INTRODUCTIONS

SEMANTIC DISTINCTIONS IN AN AGE OF LEGAL CONVERGENCE

RONALD A. BRAND*

While it may not be apparent to the general public, the change in a journal’s name from “International Business Law” to “International Economic Law” is significant to those who deal in these areas on a daily basis. The difference is more than simply semantic. While both terms cover legal relationships created when transactions cross borders, the second is much greater in scope and provides the opportunity to deal with one of the most important issues of contemporary international law. That issue is the convergence of law applicable to private party transactions with law traditionally reserved to sovereign relationships.

Members of the International Economic Law Interest Group of the American Society of International Law have had numerous discussions about the distinctions between “international business transactions,” “international trade law,” and “international economic law.” Law professors have sought to define what should be taught in a course with any of these titles. At the same time, ephemeral events often have shaped definitions for us. For the same reasons which led scholars to adopt the term “International Economic Law” several years ago to describe the growing body of law affecting transborder transactions (whether private or sovereign),¹ it is appropriate for a journal devoted to a broad view to adopt this title if it aspires to catalog and influence the development of international law applicable to economic relation-

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* Professor of Law, University of Pittsburgh.
1 See generally BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW (Stephen Zamora & Ronald A. Brand, eds. 1990).
ships.

International economic law encompasses more than the law applicable to private business in the international realm. It includes rules governing relationships among private parties, as evidenced by the important conventions developed in organizations of sovereigns such as the United Nations Commission on International Trade Law ("UNCITRAL"),\(^2\) the Hague Conference on Private International Law;\(^3\) and the Institute for the Unification of Private International Law ("UNIDROIT"),\(^4\) and organizations of merchants such as the International Chamber of Commerce ("ICC").\(^5\) It includes rules governing relationships among sovereigns.\(^6\) And it includes rules governing relationships across these two traditionally separate categories.\(^7\) Thus, it represents much of the future of international law generally.\(^8\)


\(^5\) Few sets of international commercial rules are as widely used as the ICC INCOTERMS, ICC PUB. NO. 460 (1990) and the UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, ICC PUB. NO. 500 (1993).

\(^6\) The most notable examples in international economic law are, of course, the Agreements contained in the Final Act Embodying the Uruguay Round of Multilateral Trade Negotiations, including the Agreement Establishing the World Trade Organization and those constituting "GATT 1994," all of which were signed at Marrakesh on April 15, 1994, reprinted in 33 I.L.M. 1125.

\(^7\) Examples of agreements applicable to arrangements between private parties and sovereigns are the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), reprinted in 24 I.L.M. 1598 (1985), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Aug. 27, 1965, 17 U.S.T. 1270.

\(^8\) One need only review the table of contents of any "public" international law casebook to determine that much of what is covered in fact deals with economic relationships. Issues such as treatment of alien investors, sovereign immunity (particularly the "commercial activity" exception), the U.S. act of state doctrine, and many of the cases decided by the International Court of Justice arise out of economic relationships and resulting disputes. See, e.g,
Three developmental areas indicate the convergence of what traditionally have been discussed separately as public international law and private international law. This convergence is ripe for the growth and development of international economic law. First, it has become more common for sovereign parties to engage in commercial conduct with private parties, which makes it increasingly likely that sovereign parties will be subject to municipal law applied in municipal courts. The pervasive acceptance of the restrictive theory of sovereign immunity has contributed to the growing application of private law to sovereign parties, as has the increased use of international arbitration and dispute resolution centers devoted to private/sovereign disputes.

Second, relationships between private parties and sovereigns increasingly have become subject to the application of public international law. No longer is the discussion of the treatment of aliens in their relationships with sovereigns only the province of public international law tribunals. Long-term economic development agreements, private/sovereign joint ventures, and other arrangements for public/private cooperation in the development of resources have resulted in more and more transactions (and more and more disputes) crossing the sovereign/private line.

Third, private parties increasingly have become affected by the development of bilateral, regional, and multilateral trade agreement rules generally designed to limit the conduct of sovereigns in their relationships with other sovereigns. As more international trade rules develop, more persons and entities become subject to those rules. The development of those rules requires careful attention to the manner in which they are applied and the categories of parties affected by them. While those rules and the dispute settlement mechanisms designed for their application are created by and may limit participation to sovereigns, they affect the everyday conduct of private parties and private parties increasingly will demand participation in their creation, interpretation and application.

Market economic theory and democratic process have become

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LOUIS HENKIN ET AL., INTERNATIONAL LAW (2nd ed. 1987).

9 See generally the opinion of Professor René-Jean Dupuy applying “public” international rules to a sovereign/private agreement in Award on the Merits in Dispute Between Texaco Overseas Petroleum Company and the Government of the Libyan Arab Republic, 17 I.L.M. 1 (1978).
defining elements of contemporary international relations. With their increasing acceptance has come increased involvement of the private party in transborder transactions. The structure of international law has yet to catch up with these developments. International law retains notions rooted in concepts of second-tier sovereignty that allow only the sovereign to speak for the subject, and do not allow a relationship between the subject and international law unless and until the sovereign permits it. Economic theories dealing with free markets and political theories dealing with democratic systems require the participation of private parties; in fact, they are based on the fundamental assumption of such participation. Thus, theories of sovereignty borrowed from prior centuries can no longer accommodate economic and political reality at the end of the twentieth century. To the extent international law is built on those theories, it too runs the risk of being out-of-step with the world it purports to regulate.

While we have embraced democracy and market economics as guiding principles, we have at the same time failed to recognize that their application requires the participation of private parties in the international legal system — in both the development and application of rules. Private parties with economic power have been fit to exercise influence over the development of international economic law at the national, regional, and international level. They also have sought access to the systems by which those laws are applied to disputes. The international legal system, however, has not been consistently receptive to private party participa-

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10 For a discussion of the application of traditional notions of sovereignty to a new relationship between sovereigns and private parties in international law, see Ronald A. Brand, External Sovereignty and International Law, 18 FORDHAM INT'L L.J. 1685 (1995).


tion in what traditionally has been a club of sovereigns. Nor has
the private participation which has occurred been reflective of the
broad spectrum of private interests deserving acknowledgment in
a democratic environment.

If international economic law is to succeed in improving
conditions for all peoples in an ever-shrinking world, it must
evolve to take account of the structural arrangements it purports
to regulate. Traditional separation of "public" and "private"
international law is no longer possible in the economic realm.
"International economic law" should develop in a manner
reflecting the fundamental principles of market economics and
democratic government. This may require granting authority to
multilateral and international institutions in a manner currently
considered politically unacceptable in many nations.\(^\text{13}\) Without
such evolution, however, the failure of the legal system to fit the
underlying economic and political structures can only lead to the
disintegration of the structures that do exist. There are few, if
any, areas of law more important to peaceful coexistence in the
coming years than that of international economic law. That we
still have not clearly defined the term itself only serves to
demonstrate the work ahead.

\(^{13}\) See, e.g., Jared R. Silverman, Comment, Multilateral Resolution Over
Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO, 17
section 301 and the new WTO dispute resolution provisions).