consulted for the treatment of particular problems. Complete answers should, however, not be expected. Too much depends on specific rules, for whose explanation additional treatises, text books and commentaries may have to be examined. Proposing a new paradigm for the understanding of economic law, the author hopes for the book to find readers also among economists, sociologists and political scientists. At least, he feels he owes to many of them a fair share of gratitude for the clarification of more issues than the footnotes could possibly attest to. Such broader perspective is offered by some of the theory to introduce each of the three parts of the book as well as each chapter, and to summarize their findings in Chapters IV, VIII and XII.

The breakdown of subject matter follows traditional lines. Part I, which addresses the institutional duality of economic law, is divided into state-made law in Chapter I, business-made law in Chapter II, and law made by international and supranational organizations in Chapter III. The overriding concern is with a reassessment of the state's role in the competition-of-systems game after the business investor has been accorded the novel role of selecting the winner. In Part II, the author discusses the mutual adjustment of the numerous substantive laws that may happen to overlap and cover one and the same case. Chapter V of Part II gives an overview of the various laws establishing, sustaining, or jeopardizing business markets. The scope for contract-making in transactions law is discussed in Chapter VI while Chapter VII deals with the acquisition and protection of property rights in cross-border cases. Part III elaborates on how to organize and legitimize enforcement procedures that reach beyond national borders. Its three chapters address in turn administrative, judicial and arbitral contributions to the enforcement process. The impact of globalizing markets on economic law, as the "Conclusion" will show, make multisourcing of legal rules a constant need. The various sources of national laws as well as international, supranational and transnational law (the latter understood as law made by social systems extending beyond national borders) have not merged to form a single legal system. The finding of economic law, however, regularly requires examining the other layers of legal rules and, more often than not, looking beyond national borders at foreign laws in order to apply them or to take them into account, or just for comparison. Such comprehensive approach is characterized by its transnationality.

PART I

Institutional Duality of Economic Law

Economic law is usually considered, and here considered, to encompass the legal rules designed to bring about and enforce efficiency oriented decision-making with regard to the production, trade and consumption of goods and services. Economic law therefore includes competition law as its center piece as well as a broad spectrum of legal rules ranging from contract law, product liability law, property law and corporation law to securities exchange law, expropriation law, environmental law, embargo law, etc., as well as the corresponding rules on dispute settlement. The subject matter of economic law overlaps with the one of commercial law. How are the two fields of law to be distinguished from each other?

Prima facie, economic law is likely to be associated with public law, and commercial law with private law. The difference indeed is one of perspective. Economic law is economic system oriented while commercial law is business operations oriented. The two functions are interdependent.[18] Freedom of contract largely remains a dead letter if there is no market but just a monopolist who dictates the terms of the contracts. Economic law therefore has to establish a system with players to do the trading and property rights to be traded. But trading would not work if commercial law did not provide the rules on its operation. The basic principles of contract law have a systems function, which allows attributing that particular part of commercial law also to economic law. In legal practice, the two aspects are inextricably linked as well when, for example, the equilibrium of a cross-border sales contract is affected by a sudden change of the value of the currency the sales price was quoted in.

This study will, as its title indicates, focus on economic law with the proviso that the term economic law is to cover those parts of commercial law that are of interest for the purposes of this study. Traditional usages of the term commercial, however, will be retained, e.g. in the context of commercial arbitration. But analysis will not stop at the public-private

18 See e.g. Rittner, Über das Verhältnis von Vertrag und Wettbewerb, 188 AcP 101 (1988).

borderline. Under that wide definition, economic law is understood to serve two purposes at one time. Each purpose corresponds to a different concept of justice, and the two concepts of justice correspond to two principally different types of rules. The duality of economic law needs being further explained.

Economic transactions take place on the market. People meet for the purpose of trading goods and services. They inspect and compare what is on offer, assess their wants and strike innumerable deals with each side looking after its own interests. Such decentralized making of bilateral decisions has the cumulative effect of bringing about an efficient allocation of limited resources. The basic idea was formulated by Adam *Smith* more than two hundred years ago:[19]

> By preferring the support of domestic to that of foreign industry, he (i.e. every individual) intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.

For once, public welfare is promised to result not from taxing morality but from a sound sense of selfishness unless, of course, pursued "in grossly oppressive ways."[20] Individual decision-makers are to decide by themselves with whom to contract and on what terms. Guided by the invisible hand of the market, they are bound to bring about efficient factor allocation to the benefit of the public at large.

Human society strives for more than just efficiency, and hence one cannot rely on the invisible hand of the market only.[21] Adam *Smith* already said so in his preceding book of 1759 on the "Theory of Moral Sentiments."[22] The insight is today reflected in a second function of law

19 A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, 5th ed. 1789, quoted according to the Modern Library Edition, p. 423 (1965).

20 For the qualification see E. Rothschild, Economic Sentiments, Adam Smith, Condorcet, and the Enlightenment, at p. 156 (2001).

21 A. Sen, On Ethics and Economics (1987).

22 A. Smith, The Theory of Moral Sentiments (1759).

inextricably linked with the first one. Roscoe *Pound* offered the following formulation:[23]

> For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence - in short, a continually more efficacious social engineering.

Social engineering calls for the all too visible hand of government, whose continuous presence cannot be put in doubt even by those who do not subscribe to Pound's sense of progressism. The means of social engineering include collecting revenue by taxation, granting social benefits and subsidies as well as restricting the use of property for public purposes and supervising business conduct.

The invisible hand and social engineering paradigms reflect two principally different types of justice. Their original explanation is owed to *Aristotle*. It is worth recalling:[24]

> Of particular justice and that which is just in the corresponding sense, one kind is that which is manifested in distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution (for in these it is possible for one man to have a share either unequal or equal to that of another), and one is that which plays a rectifying part in transactions between man and man.

According to *Aristotle*, justice in relations of exchange (the second type mentioned in the passage quoted above) reflects the straightforward logic of arithmetic proportionality.[25] Distributive justice (the first type mentioned) allows for a transfer of wealth from one person to another pursuant to the vaguer dimensions of geometric proportionality. It leaves

23 R. Pound, An Introduction to the Philosophy of Law, quoted according to the Yale paperbound edition of 1939, at 47 (1922).

24 Nicomachean Ethics, 9 The Works of Aristotle, translated by W. Ross (1963), at 1130 b.

25 Ibid., at 1131a et seq.

room for divergent appraisal as was later expressed more succinctly by *Cicero*'s tenet of "*suum cuique*."[26]

Private contract-making assigns the determination of what constitutes the proper *quid pro quo* to the private parties themselves. It is for private contract law to correct any imbalances as may occur.[27] The eternal verities of the private law of the invisible hand ever gauging private-to-private interests are supplemented by the public law of social engineering often involving an element of – constitutionally bounded – political decisionism. Accordingly, public law has a vertical government-to-private structure and thus differs from the horizontal structure of largely contract-based private law. To be sure, the term "public law" may not everywhere have as much significance as it has, for instance, in Germany with regard to judicial procedure, liability in tort, etc. In the one or other legal system, it may not be known at all.[28] But some set of legal rules, whatever its designation, is bound to deal with the asymmetrical relations between government and individuals in every part of the world.[29]

In economic law, the two concepts of justice and the corresponding rules of private and public law sometimes switch roles.[30] To be sure, social legislation seeks to provide for distributive justice. In addition, however, rules of contract law that protect the weaker party contain elements of social policy as well,[31] and product liability rules, in the United States tellingly giving rise to claims for punitive damages, implement a policy of deterrence to achieve a high degree of product safety in the interest of the general public.[32] Under a principle of proportionality,[33] social-engineering laws limit government intervention to the minimum necessary to reach the respective public policy goals, thus

26 M. Cicero, 1 De legibus 6, 19 (1994).

27 See e.g. Kötz, Freiheit und Zwang im Vertragsrecht, in: Festschrift für E.-J. Mestmäcker, p. 1037 (1996).

28 Szladits and Weir, in: 2 International Encyclopedia of Comparative Law, Chapter 2: Structure and the Divisions of the Law, at 2-26 and 2-115 (1974).

29 Baade, Operation of Public Law, in: 3 International Encyclopedia of Comparative Law 12-1, at 12-27 (1991).

30 Meessen, Zu den Grundlagen des internationalen Wirtschaftsrechts, 110 AöR 398, 402/3 (1985); cf. also C. Canaris, Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht (1997); Rittner, Über die privatrechtlichen Grundlagen des Kartellrechts, 160 ZHR 180 (1996); W. Hoffmann-Riem & E. Schmidt-Assmann (eds.), Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen (1996).

31 Kronman, Contract Law and Distributive Justice, 81 Yale L. J. 472 (1980).

32 Polinsky & Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 870 (1998).

33 P. Lerche, Übermaß und Verfassungsrecht (1961).

preserving the justice-of-exchange function of private property rights. The search for a formula reconciling private freedom and equality under public law is still on. It continues to challenge legal philosophers as witnessed by John *Rawls'* "Political Liberalism" sequence to his concept of justice as fairness.[34] For the time being, lawyers confronted with issues of economic law will therefore have to live with a residual tension between the two concepts. They should just be aware of the situation.

Social engineering law clearly is a product of the political system. Governments translate multiple aspirations of their constituents into binding decisions. In a democracy, the decisions are taken by the majority, which naturally favors the greater number of low income people at the expense of the few in the top bracket. Egalitarian ideals therefore, though never fully realized, continue to be targeted by spreading redistributive effects all over state-made economic law. On a horizontal level, individuals rarely agree on contracts extending favors to others. Only vertically structured rules can impose substantial sacrifices. To make them accepted, individuals need to be united by a sense of political identity of those who, according to the above quote from *Aristotle*, "have a share in the constitution." Only as citizens of a particular state, are individuals prepared to tolerate that measure of free-riding that social-engineering laws cannot preclude because of their general applicability.

Invisible-hand law, by contrast, can be considered to be at least indirectly made by transnational society, that is, society not commensurate with a particular state but extending across borders. To be sure, private contract law is also provided by nation states. States either adopt rules of statutory law, such as a comprehensive civil code, or assign the finding of the law, which always involves a creative element, to a judicial hierarchy operating under the *stare decisis* rule of common law countries. Yet the blueprint for the framework of contract law originates from, and is informed and continually tested by, private persons negotiating, concluding and consummating private contracts, both within and across national frontiers.

Competition law occupies an intermediate position. Its task is to make the invisible hand work. The beneficial effects of private transactions

34 J. Rawls, Political Liberalism (1993); id., A Theory of Justice (1971).

under the invisible hand theorem only materialize if government adopts and implements laws that establish and sustain the viability of the market.[35] The mere establishment of an "economic order"[36] may even have to be supplemented by "affirmative action,"[37] which may accompany privatization and deregulation by a host of rules to monitor what henceforth is private deregulated conduct. Affirmative action laws often have a price-regulatory component with redistributive effect absent in "ordinary" competition law. In addition, the invisible hand of the market, though principally in need of the organizing hand of government, can obtain supplementary support by private self-regulation as, was pointed out by Roy *Goode*:[38]

> Of course, what I would call private law self-regulation, in the shape of rules governing the operational conduct of the market, will continue to play a useful role in reinforcing public law regulation.

Justice-of-exchange rules, distributive-justice rules, and mixed rules, if related to economic decision-making, all form part of economic law. The rules should be recognized in their respective properties and at the same time be understood in their economic system oriented function. To emphasize either the one or the other aspect would produce results at odds with the institutional duality of economic law. Thus it would seem disingenuous to state the economic law in globalizing markets solely by reference to a model of private-to-private relations of commercial law and to portray social-engineering policies as always illegitimately frustrating the process of the invisible hand. It would be equally inappropriate to model cross-border business only as a matter of government regulation of the economy and view private trading as obstructing for personal profit the pursuit of public welfare. Only a combination of the two models allows

35 For a comparative survey see F. Hausmann, Staatliche Kartellrechtsdurchsetzung im internationalen Vergleich (1998).

36 For an account of the concept see R. Sally, Classical Liberalism and International Economic Order, Studies in Theory and Intellectual History, at p. 105 et seq. (1998); D. Gerber, Law and Competition in Twentieth Century Europe, Protecting Prometheus (1998).

37 For the context of competition law see Meessen, The Need for Affirmative Action, Introduction to a Symposion on "The Competition Law of Deregulation," 23 Fordham Int'l L. J. S 1 (2000); for the constitutional background see e.g. R. Dworkin, Sovereign Virtue, The Theory and Practice of Equality, at p. 386 et seq. (2000).

38 R. Goode, Commercial Law in the Next Millennium, at p. 49 (1998).

for a realistic understanding of economic law as the discussion of substantive law in Part II will further illustrate.

Economic law in globalizing markets often means engaging in transnational or cross-border commerce. In that event, business has to comply with the regulations of two and more states. Goods and services are subject to numerous requirements of registration, public licensing and government monitoring. Environmental laws, tax laws and securities laws demand constant attention. In sum, few transnational trade and investment transactions are devoid of traces of social engineering. At the same time, however, market transactions seek to by-pass the more burdensome schemes of state regulation. Governments therefore wisely tailor policy implementation so as to utilize, rather than suppress, the trend of market developments e.g. by making pollution rights tradable assets.

With regard to the making of economic law, the discussion of state-made rules in Chapter I therefore has to be supplemented in Chapter II by a survey of the contributions of business, and society at large, to the making of economic law. Trying to cope with economic activities that easily and regularly transgress national frontiers, governments increasingly entrust rule-making to international and supranational organizations whose contribution will be assessed in Chapter III. In Chapter IV, an attempt will be made to summarize the conclusions of this part and to evaluate their contribution to the maintenance of personal freedom.