LEX MERCATORIA (2015); Gabriella Saputelli, *The Role of Customary Law and the New Lex Mercatoria in Countries with a Civil Law Tradition: The Italian Case*, 25 TRANSNAT'L L. & CONTEMP. & PROBS. 257 (2016).

### III. STATE AND *LEX MERCATORIA*: HISTORICAL OVERVIEW

A brief historic overview can help to solve these questions by describing how the role of customary transnational law has changed as the form of states have evolved.<sup>30</sup> The choice of a source system, in fact, constitutes a variable that depends on the form of the state, as evidenced by the arrangements that sources of law have had throughout history in those various forms.<sup>31</sup> The form of a state in this sense signifies the relationship between authority and freedom and the openness to phenomena occurring outside of the state's borders.

A historic survey shows that the general legal system has always attempted to delimit and reduce the efficacy of spontaneously formed law—that, in most cases, has taken on the form of usage and customs. In observing the relationships between the main sources of law in some medieval legal systems, various attempts to delimit the efficacy of customs, or to establish an overriding role of the political sources over it, can be identified.

With the gradual concentration of the power of *imperio* [full authority], the law has become inseparably tied to the concept of sovereignty. Sovereignty, unlike other manifestations of power—such as the executive or judicial powers—has been associated mainly with the power of law-making. In the sixteenth century, Jean Bodin explained that the sovereign is the supreme legislator because he has the power to modify the law and is the ultimate legal authority to which all the others are subordinate.<sup>32</sup>

At that time, the advent of the state created deep changes in the way social groups were organized, which caused a deep fracture in the legal tradition. It reduced the efficacy of spontaneous forms of laws—those produced directly by the social group through usage and customs—and enhanced the role of political sources, which emanate from a political authority. From the assertion of this new form of political organization, the degree of closure of the legal order—from the standpoint of the production of laws and the relationship between imposed sources and sources arising from the social sphere—has become closely related to the form of the state that came about in a given historic moment.

Under the liberal state, at least in Europe, the legal order became self-sufficient and the political sources of law prevailed over customary law. Ever since, the efficacy of customary law within a state cannot be derived from the imposition of this phenomenon, irrespective of an evaluation—albeit implicit—

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<sup>30</sup> For this historical overview, see generally CARLETON KEMP ALLEN, *LAW IN THE MAKING* (4th ed. 1946); J.H. BAKER, *THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW* (2000); BERMAN, *supra* note 11; MARIO CARVALE, *ALLE ORIGINI DEL DIRITTO EUROPEO* (2005); 2 ADRIANO CAVANNA, *STORIA DEL DIRITTO MODERNO IN EUROPA* (2006); CARLO M. CIPOLLA, *STORIA ECONOMICA DELL'EUROPA PREINDUSTRIALE* (1974); JOHN K. GALBRAITH, *STORIA DELL'ECONOMIA* (1990); PAOLO GROSSI, *SOCIETÀ, DIRITTO, STATO: UN RECUPERO PER IL DIRITTO* (2006); J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 139 (1992); TRAKMAN, *supra* note 11; Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989)

<sup>31</sup> See Adolf Merkl, *Prolegomeni ad una Teoria della Costruzione a Gradi del Diritto*, in *IL DUPLICE VOLTO DEL DIRITTO: IL SISTEMA KELSENIANO E ALTRI SAGGI* 8 (C. Geraci ed., 1987) (stating that the form of the state is fundamental for the system of sources of law, because some peculiar sources of law are linked to some forms of State).

<sup>32</sup> Jean Bodin was one of the most important proponents of the theory of sovereignty in the sixteenth century. In his famous book, *Les Six Livres de la Republique*, originally published in 1583, he explained that it is in the nature of every independent State to have supreme legislative powers. See generally JEAN BODIN, *LES SIX LIVRES DE LA REPUBLIQUE* (Scientia Verlag 1977) (1583).

of the phenomenon by the state. This new form of political organization had some unique characteristics that set it apart from other legal orders, such as exclusiveness and impenetrability, which materialized in a state monopoly of law-making and was representative of one of the main features of sovereignty.

In Europe, this process coincided with the codifying experiences, between the end of the fifteenth and first-half of the eighteenth centuries, which led to the drafting of official customary law texts. Additionally, statutes issued by representatives in Parliaments delimited the efficacy of customary law, downgrading it to the status of a residual source of law.

Common law systems, referred to often as a paradigm of legal orders in which primary importance is attached to customary law, were no exception to this evolution. A closer analysis reveals that the efficacy of usage and practices undergo a conditioning that is similar to what occurs in civil law systems, as a result of the importance initially taken on by case law and, in more recent times, statutory law.

These outcomes are confirmed by other studies that furnish proof of continuity in the history of the public regulation of the economy—albeit with different modalities, instruments and intensity of regulation—and show that not even contemporary times are characterized by the end or the decline of the action of public authorities in the discipline of the economy.<sup>33</sup>

#### IV. THE CONTEMPORARY STATE AND THE *LEX MERCATORIA*

In the Italian system, there are no provisions that explicitly and formally authorize the *lex mercatoria* to produce effects within it; however, a series of elements allow for an indirect and implicit opening to it. As stated earlier, the sources of the *new lex mercatoria* correspond to some modalities of law making which are recognized by the legal systems of various states. These circumstances allow the *lex mercatoria*, even without the explicit acknowledgment by a state, to produce effects within the domestic order through the space reserved for customary law and private autonomy. In these cases, the *lex mercatoria* can never contradict the legislative order because of the hierarchical position of the sources of law which opens the door to transnational law.

The specific structure of the pluralist-democratic state, which is an evolution of the liberal state, commands new reflections. Specifically, its opening to international law may have a direct impact on its system of sources of law and may partially change the approaches inherited from the structure of the liberal state. An example is the new wording of Article 117, Paragraph 1 of the Italian Constitution, which proposes that the domestic sources of law are subordinate to “the constraints deriving from EU legislation and international obligations,”<sup>34</sup> resulting in different consequences and control modalities. Under this Article, any opening towards the *lex mercatoria* by the EU and international sources of

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<sup>33</sup> See, e.g., D'ALBERTI, *supra* note 2, at 141 (giving a description of the characteristics of *public regulation* in contemporary times and an *excursus* of the transformations that have occurred throughout history).

<sup>34</sup> Art. 117, para 1, Costituzione [Const.] (It.).

law, particularly international agreements, may lead to such law merging with Italy's domestic law.

Clauses of this type could enable custom-formed, spontaneous law to make its way into national law through international and European sources. A practical effect of this merging is that the customs of international trade, which represent a considerable portion of the *lex mercatoria*, acquire weight and authority that do not correspond to the ranking of customs in the domestic hierarchical system of law. The incorporation mechanism is always usage and practice *secundum legem* [according to the law] that springs into motion when a source refers to customs for the integration of its content.<sup>35</sup> According to the most common reconstruction, through this mechanism, custom will take on the same regulatory force and position in the hierarchical scale as the sources that cite it—deriving its authority purely from cross-referencing.<sup>36</sup>

The efficacy of transnational usage and practices is due to the prevalence of EU and international law over the system of domestic sources, which may lead to the overcoming of an explicit prohibition contained in a state or regional statute. This effect could pass through provisions of European 'private' law and European private international law, or EU trade agreements,<sup>37</sup> especially considering that the EU has an exclusive competence in trade matters.<sup>38</sup>

The peculiarities of the pluralist democratic state allow for interaction between different regulatory processes (official and spontaneous), and an interchange of rules functional with the demands that come from trade relations, thus making the legal system amenable to those needs.<sup>39</sup> At the same time, the pluralist democratic state has instruments to control and ensure the protection of rights and intertwining of interests—factors which are considered to be distinctive features of constitutionalism. Reference is being made here to the control over public order implemented by every judge, and to the control of constitutionality enforced by constitutional courts.

As a limitation to the prevalence of international and European law, the Italian and German Constitutional Courts have provided the counter-limits doctrine in case of violation of the fundamental principles of their respective Constitutions.<sup>40</sup>

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<sup>35</sup> See Alessandro Pizzorusso, *Fonti (sistema costituzionale delle)*, in 6 DIGESTO DISCIPLINE PUBBLICISTICHE 429 (1991).

<sup>36</sup> ALFREDO ROCCO, PRINCIPII DI DIRITTO COMMERCIALE: PARTE GENERALE 137 (1928).

<sup>37</sup> See, e.g., Comprehensive Economic and Trade Agreement, EU-CA, Oct. 28, 2016, O.J. (L 11) 60; Resolution 2014/2228 of the European Parliament of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 2017 O.J. (C 265) 5.

<sup>38</sup> Consolidated Version of the Treaty on the Functioning of the European Union, art. 3, Oct. 26, 2012, 2012 O.J. (C 326) 51 [hereinafter TFEU]. Considered as one of the most important sectors of the European Union, the common commercial policy has been characterized from the beginning as an exclusive competence of the Community, although its wide scope and evolution have raised issues of competence between States and Community.

<sup>39</sup> Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627, 627 (Aug. 2006) (stating that "[n]ational legal systems have adapted to the Lex Mercatoria, thereby enhancing the latter's autonomy, and the EU has begun to move in the same direction.").

<sup>40</sup> See Stelio Mangiameli, *Unchangeable Core Elements of National Constitutions and the Process of European Integration. For a Criticism of the Theory of the "Controlimiti" (Counter-limits/Schranken-Schranken)*, in 1 TEORIA DEL DIRITTO E DELLO STATO 68 (2010).

The use of the counter-limits doctrine to prevent the efficacy of European and international law is often considered a remote hypothesis, but some recent constitutional court judgments demonstrate that this control can always be activated. For example, we can mention for Germany: the *Lissabon Urteil* case of 2009,<sup>41</sup> and the 2010 *Mangold* case concerning EU law,<sup>42</sup> and for Italy: the 2014 case of the Italian Constitutional Court in which the Court prevented an international custom from entering into the domestic order through the above-mentioned constitutional provisions.<sup>43</sup>

The control claimed by these Constitutional Courts over European law and international customary law demonstrate that it is always the state that allows or rejects the efficacy of laws produced by external sources of law in domestic legal systems. The breadth of this control will of course depend on developments in international and European law.

Therefore, it can be stated that the inclusion of constitutional provisions that allow the opening of the domestic order does not imply a retreat of the state in the exercise of sovereign functions but, on the contrary, it presupposes them.<sup>44</sup>

The approach described considers the judge—namely the person who interprets national law and confirms the efficacy of the phenomena that produces transnational rules—as main guarantor of the rule of law and reflects the role that judges are increasingly playing in the contemporary system. By carrying out this function, the judge may also use many instruments provided by the *internationalization* or *Europeanization* of fundamental rights that arguably offset the loss of sovereignty that commonly follows globalization. This approach tends to bring the continental system closer to the common law system, but it is not sufficient in civil law systems, where remedies require an evaluation by representative bodies as they cannot be left solely in the hands of the judges. However, it is almost evident that in a globalized context, the role of states is still important but not sufficient. Supranational organizations are better suited for this role than states, which are no longer capable of regulating the global economy alone, as they did in the past.

## V. THE EUROPEAN UNION AND THE *LEX MERCATORIA* IN A GLOBAL CONTEXT

In the European context, the prevalence of EU law and EU competence in trade matters show that the EU has become the main forum for the dialogue between law and market. In order to re-establish a *public law dimension*, an

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<sup>41</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 30, 2009, 2 BvE 2/08, [http://www.bverfg.de/e/es20090630\\_2bve000208en.html](http://www.bverfg.de/e/es20090630_2bve000208en.html).

<sup>42</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 6, 2010, 2 BvR 2661/06, [http://www.bverfg.de/e/rs20100706\\_2bvr266106en.html](http://www.bverfg.de/e/rs20100706_2bvr266106en.html).

<sup>43</sup> Corte Const., 22 ottobre 2014, n. 238, G.U. 2014, I, 45, 1 (It.). See also, *Sentenza n. 238 anno 2014*, CONSULTA ONLINE, <http://www.giurcost.org/decisioni/2014/0238s-14.html> (last visited Apr. 2, 2018) (providing numerous comments on the judgment).

<sup>44</sup> Adele Anzon Demming, *Principio Democratico e Controllo di Costituzionalità sull'integrazione Europea nella "Sentenza Lissabon" del Tribunale Costituzionale Federale Tedesco*, 2009 GIURISPRUDENZA COSTITUZIONALE 5213, 5243–44.

equilibrium needs to be found at the EU level between the rule of law and free markets (thus far guaranteed by the state).

This conclusion is even more important if we consider the peculiarities of the EU market compared to the global market, as emerges from Article 3, paragraph 3 of the Treaty of the European Union (TEU):

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.<sup>45</sup>

On the one hand, the European legal system is progressively oriented to achieving a balance between economic freedoms and other rights and public interests;<sup>46</sup> on the other hand, it leaves Member States the opportunity to balance interests and to limit “economic freedoms in the name of public interests, social values and other fundamental rights.”<sup>47</sup>

It is meaningful that Article 3, paragraph 3 of the TEU mentions the social market economy which refers to a model of economic theory developed in Germany by the Freiburg school, according to that model the needs of the market “must be balanced and integrated with those of social policy,” although the context is that of a “strongly competitive” market economy.<sup>48</sup>

The Lisbon Treaty<sup>49</sup> has also strengthened the EU's role and competences in international trade and limited the action of Member States, which lose the power to undertake unilateral initiatives outside the common framework<sup>50</sup>—even if limits on the exercise of competence in the area of common commercial policy are confirmed, such as in the reference to the principle of allocation in Article 207, paragraph 6 of the Treaty on the Functioning of Europe Union (TFEU).<sup>51</sup>

<sup>45</sup> Consolidated Version of the Treaty of the European Union, art. 3, Oct. 26, 2012, 2012 O.J. (C. 326) 17 [hereinafter TEU].

<sup>46</sup> D'ALBERTI, *supra* note 2, at 110, 125, 145, 116, 133 (underlying the disproportion of the law of the global economy compared to the EU which allows for a balance of interests).

<sup>47</sup> *Id.* at 119 (showing some examples of limitations to competition rules).

<sup>48</sup> L. Fumagalli, *Art. 3 TUE*, in TRATTATI DELL'UNIONE EUROPEA 15, 18 (Antonio Tizzano ed., 2014). See Karl Peter Sommermann, *Article 3: The Objectives of the European Union*, in THE TREATY ON EUROPEAN UNION (TEU): A COMMENTARY 157, 172–73 (Herman-Josef Blanke & Stelio Mangiameli eds., 2013) (providing an analysis of the expression “social market economy”).

<sup>49</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

<sup>50</sup> See G. CONTALDI, *Art. 206 TFUE*, in TRATTATI DELL'UNIONE EUROPEA, *supra* note 48, at 1701, 1704; Alessandra Mignoli, *La Politica Commerciale Comune*, in L'ORDINAMENTO EUROPEO: LE POLITICHE DELL'UNIONE 133, 179 (Stelio Mangiameli ed., 2008).

<sup>51</sup> TFEU, *supra* note 38 art. 207, ¶ 6 (“The exercise of the competences conferred by this Article in the field of common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to the harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.”). See Andrea Caligiuri, *Art. 207 TFUE*, in TRATTATI DELL'UNIONE EUROPEA, *supra* note 48, at 1706, 1706 (discussing problems related to the division of competences).

The role of the EU in the globalized context also appears in Article 21, paragraph 2 of the TEU:

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to . . . encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade. . .<sup>52</sup>

For these reasons, the relationship between political (or institutional) sources of law and spontaneous sources of law must be found at the EU level. Also in the EU the efficacy of spontaneous sources of law cannot be derived irrespective of an explicit or implicit evaluation by the EU through sources of law.

The goal of creating a common market has prompted the need to harmonize, standardize, and unify the law of the various European countries, resulting in some advantages for member states' regulation of globalization effects. Even though this was not the original aim of the European order,<sup>53</sup> the creation of a single market has indirectly controlled and reduced spontaneous sources of law by market operators in a given geographic area.

An examination of the European legal system through some significant indicators—the marginal role of spontaneous, customary, sources of law by EU law; European Court of Justice case law about the *lex mercatoria*;<sup>54</sup> choice of law in European private international law;<sup>55</sup> the consideration of customary law by the European private law proposals of the Principles of European Contract Law and the Common European Sales Law<sup>56</sup>—shows the attitude of the EU legislator toward sources of *lex mercatoria*. This attitude, while open in some cases—as indicated by references to transnational customary sources of law seen

<sup>52</sup> TEU, *supra* note 45, art. 21, ¶ 2(e). See also Stefan Oeter, *Art. 21 TUE: The Principles and Objectives of the Union's External Action*, in THE TREATY ON EUROPEAN UNION (TEU): A COMMENTARY, *supra* note 48, at 833, 861.

<sup>53</sup> The original purpose of the European integration process was the peaceful cooperation between states after the Second World War. See *The History of the European Union*, European Union, [https://europa.eu/european-union/about-eu/history\\_en](https://europa.eu/european-union/about-eu/history_en) (last visited Apr. 23, 2018).

<sup>54</sup> See Case C-87/10, *Electrosteel Europe SA v. Edil Centro SpA*, 2011 E.C.R. I-04987 (recognizing the importance of 'uses' in international trade, the Court refers to the codified version of Incoterms for the interpretation of contractual legal relations governed by European law). This case demonstrates that EU law is permeable to the customs of international trade. However, it must be underlined that in the same decision, the Court implies that the "European Union legislature" can always exclude the application of commercial customs, or provide for their delimitation to specific issues.

<sup>55</sup> See *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, COM (2005) 650 final (Dec. 15, 2005) [hereinafter *Rome I*] (debating Regulation 593/2008 on the modification of "Article 3 – Freedom of choice," the Commission remarked that "[t]o further boost the impact of the parties' will, a key principle of the Convention, paragraph 2 authorises the parties to choose as the applicable law a non-State body of law. The form of words used would authorise the choice of the UNIDROIT principles, the *Principles of European Contract Law* or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognised by the international community.").

<sup>56</sup> THE COMM'N ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II. (Ole Lando, Hugh Beale eds., 1999); *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11, 2011).

in the judgment of the European Court of Justice<sup>57</sup>—is more restrictive in others, as illustrated by the reaffirmation of the prevalence of other sources of European law, as in the debate on the Rome I Regulation.<sup>58</sup>

These circumstances suggest that regulatory strategies are no longer the remit of states—which are unable to regulate or limit the phenomenon as they did in the past—but are produced by more complex entities that are now the main interlocutors of globalization.

For these reasons, it is possible to conclude that in a global market, a stronger EU could help guarantee the rule of law in the European context; the EU can help recover and defend the ‘public dimension’ in a globalized context<sup>59</sup> by ensuring that the balancing of interests involves not only judicial bodies, but also includes legislative bodies that represent these interests.

A guarantee-based approach of this type requires that the limits inherent in the EU order be solved: firstly, the limits inherent in the EU’s role in the global context, and its relationship with international actors, states, large corporations, and lobbies; secondly, the well-known limits related to the EU institutional structure and process: transparency of the EU decision-making process, democratic deficit and accountability.<sup>60</sup>

Two recent important documents show that the EU is achieving awareness in this direction. First, in a 2016 opinion by the European Court of Justice, the Court stated that the provisions of the free trade agreement with Singapore relating to non-direct foreign investment and those relating to dispute settlement between investors and States do not fall within the exclusive competence of the EU, so that the agreement could not be concluded by the EU alone without the participation of the Member States; it can, as it stands, only be concluded by the EU and the Member States jointly.<sup>61</sup>

In the second, in their “Reflection Paper on Harnessing Globalization,” the European Commission seems to discount the excessive use of dispute settlement through arbitration, noting that “[d]isputes should no longer be decided by arbitrators under the so-called Investor to State Dispute Settlement (ISDS). This is why the Commission has proposed a Multilateral Investment Court which

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<sup>57</sup> See, e.g., Case C-87/10, *Electrosteel Europe SA v. Edil Centro SpA*, 2011 E.C.R. I-04987

<sup>58</sup> *Rome I*, *supra* note 55.

<sup>59</sup> See BECK, *supra* note 1, at 157, 189 (explaining that globalization does not determine the end of politics but opens a new era for it. The author’s analysis focuses on the importance of international cooperation, stating that there is no national way-out from the trap of globalization. An institution such as the European Union could restore the priority of politics, a stronger social and economic capability for cooperating States, under democratic control. A stronger and democratic European Union could use its power as the world’s largest trading power to introduce effective reforms both internally and externally). See also ULRICH BECK, *POTERE E CONTROPOTERE NELL’ETÀ GLOBALE* 216, 323 (C. Sandrelli trans., 2010) (examining the State’s strategies between renationalisation and transnationalization, as well as the change in the concept of the form of state and politics).

<sup>60</sup> See Giuliano Amato, *Poteri e Sovranità nel Mondo Globale*, ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI,

<http://www.associazionedeicostituzionalisti.it/download/jb5kPXP4zinecEqMjPk9qB0umYRDctO2gD1LIUOeL-c/relazione-amato.pdf> (last visited Apr. 3, 2018) (discussing the different paths that can be followed in order to control the powers acting in the global arena, which may merge into a supranational governance framework organized according to democratic rules).

<sup>61</sup> Case C-2/15, *Request for an Opinion pursuant to Article 218(11) TFEU — Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore — Allocation of competences between the European Union and the Member States*, 2016 E.C.J. 992.

would create a fair and transparent mechanism and is being discussed with our partners.”<sup>62</sup>

The Commission underlines the important role of the EU on the global scene, and its intention to manage globalization, noting that “outside the EU, an effective European economic diplomacy will help write the global rulebook and ensure that European companies can prosper in fast-growing international markets,” and that the EU has “the opportunity to shape globalization in line with [their] own values and interests.”<sup>63</sup> These objectives require a revision of the European structure and strong cooperation between the EU and Member States. Recognizing the continued role of states in the *global market*, the Commission concludes that “harnessing globalization therefore starts at home” and that “EU institutions cannot do this alone: this must be a joint endeavor of the EU and its Member States.”<sup>64</sup>

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<sup>62</sup> See *Reflection Paper on Harnessing Globalisation* COM (2017) 240 final (May, 10, 2017) (footnotes omitted).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*