

1995

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Recommended Citation

Paul, Joel R. "The New Movements in International Economic Law." American University International Law Review 10, no. 2 (1995): 607-617.

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THE NEW MOVEMENTS IN INTERNATIONAL ECONOMIC LAW

Joel R. Paul*

One of the insights of the science of complex systems¹ is that apparently random events—the formation of clouds, the shape of crystals, the clustering of automobiles on a freeway—can be understood as conforming to certain patterns.² These patterns are sensitive to certain initial conditions. For example, a release of carbon dioxide into the atmosphere may affect the global environment a century later. Therefore, the patterns are easily disturbed and do not repeat themselves. What once appeared as unpredictable as the movement of a bubble in a glass of champagne can be described by non-linear equations.³ Theory has distilled order from chaos.

Scientists observing the patterns generated by non-linear equations in certain instances, such as the motion of a satellite in space, speculate that some unknown natural principles “attract” complex systems into relatively stable states.⁴ These “strange attractors” may govern the inci-

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1. Complex systems include both chaos and simple elements. Chaos is any sequence of events that is not repetitive or predictable, but which may nevertheless conform to general behavioral patterns. Simple elements are predictable. An example of a complex system is the movement of leaves on a river. Where the water is tranquil or slow moving, the trajectory of the leaves is predictable or “simple.” Where the river flows through rapids, the movement is unpredictable or “chaotic.” ROGER LEWIN, *COMPLEXITY: LIFE AT THE EDGE OF CHAOS* 14-16 (1983) (introducing the inclusion of all disciplines in complex adaptive systems) [hereinafter *COMPLEXITY*]. See generally ANASTASIOS A. TSONIS, *CHAOS: FROM THEORY TO APPLICATION* (1992).

2. *COMPLEXITY*, *supra* note 1, at 15 (noting that “complex adaptive systems are pattern seekers”).

3. A non-linear equation is an equation with more than one variable that generates an unpredictable series of points on a graph.

4. JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* 134 (1987).

dence of some sets of apparently random events. In this view, there is a comforting underpinning of order that regulates what merely masquerades as confusion.

Postmodern social theory suggests an alternative view: that *confusion* may be the underpinning that masquerades as *order*. In this skeptical view, it may be that the appearance of order is a function of how we observe these events.⁵ Indeed, we may find that there is some quality inherent in our capacity for observation that causes us to "order" chaos.⁶ Understanding multiple points of observation then would enable us to order chaos differently.⁷

Imagine how a young child observes the sporadic ebb and flow of people and freight entering and leaving the terminal of an international airport. The economist observing the same scene could describe the inflow and outflow of passengers in terms of the balance of services or the unloading of air cargo as reflecting the rise and fall of exchange rates. The trade lawyer would view increased air traffic as a manifestation of the removal of the lifting of tariff and non-tariff barriers to

5. For example, our ability to find a pattern to which weather may conform is a function both of the sophistication of our computers and of the variables (temperature, wind, barometric pressure, humidity, etc.) that we select to input.

6. One explanation for this quality may be the nature of human cognition. According to theories of cognition, when an individual is flooded with conflicting information, the individual will seek to impose an internal order on this information in order to be able to adapt to it. The internally perceived order is not necessarily consistent with the conflicting reality. See DANIEL KATZ AND ROBERT L. KAHN, *THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS* (1966). One familiar example of that phenomenon may be cognitive dissonance. The theory of cognitive dissonance suggests that an individual will respond negatively to conflicting information in part by attempting to avoid information that is inconsistent with the individual's own perception of order. See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957); PETER H. LINDSAY AND DONALD A. NORMAN, *HUMAN INFORMATION PROCESSING: AN INTRODUCTION TO PSYCHOLOGY* (1972).

7. My point here is consistent with the need to emphasize the relational or tentative nature of such assumptions. See MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 10-11 (1992) (noting that postmodern and feminist theory share a concern with the multiplicity of experience and a concomitant rejection of an essentialist perspective on human nature). While recognizing the need to generalize experience or categorize groups, postmodern and feminist scholars have attempted to de-stabilize our assumptions about categories like gender, race and sexuality. See, e.g., Angela Harris, *Race & Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 586 (1990) (noting the long apparent need for "multiple consciousness in feminist movement"); MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 1, 11 (1990) (discussing how law "could and does treat differences and boundaries between people.").

trade. The economist's observation overlooks the state's role in constructing the market for air travel and regulating imports and exports of goods and services. The lawyer's perspective does not capture the cultural disorientation and anxiety that characterizes international air travel for most of us,⁸ as for the uninitiated child. We order social phenomenon through our interpretation, and there is no single "true" modality of interpretation that can completely reproduce what we experience.

The recent outpouring of scholarship known as the "new movements" in international law has included a broad and varied effort to reconceptualize international economic regulation on multiple fronts. There is no single ideology or methodology that unifies these movements. Rather, the new movements are characterized by pluralistic politics and eclectic approaches. The challenge in introducing this impressive collection of essays reconceiving international economic law⁹ is to identify some common themes while respecting the individuality of these authors.

David Kennedy has described a "new stream of international legal scholarship."¹⁰ This movement represents a new generation of scholars coming of age in the last decade shaped by the collapse of bipolar politics, the emergence of postcolonialism, the resurgence of market ideology and the challenges posed to state regulation by accelerating transborder flows of goods, services, capital and culture. As politics, economics and technology transform international society, we would expect accompanying transformations in our legal theory and scholarship describing the world economy. The new movement is a reaction to the traditional canons of international economic law influenced by the historical experiences of this new generation of legal scholars.

The traditions of international economic law trace back to the law merchant and the organization of a set of principles for resolving juris-

8. Once observing people rushing to and from the airport, David Kennedy remarked on the extraordinary coincidence that so many strangers had woken up in the wrong city.

9. In its broadest sense, international economic law includes all national and international legal norms that affect transnational movements of goods, services, capital and labor. The field may include subjects like international business transactions, private international law, international trade law, immigration law, European Communities law, comparative law, transnational litigation, international arbitration procedure, and aspects of banking, competition, employment, environmental, intellectual property, securities, tax, and telecommunications laws that regulate transnational transactions.

10. David Kennedy, *A New Stream of International Law Scholarship*, 7 *WIS. INT'L L. J.* 1 (1988).

dictional conflicts. In Anglo-American law, Justice Joseph Story published the first significant treatise on the subject of conflicts in 1834.¹¹ Story's *Commentaries* represented a bold innovation drawing on voluminous continental scholarship. Justice Story coined the term, "private international law," to describe the principles governing conflicts which he derived from the law of nations. By relying on international law as the foundation for conflicts rules, Story sought to universalize its effects. His most enduring contribution was the principle of international comity which he borrowed from the Dutch jurists of the seventeenth century.¹² For Story, comity was the key to resolving the conflict between free and slave states.¹³ It left to the discretion of the courts of free states whether to enforce the property rights of slaveholders. Several of the key cases in the field of conflicts arose in connection with this question.¹⁴ The courts' discomfort in denying property rights on the one hand or justifying the brutality of slavery on the other, shaped the development of conflicts rules.

Story conceived private international law as a subject of international law. This unity of public and private international law laid the foundation for a claim of universality. The unity of private and public international law, however, was short-lived. In the latter part of the nineteenth century, the rise of industry was facilitated by the separation of public and private law.¹⁵ The isolation of private international law meant that any pretense of universality was lost.¹⁶ Private international law was

11. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* (1834).

12. These included Paul and John Voet, Christian Rodenburg and Ulrich Huber. See generally Ernest Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375 (1919); Hessel Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953).

13. R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY* 372 (1985).

14. See, e.g., *Somerset v. Stewart*, 98 Eng. Rep. 499 (1772) (holding that an American slaveholder had no right to enforce his property interest against the public policy of England); *The Antelope*, 23 U.S. 66 (1825) (holding that a U.S. court would enforce a Spanish slave trader's property interest, even though the law of the United States prohibited slave trade); *La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (J. Story., holding that the slave trade violated the law of nations).

15. See Morton Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (noting how the public/private distinction was brought into the core of legal discussion by the evolution of the market as a central legitimating institution).

16. See Joel R. Paul, *The Isolation of Private International Law*, 7 WISC. INT'L L.J. 149, 161-163 (1988) [hereinafter *Isolation of Private International Law*] (discussing the fact that the increasing role of private international law contributed to its iso-

subsumed under municipal law and became known in the United States as conflicts of law. Story's influence on the continent continued for a time through the teachings of Savigny,¹⁷ but efforts at universalizing private international law repeatedly failed.¹⁸ Since at least the beginning of this century, U.S. courts sought to accommodate foreign sovereigns out of comity often by limiting U.S. jurisdiction to prescribe or adjudicate, even where significant public policies were implicated.¹⁹ Comity allowed courts deciding whether to honor a foreign choice of law or forum selection provision to shift from the rhetoric of contract—protecting the expectations of private parties to a transaction—to the rhetoric of sovereignty—respecting the foreign law and foreign courts. This strategic maneuver also had the effect of legitimating efforts by private parties to opt out of domestic economic regulation. The globalization of production

lation from public international law).

17. See Gerhard Kegel, *Story and Savigny*, 37 AM J. COMP. L. 39 (1989) (discussing the works of Story and Savigny and their impact on private international law); FRIEDRICH VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 43044 (W. Guthrie trans. 1869, 2d rev. ed. 1980).

18. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L. REV. 1, 25-26 (1991) [hereinafter *Comity*] (addressing the separation of public and private international law in the United States at the turn of the century).

19. *Hilton v. Guyot*, 159 U.S. 113 (1895), (holding that "Comity in the legal sense, is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other."); see *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (holding that complaints premised on foreign conduct "alleges no case under the [Sherman Act]"); cf. *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust and Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976) (noting United States courts have broken with the "settled law" of comity and found extraterritorial jurisdiction under the Sherman Act, but there is no consensus on how far to extend it.); see also *Mitsubishi Motors Corp. v. Soler-Chrysler*, 473 U.S. 614 (1985) (concluding that international comity required the court to enforce an international contractual agreement, regarding arbitration, even though the court would be likely to not do so in a domestic context); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (declining jurisdiction and accepting the party's forum-selection clause in the interest of continued development of international commerce despite the public policy against respecting these contract provisions); *Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 9 (1971) (rejecting the "parochial concept that all disputes must be resolved under our laws and in our courts" and finding the party's forum-selection clause controlling); *Bourselan v. Aramco*, 498 U.S. 808 (1990) (holding that the federal law barring employment discrimination is presumptively territorial and does not prohibit a U.S. company from discriminating against a U.S. national in its foreign office). Cf. *Hartford Fire Insurance Co. v. CA.*, 113 S.Ct. 2891 (1993) (holding that international comity does not preclude application of the Sherman Act to foreign reinsurance companies' conduct outside U.S. territory).

and the capital markets was facilitated by the rhetoric of comity, which often masked the underlying political conflicts between the public policies of the forum state and the foreign state.²⁰

Since the postwar period began, there has been steady progress toward reconceptualization of the field. Philip Jessup sought to reimagine international law as involving more than the relationships of one state or nation with another. He envisioned a "transnational law" that embodied "all law which regulates actions or events that transcend national frontiers."²¹ Legal scholars like Milton Katz, Kingman Brewster,²² Detlev Vagts, Henry Steiner,²³ and John Jackson²⁴ sought to redefine the field by integrating public and private, municipal and international law in their casebooks, which became highly influential in the field. Professor Jackson's work focused on law, regulation and policy governing imports and exports at the international and national levels rather than interests of private parties to the export transaction. While these postwar scholars gave greater emphasis to the connections between transnational transactions and public policy, the public/private dichotomy persisted in international law to a greater extent than it exists today in municipal law.²⁵

The boundaries of public and private international law are shifting in ways that legal theory and doctrine have not yet fully absorbed. The expanding role of multinational companies, the move toward the global

20. See *Comity* *supra* note 18, at 70-77 (addressing the implications of comity and suggesting alternative legal approaches for managing private-international-law disputes).

21. P. JESSUP, *TRANSNATIONAL LAW* 2 (1956) (defining transnational law).

22. M. KATZ & K. BREWSTER, *THE LAW OF INTERNATIONAL TRANSACTIONS AND RELATIONS* (1960).

23. D. VAGTS & H. STEINER, *TRANSNATIONAL LEGAL PROBLEMS* xi (1968) (introducing the theme of the book and noting its distinction for that written by Katz and Brewster).

24. J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (1977).

25. Feminist theorists have shown that where the terms "public" and "private" are invoked in domestic law, particularly family law, they are used to legitimate the exercise of "private" power and to limit the intervention of "public" authority into the "private" sphere. See, e.g., Frances Olsen, *Constitutional Law: Feminist Critiques of the Public? Private Distinction*, 20 CONST. COMMENT. 319 (1993) (discussing the characterization of power as "private"). Privileging the exercise of private rights to contract over public regulation is also a frequent characteristic of the operation of private international law. See generally *Comity*, *supra* note 18, at 54-77 (discussing the function of comity in U.S. courts); *Isolation of Private International Law*, *supra* note 16, at 149-155 (introducing the separation of public and private international law).

factory, the increased capacity of container vessels to move large volumes of goods more rapidly, improved telecommunications facilitating almost instantaneous capital movements that defy national controls and the lessening of tariff and non-tariff barriers to trade negotiated under the General Agreements on Tariffs and Trade and regional associations like the European Community and the North American Free Trade Agreement, all gave greater importance to the economic activities of private entities and of parastatal enterprises.

The new movements' responses to the traditional canons of international economic law encompass a number of jurisdictional movements that have dominated U.S. legal education in the last two decades. These would include at a minimum, critical legal studies, feminist theory, critical race theory, international relations theory, law and economics, law and society, and public choice theory. The differences among these jurisprudential strands are obvious and have been discussed at length elsewhere. Broadly speaking, most theorists in public choice theory, game or regime theory, and law and economics attempt to posit a value-neutral system for understanding and applying legal norms. Conversely, most theorists in critical legal studies, feminism, and law and society would avoid making any claims of a value-neutral methodology. Indeed, implicitly these theories are premised on the idea that legal analysis cannot escape the trap of subjectivity. Whereas the first set of theories assumes that objectivity and neutrality are necessary, desirable, and realizable features of legal analysis, the alternative theories reject both the desirability and the possibility of objectivity or neutrality. Yet, these theories share a common interest in introducing interdisciplinary approaches to legal analysis and represent a generational shift away from descriptive doctrinal analysis and law reform toward social theory.

Thus, internationalists have been compelled by changes in the political structure of the postwar period to respond to the traditional canons of international law, while the foundations of our jurisprudence shift and crack. At the same historical moment that the globalization of production of goods and services has heightened interest in international economic law, legal scholars are rethinking the fundamental categories and doctrines. Sovereignty, the preoccupation of classical public international law, has meant having the authority to control actors and activities within the sovereign's own territory. Yet today, sovereigns cannot control what their national actors do outside their territory, nor how those activ-

ities directly affect their territory. From this perspective, the reach of the state has contracted before the market.²⁶

It is particularly ironic that in the same historical moment that millions have achieved national self-determination in Eastern Europe and the third world, they are finding that they cannot control economic conditions at home without the participation of foreign creditors, investors and markets. "Self-determination" is being redefined to mean the capacity to determine something *other* than one's own economic destiny. What is left to the sovereign is the authority to police the social values of its citizens—the reproductive rights of women, the place of racial, ethnic, religious, and sexual minorities, the education of children and the role of churches. The rise of fundamentalism in both the West and the East—what some have called a "culture war" in the United States—can be seen as an admission that there is very little else left for the sovereign to manage other than the consciences of its nationals.

This symposium is intended to open up the discourse about the nature and the relationship of the sovereign and the market. The papers collected in this volume resulted from a workshop organized by the International Economic Law Group of the American Society of International Law on interdisciplinary approaches to international economic law. They represent a sampling of the rich new literature in the field. They are organized around four modalities for interpreting international economic law: historiography, social theory, critical theory, and economic and game theory. These different approaches to understanding the regulation of the global market form a conversation about the nature of the enterprise. Should we be discussing the huge shifts in capital that occur in electronic pulses, or should we focus on the redundant workers? Is international economic law about the state, or is it about non-state actors? Are we moving toward a globalization of legal regimes, or is international law being absorbed into the municipal law? Are international economic forces intruding into state regulation, forcing state regulators to compete for scarce capital in a race to the bottom?

The papers by Professors Nathaniel Berman and David Kennedy trace the historical development of international economic institutions in this century. Berman describes the evolution of Keynes' interpretation of nationalism as initially incompatible with economic development and

26. Joel R. Paul, *Free Trade, International Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. (1995). I have argued there that the market and the state are interrelated in complex ways that calls into question the assumption of an autonomous market.

later as a cultural agent for reconstruction. Berman uses John Maynard Keynes' criticism of the Treaty of Versailles and its aftermath as a paradigm for understanding the relationship of modern nationalism and international economics. Berman characterizes this as a shift from the modernist view of nationalism and internationalism in conflict, to a postmodern view that transnational forces may be seen as allies of local or national interests.

Professor Kennedy picks up the historical development of economic institutions after the collapse of the League and the Second World War, showing the shift from a style of idealistic thinking about public international law and institutions which he characterizes as "metropolitan," to the more pragmatic private-oriented thinking he calls "cosmopolitan." The emblematic figure in this shift is Professor John Jackson, whose prolific writings have had a long and enduring influence in the development of international economic law and institutions. Employing a structural analysis of the text of Jackson's treatise, Kennedy sees Jackson as a paradoxical figure whose modest descriptive approach to international economic law often disguised his own efforts at pushing the envelope of what could be done through cooperative efforts. Kennedy reveals a persistent "cosmopolitan" idealism in Jackson's realist rhetoric.

Professor Jackson's foreword typifies that attitude, describing international economic institutions as the "boilerroom" of global politics. Jackson's ambitions for the development of international economic law become more apparent when he describes the allocation of power among sovereign states under the GATT and the WTO, as forming an international constitution. Jackson's claim of a constitutionalism is itself a significant step in the development of international economic institutions and a recognition of the underlying challenge of international governance and accountability.

The second cluster of papers apply public choice and international relations theories to international economic law and institutions.

Professor Anne Marie Slaughter describes the three principle schools of international relations theory—realism, institutionalism, and liberalism—and argues that regardless of political views, international relations theory can be an effective analytical tool for understanding the international economic system. Slaughter applies the liberal paradigm to the development of the doctrine of extraterritoriality. The shift that Slaughter identifies, from power relations to interest balancing, has the consequence of reversing the presumption that all law is territorial. Her normative analysis leads to a presumption of extraterritoriality that favors national regulatory policies. The liberal paradigm describes a network of

liberal societies with criss-crossing interests, engaged in a web of economic relationships that determine the legal relations of private and public parties.

Professor Paul Stephan, III, explains how economic theory describing the behavior of private individuals may be used to understand the outcomes of legislative decisions. Professor Stephan shows how monopolistic rent-seeking behavior by lawmakers may lead to inefficiency and distort democratic representation. The ability of discrete interest groups to control the public agenda, according to Stephan, explains the systematic under-investment in public goods. Stephan applies public choice theory to shed new light on the exercise of executive power in international trade relations, the imposition of currency controls, the continuing tension between protecting the environment and lowering trade barriers, and the preservation of national culture from foreign influence. As seen by Stephan, both protectionism and free trade may be the consequences of rent-seeking behavior.

Professors Saskia Sassen and Rosemary Coombe in the third cluster of papers, employ social theory to understand global restructuring of capital. Sassen examines how the globalization of production both disperses economic activity beyond the reach of national regulatory authorities and also results in an agglomeration of management in global cities. She is concerned with filling the void of accountability and governance left by the collapse of the Bretton Woods system. Her intellectual strategy for realizing this project is to recover "place"; that is, to identify the specific communities where globalization is occurring as points at which to exercise regulatory control.

Like Professor Sassen, Professor Coombe is engaged in the project of recovering place. Employing her training as an anthropologist, Coombe focuses attention on a specific group of informal market actors by viewing through their eyes the ironies of commodifying symbolic goods like copyrights. Paradoxically, Coombe shows that globalization can only be understood locally in terms of specific communities and its effect on their cultural and economic life.

Finally, Professors Anita Allen and Shelley Wright, using quite different poststructural critiques, examine the relationship of individuals to the market. Allen deconstructs the text of Shakespeare's "Merchant of Venice," to examine how culture contours economic relations. Allen describes how the market demands that we set aside our cultural antagonisms and prejudices to do business with the stranger. Allen illustrates from the text that law operates contingently in the market, reflecting the

prejudices of those who wield it, while justice itself is a measure of market values.

Through a feminist lens, Professor Wright critiques the disparate impact of international commerce on women. Wright challenges the appearance of formal equality in the market by exposing the realities of substantive inequality that systematically operate against the claims of women for property. Wright responds to the arguments of economic efficiency that it is irrational not to invest in the well-being and education of a work force. Wright views these market realities as a matter of priorities, which the international system could reorder, if it had the will to do so.

Drawing generalizations about this rich and complex collection of papers is difficult. Most of these authors are self-consciously employing interdisciplinary studies, while rejecting traditional legal categories of public/private or national/international. Rather than focusing on the traditional subjects, like multinational enterprises, these writers are calling attention to the externalities of globalization—the communities and individuals at the peripheries whose experiences are not usually reflected in the traditional canons of international economic law. Yet, the papers in this symposium do not present a uniform ideology or a manifesto or even an agenda. Rather, they represent a first effort to challenge the traditional categories and doctrines of international economic law and to explore the subject with fresh insights. The science of complexity may call into question our ideas about order and chaos and may lead social theorists to the view that our ideas about order are socially constructed and vary with perspective. Similarly, the heterogeneity of the new movements in international law may lead us to the conclusion that there is no single correct modality for viewing economic regulation. •