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Towards a New Sensibility for International Economic Development

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Toward a New Sensibility for International Economic Development

LAN CAO[†]

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I. INTRODUCTION

A primary concern of all models of economic development¹ is the condition of poverty of the developing countries. However measured, poverty has defined—absolutely and relatively—the living conditions of the people of the world's low-income countries. At the end of World War II, the United States had approximately 6.3% of the world's population but 50% of the world's wealth.² More recent estimates show that while per capita income stood at \$18,530 in the United States and \$14,670 in other high-income countries, per capita income for the majority 60% of the world's population stood at a mere \$290.³ This startlingly disproportionate pattern of wealth concentration is further reflected in global mortality rates that demonstrate the disproportionate impact of poverty on the world's poor: an infant mortality rate of 13 for every 1000 live births in the United States as contrasted with an infant mortality rate of over 100 for every 1000 live births in the sixty-three poor nations, whose total population is two billion.⁴

Despite this infelicitous state of affairs, a global redistribution of resources is unlikely to occur. For reasons discussed in Part V below, exhortations for a transfer of wealth, espoused by the United Nations (UN) and other international nongovernmental institutions, have been ineffective in restructuring the international order to a more egalitarian line.⁵ In light of the dismal record of international aid, a host of economic development models have been pursued in an attempt to extricate the poor countries from conditions of extreme poverty. Development economics⁶ was established as a subdiscipline of economics and consists of multiple paradigms for economic development, each generating its own promise

1. The term "economic development" has not been easy to define. It generally refers to some transformation in the economic structure and the establishment of certain institutions necessary to increase wealth, presumably with the hope that increased production will result in more equal distribution.

2. See Juliet B. Schor, *The Great Trade Debates*, in *CREATING A NEW WORLD ECONOMY: FORCES OF CHANGE AND PLANS FOR ACTION* 274, 281 (Gerald Epstein et al. eds., 1993) [hereinafter *CREATING A NEW WORLD ECONOMY*].

3. See Juliet B. Schor, *Global Equity and Environmental Crisis: An Argument for Reducing Working Hours in the North*, in *CREATING A NEW WORLD ECONOMY*, *supra* note 2, at 183, 183. To make matters worse, the ratio of income of the richest 20% as compared to that of the poorest 20% jumped from 30 to 1 in 1960 to 60 to 1 in 1990. See Gerald Epstein, *Power, Profits, and Cooperation in the Global Economy*, in *CREATING A NEW WORLD ECONOMY*, *supra* note 2, at 19, 22–23. Other indicators reveal a similar picture of extreme global inequality not just in wealth but in resource consumption. For example, as recent figures show, even though the developed countries comprised approximately 26% of the world's population, they consumed 85% of the world's paper, 79% of the world's steel, and 80% of the world's commercial energy. See Schor, *supra* note 2, at 183.

4. See Schor, *supra* note 2, at 183. The infant mortality rates quoted above are average rates. The situation may in fact be worse if individual countries from the poorest versus the richest regions are compared. For example, in 1987, the infant mortality rate was 7 per 1000 live births in Sweden and 174 per 1000 live births in Nigeria. See Epstein, *supra* note 3, at 22.

5. For example, the approximately \$22 billion spent in the United States in 1984 on cigarettes was greater than the combined dollar value of aid granted in 1986 by the three largest donor countries, the United States, Japan, and France. See Jessica Nembhard, *Foreign Aid and Dependent Development*, in *CREATING A NEW WORLD ECONOMY*, *supra* note 2, at 314, 316.

The low priority placed on correcting global inequality is also reflected in the following figures: the total annual value of world aid toward the end of the 1980s was comparable to the combined military expenditures spent by the United States and the former Soviet Union in one month, at approximately \$1.5 billion a day. See *id.*

6. See generally Albert O. Hirschman, *The Rise and Decline of Development Economics*, in *PARADIGMS IN ECONOMIC DEVELOPMENT: CLASSIC PERSPECTIVES, CRITIQUES, AND REFLECTIONS* 191 (Rajani Kanth ed., 1994) [hereinafter *PARADIGMS IN ECONOMIC DEVELOPMENT*]. The focus of economic development theorists was on "firstly the causes of the relative poverty of underdeveloped countries, and secondly the potential way forward for these economies, the specification of the route to economic progress in these largely pre-industrial regions." DIANA HUNT, *ECONOMIC THEORIES OF DEVELOPMENT: AN ANALYSIS OF COMPETING PARADIGMS* 7 (1989). The term "development economics" was coined in 1952 by economic historian Alfred Sauvy. See *id.* at 80.

for the economic betterment of developing countries in Asia, Latin America, and Africa.⁷ Even though there are multiplicities of development models,⁸ they can be analytically reduced to two overarching but diametrically opposed schools of thought: the classical liberal economic school and the dependency, neo-Marxist radical school,⁹ both of which have spawned a plethora of related subapproaches to the development debate.¹⁰

One of the most conspicuous and yet unexamined omissions in the development debate is a comprehensive analysis of the theoretical foundations that make up the two dominant models of economic development. My contention is that the discourse on economic development has been circumscribed and distorted by the uncritical acceptance of a number of dichotomous premises upon which the development debate has been based.

One unexamined premise involves the dichotomy between the national market and the international market. Like the family or the home, which must be protected from the intrusion of the public realm, the national market is viewed as a "private" and separate sphere of productive activity apart from and, in many cases, to be protected against the international market. This national/international market dichotomy is, in turn, intertwined with and inseparable from yet a second dichotomy: the public/private international law dichotomy.

A distinct set of opposing imageries is associated with the first dichotomy—the national/international market dichotomy. Compared to the international market, the national market is identified as something that is "ours," "in here," and, in that sense, "private," and part of our "national sovereignty." In contrast, compared to the national market, the international market is associated with something that is "theirs," "out there," and, in that sense, "public," and a possible intrusion on and menace to our "national sovereignty."

On the other hand, both "our" national market as well as "their" international market are subsumed under and considered to be part of the "private," as opposed to the "public," international order. In that sense, "private" international law¹¹ stands in opposition to the more unruly "public" international order of international politics. Thus, there are two

7. The Food and Agriculture Organization of the United Nations has classified the approximately 40 countries in North America and Europe and the states of the former Soviet Union, Israel, Japan, and South Africa as developed countries. Developing countries comprise all the other more than 150 countries of Africa, Latin America, the Middle East, and Asia. See *Country Notes*, [1990] 44 U.N. Food and Agriculture Y.B.: Production xvii–xviii (1991).

8. Several key paradigms have emerged: the expanding capitalist nucleus paradigm, the structuralist paradigm, the neo-Marxist paradigm, the dependency paradigm, the Maoist paradigm, the basic needs paradigm, and the neo-classical paradigm. See generally HUNT, *supra* note 6.

9. See generally DAVID H. BLAKE & ROBERT S. WALTERS, *THE POLITICS OF GLOBAL ECONOMIC RELATIONS* 4–9 (4th ed. 1992). The classical liberal model is essentially aligned with the economic orientation of the advanced industrial nations such as the United States, Europe, and Japan, and the open trade prescriptions of the Bretton Woods system. It considers economic growth and efficiency to be a primary objective of economic development and aims toward the integration of developing-country markets with the international market in accordance with the liberal principle of comparative advantage. The radical model focuses on structural and systemic inequities in the international economic system and favors economic autonomy for developing countries instead of economic integration with developed-country markets. See *infra* Part III. Articulated by David Ricardo, the theory of comparative advantage essentially states that all "countries will gain by each specializing where their advantage lies and then engaging in trade. Production of both products will be increased (valuable resources will be put to their best use) by letting the principle of comparative advantage work." ALAN C. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS IN THE REGULATION OF INTERNATIONAL BUSINESS & ECONOMIC RELATIONS* 197, § 3.02 (1991).

10. For a detailed examination of the various approaches to development, each varying in general purpose, analysis, perspective, ideology, and overall focus, see generally HUNT, *supra* note 6, at 41–85.

11. While what has been termed "private international law" may include international economic law as well as other disciplines such as international family law, as used in this Article, the term "private international law" is only intended to mean international economic law. See *infra* notes 74–75.

separate but interrelated dichotomies: on the one hand, the dichotomy between the political world of public international law and the commercial world of private international law; and, on the other hand, the dichotomy between the national market and the international market, both of which are considered part of the private international law system.

Both dichotomies have produced their respective spheres of consciousness and imageries. These spheres have, in turn, been incorporated into the very foundational bases of the two currently dominant models of international economic development. Because both the classical liberal model and the radical models appear to be blindly unconscious of this dual dichotomization, they have accordingly failed in two important respects. First, both models have been unable to transcend the radical separation between the national and international market, and thus neither model has been able to reconceive the relationship between the two. Under both models, the national/international market dichotomy is entrenched, not loosened.

Second, both models have failed to reconceptualize the relationship between public international law and private international law. Neither model has reconciled the traditional public international law thesis—a thesis characterized by state sovereignty and state autonomy—with its traditional private international law antithesis—marked increasingly by interdependence between the national and the international market. Thus, under both models, the public international law/private international law dichotomy is also reinforced, not eradicated or relaxed. Neither model is able to resolve the tensions between nationalistic sovereignty and economic nationalism, on the one hand, and globalization and economic interdependence, on the other hand.

By exploring the apparent contradictions presented by the national/international market dichotomy and the public/private international law dichotomy, this Article challenges the two models of international economic development and argues for the removal of both dichotomies in order to articulate a new conceptual synthesis for the development debate.

Part I of this Article examines the ideological demarcation which separates the national from the international market. As an illustration, Part I also explores the evolution of the American market, the attendant creation of various ideological constructs associated with the idea of a home versus foreign market, and the reinforcement of this antiquated split in U.S. and international regulation of trade. The ideology of the national versus international market and the host of antagonistic imageries associated with each have perpetuated the separation between these two spheres and prevented an effective reconceptualization of these two constructs for purposes of international economic development.

Part II explores the ideological division between public international law and private international law. This section will provide a brief examination of the history of international law, focusing primarily on the evolution of international law in the United States and its division into two distinct disciplines—public and private international law. With the active complicity of courts, this apportionment of international law into two fragments has resulted in the view that public international law is about politics, not law; and the corollary view that private international law is about law or economics, not politics.

Against the backdrop of this context, Part III will demonstrate how the two dominant models of international economic development have reproduced and incorporated these two dichotomies into their foundational assumptions. Although both models negotiate the national/international market dichotomy in their own ideologically specific and distinct ways, both models on the whole reinforce the dichotomy and view the national economy and the international economy as separate spheres. Similarly, both models also situate themselves in diametrically opposed spaces within the public/private international law

dichotomy. The classical liberal model is wholly immersed within the “private” international economic order of the General Agreement on Tariffs and Trade (GATT), excludes elements considered part of the “public” international order from its parameters, and adopts an apolitical posture toward the national and the international market. By contrast, the radical model navigates the national/international market dichotomy in the politically charged language of public international law, inhabits the “political” public international order of nation states and of the UN, and excludes elements considered part of the “private” international world of commerce from its parameters.

Part IV will explore the possibility for renewal in the international economic development field. This section will examine the decline of the state-dominated system and the concomitant transformation of the international economic system from one of economic nationalism to one of economic globalization. As every major structure of power in the world economy has become increasingly globalized (including the capital, investment, and information structures), such globalization has called into question the traditional division of the private international law order into a duality of national versus international market and similarly, the traditional division of international law into a public and private compartment. Part IV will also offer a critique of why the two dichotomies, from both a normative and factual standpoint, are obsolete and should be reexamined.

The fifth and final part of the Article will explain why this transformation from autonomy and nationalism to interdependence and globalization is important to the development of a new theory of international economic development. To the extent that the international economic order transcends the narrow constructs of the state and the restraints imposed by sovereignty, it contributes to a growing sense of global interdependence and economic integration vital for the effective implementation of any economic development model. The argument in Part V is based on a number of claims. First, I argue that economic globalization has altered the structure of international economic relationships and the configuration of economic power, with inadvertent but positive ramifications for international economic development. Thus, the vertical top-heavy structure of international economic relations, with developed countries at the top and developing nations at the base, is being replaced by a web-like structure involving a proliferation of nonstate actors unconstrained by the parameters of economic nationalism. Although increased foreign competition has resulted in a resurgence of economic nationalism and in renewed calls for home market protectionism,¹² I argue that global dispersion of economic activities has rendered nonviable economic distinctions founded on an “us” versus “them” or a “national” versus “international” market. To the extent that a “national” or “home” market can be accurately identified at all, its identification does not derive from the traditional conceptions of a “home” corporation or a “home” product, but rather a “home” work force. The new sensibility I advocate would alter our notions of a national/international market by enhancing the competitiveness of the “national” work force. This new framework would invest in human capital, as opposed to enhancing the competitiveness of the “national” product or the “national” corporation, which has become increasingly disconnected from the national territory and hence increasingly stripped of a “national” identity.

Second, I suggest that breaking out of the national/international market dichotomy requires a post sovereign, post national sensibility that transcends the public/private international law dichotomy by integrating the “private,” nonstate orientation of private international law and the classical liberal model with the “public,” political orientation of public international law and the radical model of development. Moreover, this new and

12. See, e.g., Patrick J. Buchanan, *America First, NAFTA Never* (last modified Nov. 7, 1993) <<http://www.buchanan.org/never.html>>.

integrated sensibility should be harmonized with, rather than opposed to, the forces of global economic integration. While international law has struggled to achieve a sense of global community by creating a strengthened sovereignty at the international level through the institutions of the UN, economic integration has in fact already occurred on a global level in a way which has called into question the constructs of sovereignty. The sensibility which makes sense, given today's international economic reality, is not one which utilizes the vertical, top-down command of the UN for the purpose of creating a global economic community. Rather, the challenge for developing countries (and developed countries) is to institute and maintain the institutional infrastructure necessary to attract the centrifugal forces of the global market for the purpose of economic development. Where market failures require correction through public regulation, a regulatory regime should be carefully crafted to ensure a balance between attracting versus controlling global economic activities.

In sum, my conception of a new sensibility for international economic development calls for a completely different orientation than the one that informs the current discourse. This synthesis would move beyond the home market focus of both models of economic development and, thus, would remove the national/international market dichotomy as traditionally understood from the parameters of the development debate. Similarly, because it would further the cross-fertilization of seemingly antagonistic norms within the public and private components of international law, this perspective would also provide a new theoretical framework that encompasses both the political and "public" sensibility of public international law with the "private" and market sensibility of private international law. Instead of relying on vertical, top-down attempts at global integration through the state-centered regime of the UN, the new sensibility would aim to harness the economic forces of a global economy that national boundaries no longer constrain by constructing a regulatory framework necessary to attract and, at the same time, channel the international market for the purpose of economic development.

II. THE NATIONAL MARKET/INTERNATIONAL MARKET DICHOTOMY

A. *The Ideology of the National Versus the International Market*

Although a "national market" composed of common national interests linked to a nation-state is quite a recent construct,¹³ it already seems inevitable. Yet, the notion of a national market existing for the good of the nation as a whole is a relatively recent phenomenon. Before the eighteenth century and the spread of political democracy, "[n]ational wealth pertained only to the wealth of the sovereign—to the kings and queens and retainers who contrived, financed, and directed various schemes to accumulate foreign riches in order to wage wars and enhance their power and prestige—rather than to the well-being of ordinary individuals within the nation."¹⁴ However, as Europe made the transformation from monarchy to democracy, economic mercantilism designed to accumulate wealth for the monarch was replaced with economic nationalism designed to

13. "The familiar picture of a national economy whose members succeed or fail together would have appeared novel to someone living as recently as the seventeenth century—even in Europe, where the idea of the nation-state had developed furthest. Before the eighteenth century few kings, statesmen, or political philosophers regarded the nation as in any way responsible for, or necessarily connected to, the economic well-being of its population." ROBERT B. REICH, *THE WORK OF NATIONS* 13 (1991).

14. *Id.* Before the emergence of nation-states, "the international system was a kind of 'club' of princes. The move from prince-nations to states, from a club of princes with club rules to a developed political system with international law rules, is commonly dated from the Peace of Westphalia (1648) and the emergence of the secular state." LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 9 n.** (1995). The wealth of prince-nations belonged to the prince, not the nation.

"improv[e] the well-being of the nation's population."¹⁵ Because the shift from mercantilism to economic nationalism was also accompanied by a shift from absolutism to democracy, the idea of a national economy and the correlative constructs associated with the "home" market were on the whole celebrated. After all, that the economic wealth of the nation should be accumulated for the benefit of its citizens rather than its monarch cannot be deemed to be a bad thing.

As economic nationalism surged with a rising sense of national consciousness, nurturing the home market became a matter of economic sovereignty. Although Adam Smith's logic favoring international trade and condemning mercantilism was founded on "universal economic principles, . . . his frame of reference was resolutely *national*. He condemned English mercantilism not because it reduced the wealth of other nations but because it caused England's citizens to be poorer than they would be otherwise."¹⁶

For nations less powerful than England, such as the young United States, however, it was argued that the national economic interest might be furthered by governmental activism rather than nonintervention. In the early part of U.S. history, protectionists engaged in fervent debates about tariffs. Indeed, American protectionists invoked passionately antagonistic imageries of two dueling spheres—the national market in one sphere against the international market in a separate sphere—to justify home market protection. With the "home" against the "world," and "us" against "them," moral overtones were cast upon the debate and references made to various characteristics, supposedly natural, of the home market. Thus, advocating in favor of a strong domestic market in manufactures, Alexander Hamilton argued that "a domestic market is greatly to be preferred to a foreign one, because it is, in the nature of things, far more to be relied upon."¹⁷ In a similar vein, Henry Clay of Kentucky declared that "[t]he superiority of the home market results, first, from its steadiness and comparative certainty at all times; secondly, from the creation of reciprocal interest; thirdly, from its greater security; and, lastly, from an ultimate and not distant augmentation of consumption (and consequently of comfort) from increased quantity and reduced prices."¹⁸

Protectionists imparted a number of traits to the home market on the presumption that only a home market could provide the necessary degree of comfort and certainty. Hamilton pronounced a connection between the prosperity of the home market and "the wealth [and] independence and security of a country"¹⁹ Clay similarly declared that between the national and the international market, "with respect to their relative superiority, I cannot entertain a doubt. The home market is first in order, and paramount in importance."²⁰

In stark contrast to the reliable home market, protectionists deemed the foreign market capricious at best and at worst malevolent. Because the foreign market tends to be fickle by nature, "foreign demand for the products of agricultural countries is in a great degree rather casual and occasional than certain or constant,"²¹ causing "injurious interruptions of the demand for some of the staple commodities of the United States."²² As a repository for all

15. REICH, *supra* note 13, at 15.

16. *Id.* at 18–19 (emphasis in original).

17. Alexander Hamilton, *Report on the Subject of Manufactures*, in STATE PAPERS AND SPEECHES ON THE TARIFF 1, 22 (F.W. Taussig, ed., 1893). Hamilton also argued that a strong domestic manufacturing sector could be a synergistic boost to domestic agriculture because it would absorb surplus in agriculture.

18. Henry Clay, *Speech of Henry Clay on American Industry in the House of Representatives, March 30 and 31, 1824*, in STATE PAPERS AND SPEECHES ON THE TARIFF, *supra* note 17, at 252, 267.

19. Hamilton, *supra* note 17, at 55.

20. Clay, *supra* note 18, at 258. According to Clay, the inferiority of the international market as compared to the national market apparently lies in its inability to provide "an adequate vent for the surplus produce of our labor." *Id.* at 259.

21. Hamilton, *supra* note 17, at 23.

22. *Id.*

that is undesirable, protectionists saw the foreign market not only as unreliable and potentially destructive, but also seemingly omnipotent. Even "without imputing to them any sinister design,"²³ foreign markets and "the superior advance of skill, and amount of capital, which foreign nations have obtained by the protection of their own industry"²⁴ could easily overwhelm the home market.

While the national/international market dichotomy produced the imagery of a virtuous home market juxtaposed against a formidable but dangerous foreign market, it also produced the exact reverse—an inefficient national market that required the rugged disciplines of its international counterpart. While the home market was celebrated as a national sphere (superior because it was deemed more reliable), it was also devalued as a "lesser" sphere of productivity. Those opposed to protective measures saw the national market as essentially incomplete if insulated from its international counterpart. "The home market, of itself, is wholly inadequate for [our] products. They must have the foreign market, or a large surplus, accompanied by great depression in price, must be the result."²⁵

The competitive and modernizing forces of the international market, it was argued, must be channeled in a positive way. Speaking of the vigors of the American shipping industry, Daniel Webster noted that the reason why American shipowners and navigators "are able to meet, and in some measure overcome, universal competition" is not "by protection and bounties, but by unwearied exertion, by extreme economy, by unshaken perseverance, by that manly and resolute spirit which relies on itself to protect itself."²⁶ International competition and efficiency, forcing rugged self-reliance and discipline onto the national market, were all factors positively associated with the international market.

The national/international market dichotomy has produced an interesting mix of diametrically opposed imageries. Like the home itself which is "ours" and intimately private, and hence "a haven from the anxieties of modern life,"²⁷ the home market has been celebrated as "our" reliable sphere of nationalistic productivity. However, like the home, which has also been devalued as a female sphere and thus "the object of yearning, and yet of scorn,"²⁸ the home market too has been denigrated as an inadequate sphere requiring special coddling and protection. Similarly, the international market has also been simultaneously exalted and decried—admired for its stimulating effect but maligned for its unfair practices and feared for its supremely superior strength.

Ultimately, the question has been how to negotiate, not reconcile, the divide between the national versus the international. U.S. trade law essentially accepts the set of antagonistic imageries associated with the national and international spheres and takes for granted the existence of the national and international divide. By equating the home market with the collective "we,"²⁹ the United States, for example, was able to ignore southern farmers who wished to purchase cheap foreign machinery and favor New England

23. Clay, *supra* note 18, at 295.

24. *Id.*

25. Robert J. Walker, *Report From the Secretary of the Treasury on the State of the Finances, etc.*, in *STATE PAPERS AND SPEECHES ON THE TARIFF*, *supra* note 17, at 214, 236.

26. Daniel Webster, *Speech of Daniel Webster Upon the Tariff in the House of Representatives, April 1 and 2, 1824*, in *STATE PAPERS AND SPEECHES ON THE TARIFF*, *supra* note 17, at 315, 329–30.

27. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983).

28. NANCY COIT, *THE BONDS OF WOMANHOOD* 62 (1977), *quoted in* Olsen, *supra* note 27, at 1499–1500.

29. The reality beneath the facade of a common national fate is more complex. The Nullification Crisis of 1832 reveals deep divisions along sectional lines, with northerners and westerners favoring, and southerners opposing, tariff protection. By 1832, southern opposition to the Tariff of 1828 was so high that South Carolinians adopted an ordinance of nullification, which declared the federal tariff nullified in South Carolina. See Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1251.

manufacturers by imposing an average tariff rate of 50% on all foreign goods entering the United States.³⁰

In the United States, the idea of a common national market and an overarching economic fate which melded disparate sectional interests into a cohesive whole reached a peak in the latter part of the nineteenth century. With inventions such as the steam engine, the locomotive and the railroads, sourcing for raw materials and individual components was no longer restricted by mere geography. From parts gathered all over the United States, an American product, or more accurately, hundreds of thousands of American products,³¹ would emerge.

Ironically, while the industrial revolution and technological changes contributed to the sense of a national economy, they also exposed the home market to foreign threat as foreign manufacturers armed with the same high-volume capacity aggressively sought to open markets for their products. Foreign overproduction and the quest for new markets evoked images of a home market under siege, stimulated home-market protectionism, and with it, economic nationalism.³²

Although economic nationalism initially meant home market security and protection, over time, economic nationalism meant ensuring not just the well-being of the home market but also the well-being of the home players. To provide a united front at home to better defend the home market from high-volume production in the international market, domestic competition had to be reduced by consolidating "production within large, nationally-based corporations"³³ and streamlining the production process in a few centralized facilities. The alliance in the United States between the national corporation and its citizens reached a peak in the 1950s, when high-volume production was accompanied by both high-volume consumption and high-volume employment. From then on, the health of the national economy became intertwined with the health of its corporations, and both the home market and the home corporation constituted an entity separate and apart from both the foreign market and the foreign corporation.

B. International Trade and the National/International Market Dichotomy

Indeed, U.S. and international trade laws are founded on the premise that an ideological divide characterized by opposing imageries exists between the national and the international market. Under the rubric of protecting our home market and nurturing our home corporation from the international market, the United States has instituted an arsenal of national trade laws. At the same time, because the international market is also admired for the efficiency benefits it bestows, the United States has designed an international trade regime to balance national protection with international liberalization. The national and international regime thus consists of an interlocking network of rules and norms, which exhibit both nationalist, protective tendencies as well as internationalist, liberalizing tendencies.

On the one hand, U.S. trade law, for instance, consists of basic import-restraining measures, such as the tariff and the quota, to limit the entry of foreign products into the

30. See REICH, *supra* note 13, at 21–22.

31. Mechanical industries and more technologically advanced processes made high-volume output possible. American corporations of all kinds, such as Proctor & Gamble, Diamond Match, Standard Oil, American Sugar Refining, Carnegie Steel, International Harvester, and Singer Sewing Machine all experienced huge surges in production. See *id.* at 26. Manufacturing investment increased from \$2.7 billion in 1879 to \$8.2 billion in 1899. See *id.*

32. See *id.* at 28–29.

33. *Id.* at 34.

national market. The Harmonized Tariff Schedule of the United States consists of a complex set of tariff rates depending on the type and value of imported goods and the origin or source of the goods.³⁴ At the same time, multilaterally-based commitments, designed to limit the level of tariffs through tariff bindings negotiated through a series of GATT rounds, have curbed nationalist tendencies.³⁵ However, such GATT bindings, which impose a limit on the extent to which a national market may be protected against other GATT partners, are in turn subjected to a number of exceptions, such as escape clause proceedings to soften the impact of increased imports or antidumping and countervailing duty proceedings to counteract so-called unfair trade practices. Hence, what this triad of protectionism, liberalization, and "cushioning" mechanisms reveals is the fact that the international economic system is defined by a set of competing tensions marked along national versus international lines, which require constant balancing and rebalancing.

One of the measures utilized by the United States as a buffer against imports is the escape clause contained in section 201 of the Trade Act of 1974.³⁶ Under section 201, a plaintiff must demonstrate proof of an increase in imports³⁷ which substantially causes³⁸ or threatens to cause serious injury³⁹ to domestic industries producing like or directly competitive articles.⁴⁰

Under section 201, only imports, rather than a multiplicity of other interlocking factors—such as changes in consumption pattern,⁴¹ management decision-making,⁴² and

34. See JOHN H. JACKSON ET AL., *INTERNATIONAL ECONOMIC RELATIONS* 374–75 (1995).

35. Commitments to limit the level of tariffs are contained in the tariff bindings or tariff concessions. Contracting parties to the GATT are prohibited from raising their tariff levels on particular products above their GATT binding, although tariff levels lower than the bindings are allowed. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-19, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. Where a nation has not negotiated a GATT binding for a particular product, it may impose any tariff level it chooses. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 119 (1989).

36. Trade Act of 1974, Pub. L. No. 93-618, Title II, § 201, 88 Stat. 2011 (1975), amended by Trade Agreements of 1979, Pub. L. No. 96-39, §§ 106(b)(3), 1106(a)(1)–(7), 93 Stat. 193, 312, and Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 248(a), 249, 98 Stat. 2998 (codified at 19 U.S.C. § 2251 (1980 and Supp. 1988)).

Section 201 is the U.S. domestic statute which implements American obligations under Article XIX of the GATT. See JACKSON, *supra* note 34, at 597.

37. The first prerequisite for section 201 escape clause relief is proof of increased imports. Similarly, Article XIX of GATT requires "increased quantities" of imports. However, the International Trade Commission (ITC) has interpreted section 201 to require a relative, not absolute increase in imports. Even if the total volume of imports has decreased, an increase in the import share of the domestic market would suffice for a section 201 action. The Uruguay Round Agreement on Safeguards has essentially adopted the ITC's position for GATT Article XIX purposes. See JACKSON, *supra* note 34, at 612.

38. Substantial causation is defined in 19 U.S.C. § 2252(b) (1993) as "a cause which is important and not less than any other cause." GATT Article XIX and the Uruguay Round Agreement only require that the increased imports "cause or threaten to cause" serious injury. See *id.* at 629.

39. Among the factors to be considered by the ITC for injury determination are the following: "the significant idling of productive facilities in the domestic industry, the inability to profitably carry out domestic production operations, significant unemployment or underemployment within the domestic industry." Trade Act § 202(c)(1)(A).

40. In determining the identity of the domestic industry, GATT Article XIX requires that the increased imports injure producers of "like or directly competitive products." GATT art. XIX. The same requirement can be found in section 201. Trade Act § 201.

41. The circularity of the causation criterion can be illustrated in the following hypothetical. Consumers of video games in the United States change their consumption pattern, switching to foreign video games to the detriment of domestic video game producers. As a result, purchases of imported video games increase. As the demand for imports increase, so does the supply. Hence, the dramatic increase in imports coincides with the economic decline of U.S. manufacturers. Although increased imports occur in conjunction with domestic decline, both can be traced back to the change in consumer tastes. The law, however, treats imports as the causal factor. From an economist's perspective, "this formulation makes little sense because the quantity of imports, as in our example, is always an 'effect,' with the forces of supply and demand (tastes, income, technology, input prices, and so forth) being 'causal.'" JACKSON, *supra* note 34, at 630.

42. See RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS* 223 (1995).

overall economic factors such as high interest rates or tight credit—can be the substantial cause of injury to the domestic industry at issue.⁴³ Disaggregating the web of causes and separating one cause from another in order to determine whether or not imports were the “substantial cause” has resulted in vastly inconsistent determinations.⁴⁴ Nonetheless, section 201 not only assumes that there are separate and distinct causes for injury which must be parsed through and separated, it also assumes that injury caused by imports is more egregious than injury caused by other factors.

In addition to safeguards such as section 201 escape clause proceedings, there are other avenues for home market protection which focus not only on the effect of increased imports but on the unfairness of the foreign acts. These acts may be either acts by private firms, such as dumping, or acts by governments, such as subsidies, both of which may be counteracted by the imposition of antidumping or countervailing duties designed to “level the playing field” for U.S. companies and products.

There are several assumptions—both rooted in the national/international market dichotomy—that underlie the so-called unfair trade laws. First, because both antidumping and countervailing duty proceedings are designed to protect domestic firms, it is assumed that the economic well-being of domestic firms is linked with the economic well-being of the nation’s economy, presumably on the rationale that the national corporation, since the days of the “great bargain,”⁴⁵ acts with the interests of the nation in mind. This assumption is itself rooted in the idea of a virtuous home market and a home corporation essentially connected to its home economy. Second, because both antidumping and countervailing duty actions only protect domestic firms from acts by foreign firms or foreign governments, it is assumed that there is something especially insidious when the actor is a foreign entity, as opposed to a domestic one.

Dumping occurs when imports are sold in the United States at less than “fair value”⁴⁶—less than the price for home market or third market sales—and cause or threaten

43. If imports are the substantial cause of injury and if the President accepts the ITC’s advisory opinion recommending relief, 19 U.S.C. § 2254(e) (Supp. 1996), a number of import restraining measures may be adopted: tariff increase, quotas, or orderly marketing arrangements (OMAs), which will now be subjected to new GATT discipline after the Uruguay Round. See JACKSON, *supra* note 36, at 643. Presidential relief may also focus on government assistance to workers and firms injured by import competition, for example, adjustment assistance such as training, job search assistance, and relocation payments. See 19 U.S.C. § 2253(a) (Supp. 1996). Adjustment assistance, however, is contingent on proof that workers of a firm had been injured by imports. See JACKSON, *supra* note 34, at 664.

44. In *Heavy Weight Motorcycles, and Engines and Power Train Subassemblies Therefor*, the ITC considered but refused to treat economic recession—a non-import factor—to be a more substantial cause for domestic injury than the import of foreign motorcycles. See U.S. INT’L TRADE COMM’N Pub. 1342 (Feb. 1983), Inv. No. TA-201-47, 4 INT’L TRADE REP. DECISIONS (BNA) 2469 (1983), reprinted in JACKSON, *supra* note 34, at 635–36. See also FOLSOM, *supra* note 42, at 223. By contrast, in *Certain Motor Vehicles and Certain Chassis and Bodies Therefor*, although the ITC conceded that there had been an increase in Japanese automobile imports, it found that economic recession was a more substantial cause of domestic injury. See *Certain Motor Vehicles and Certain Chassis and Bodies Therefor*, U.S. INT’L TRADE COMM’N Pub. 1110, Inv. No. TA-201-44, 2 INT’L TRADE REP. DECISIONS (BNA) 5241 (1980), reprinted in JACKSON, *supra* note 34, at 630–35.

Congress has recently prohibited the use of economic recession or downturn as a substantial cause for domestic injury for escape clause proceeding purposes. See 19 U.S.C. § 2252(c) (Supp. 1996). Thus, it will now be easier to establish that a domestic industry faced with a recessionary climate and suffering from low sales was injured by imports as opposed to other causes.

45. The “national bargain” struck between the corporation and the nation included: “First, the core American corporation would plan and implement the production of a large volume of goods. . . . A large portion of the revenues would be reinvested in new factories and machinery, but a significant share would go to middle managers and production workers. REICH, *supra* note 13, at 67.

46. Fair value is determined by comparing “normal value” (formerly “foreign market value”) with the “U.S. price.” If the U.S. price is lower than the normal value, the difference is the dumping margin. See David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT’L & COMP. L. 7, 35 (1995).

to cause material injury to a U.S. industry.⁴⁷ An antidumping duty may be imposed if the International Trade Administration of the Department of Commerce determines that the "subject" merchandise is being, or is likely to be, sold in the United States at less than "fair value" and if the International Trade Commission determines that a U.S. industry is materially injured or threatened with material injury.⁴⁸

Although the terminology evokes an agenda of malice, as defined, dumping is essentially nothing more than price discrimination and does not necessarily entail or require any showing of sales below cost or predatory pricing.⁴⁹ If the price in the United States is lower than the "normal value," this difference in dollars constitutes the dumping margin,⁵⁰ and antidumping duties equal to the amount of the margin may be imposed to counteract the impact of dumping on U.S. producers.⁵¹ Although dumping may indeed result in lower prices and hence increase consumer benefits, it is considered harmful because dumping injures domestic industry, even though it benefits consumers.

More significantly, dumping law makes no distinction between price discrimination and predatory pricing.⁵² As long as a price difference exists between the foreign producer's market and the U.S. market, and as long as this price differential causes material injury to domestic industry,⁵³ the foreign conduct at issue is punishable. This bluntness stands in stark contrast to the more refined and precise inquiry mandated for antitrust actions under the Sherman Act⁵⁴ and the Robinson-Patman Act.⁵⁵ Because dumping law is specifically targeted against foreign, as opposed to domestic industry, the tendency has been to cast a wide, not restrictive net in order to punish a range of conduct normally not punishable if perpetrated by a domestic firm. Where price discrimination by a domestic firm against other domestic rivals on the domestic market has been deemed actionable, something more than mere price difference has been required to find an antitrust violation. For example, proof may be required that a "business rival has priced its product in an unfair manner *with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.*"⁵⁶

As the Supreme Court declared, even if "below-cost pricing may impose painful losses on its target, [it] is of no moment to the antitrust laws if competition is not injured"⁵⁷ "Low prices benefit consumers regardless of how those prices are set, and

47. See Tariff Act of 1930, §§ 731-39, amended by 19 U.S.C. §§ 1673-73h (1980) and Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 211-34, 108 Stat. 4842-4901 (1994).

48. See 19 U.S.C. §§ 1673 (1988), amended by Uruguay Round Agreements Act §§ 201-34, Pub. L. No. 103-465, 108 Stat. 4809 (1994). Article VI of the GATT also authorizes antidumping duties to offset foreign dumping if it causes or threatens material injury to a domestic industry.

A countervailing duty proceeding is similarly bifurcated between the International Trade Administration and the International Trade Commission. See 19 U.S.C. § 1671(a) (1994).

49. See Gantz, *supra* note 46, at 10.

50. See *id.*

51. See 19 U.S.C. § 1673 (1994).

52. Predatory pricing generally occurs when a competitor sells a product below cost, at a loss, for the purpose of driving other competitors out of the market, with the long-term goal of eventually increasing prices to the detriment of consumers.

53. As in escape clause proceedings, the injury sustained must have been caused by imports, see 19 U.S.C. § 1671(a)(2) (Supp. 1996), as opposed to any other factor which could be attributed to the generally poor economic situation of the domestic industry. See JACKSON, *supra* note 34, at 689-90. Following the Tokyo Round GATT Antidumping Code, although the U.S. standard for determining "material injury" is no longer mere "de minimis" injury, the higher threshold is still not difficult to meet and is, in fact, much lower than the "serious injury" required for section 201 escape clause relief. See FOLSOM, *supra* note 42, at 142-47.

54. Sherman Act, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

55. Robinson-Patman Act, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13-13b, 21a (1994)).

56. Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (emphasis added).

57. *Id.* at 224.

so long as they are above predatory levels, they do not threaten competition."⁵⁸ Under section 2 of the Sherman Act, the plaintiff must also "prove a dangerous probability that [the defendant] would monopolize a particular market."⁵⁹

Clearly, the same meticulous investigation is not accorded an antidumping inquiry. While the objective of antitrust is "the protection of competition, not competitors,"⁶⁰ the objective of the dumping law is the protection of domestic competitors, rather than the protection of competition. Unlike an antitrust investigation, which asks whether or not predation is likely to be a success because "unsuccessful predation is in general a boon to consumers,"⁶¹ there is no analysis in an antidumping investigation of whether or not a predator has "a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered."⁶² Because the dumping law is designed with the ultimate objective of protecting the national from the international market, it is less concerned about precision than protection, and the prerequisites to recovery established by the Sherman Act to ensure real injury and to minimize "the costs of an erroneous finding of liability"⁶³ are virtually nonexistent in an antidumping action.

Similarly, where foreign competitors receive unfair advantages from their governments, such as subsidies,⁶⁴ countervailing duties may be imposed even if the end result is an increase in overall competition in the home market. Like antidumping actions, the overriding concern of a countervailing duty investigation is not the nature of the conduct but the identity of the actor. The assumption seems to be that although successful domestic predation is bad, successful foreign predation is worse because in that case, if "prices rise above the competitive level, the loss of domestic consumer surplus will not be partially offset by an increase in domestic producer surplus—foreign companies will capture monopoly profits."⁶⁵

These distinctions only make sense if analyzed within the context of the national/international market dichotomy. The division between the national and

58. *Id.* at 223 (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). "Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy." *Brooke Group*, 509 U.S. at 224.

59. *Id.* at 225 (citing *Spectrum Sports, Inc. v. McQuillan* 506 U.S. 447, 458 (1993)).

60. *Id.* at 254.

61. *Id.* at 224; see also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* 475 U.S. 574, 589 (1986)

A predatory pricing conspiracy is by nature speculative. . . . [T]he success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.

Id.

62. *Id.*

63. *Brooke Group*, 509 U.S. at 226; see also *Matsushita Electric*, 475 U.S. at 594. "Cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.*

64. There are two types of subsidies: domestic and export subsidies. A domestic subsidy is granted to all products produced by an industry regardless of whether the products are exported. An export subsidy is granted only to those products produced by an industry for the purpose of exportation. With an export subsidy, the subsidized product which is then exported can be sold on the international market at a price level less than the price level for the same product sold on the domestic market.

A domestic subsidy is not actionable unless it is "specific," so that subsidies that are available to the public at large are not actionable. Export subsidies are explicitly prohibited. See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, arts. 1-3, Apr. 15, 1994, H.R. Doc. No. 316, 103d Cong., 2d Sess. 1533 (1994).

65. Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 242 (1989).

international market explains why a practice is punished if it is perpetrated by a foreign actor, and an injury is compensated if the harm is caused by a foreign product. As discussed previously, two premises underlie this distinction. First, the distinction is based on the idea that a distinctive home economy in fact exists and second, that its fate is deemed to be synonymous with the fate of its national players.

The liberal view of trade, of course, recognizes that "competition from overseas producers can disadvantage domestic producers, just as competition from domestic producers can disadvantage other producers."⁶⁶ Yet the distinction maintained between domestic-source competition versus foreign-source competition can only rest on the assumption that, although competition may create winners as well as losers, "hardship that results from competition with subsidized imports . . . is . . . different from the hardship that can result from competition with unsubsidized imports or indeed from competition with domestic firms."⁶⁷ Similarly, if foreign-source injury is presumed to be more injurious and hence actionable, any *benefit* derived from foreign competition is also presumed to be less beneficial, even though "benefits of competition arise whether the competition is foreign or domestic."⁶⁸

Trade law then has been characterized by a constant *pas de deux* between protection and liberalization followed by safeguards and other restrictions. The deeply entrenched imageries associated with the "home" versus the "world" and the dichotomy between the national versus the international market, which date back to the days of Hamilton and Clay, explain the disparate treatment accorded foreign as opposed to domestic competitors. As I demonstrate in Part II, the national/international market dichotomy is also intertwined with the dichotomy between public and private international law—both of which are reproduced, albeit in distinctly different ways, in the discourse on economic development.

III. THE PUBLIC/PRIVATE INTERNATIONAL LAW DICHOTOMY

A. *International Law Before the Public/Private Dichotomy*

The term "international law" was coined and popularized by Jeremy Bentham to describe the newly emerging field of law between and among nations.⁶⁹ Before the term was associated with rights and obligations among states specifically, the "law of nations," as it was once called, was considered to be binding not just on states but on all "mankind."⁷⁰ *Jus gentium* was a Roman term used to describe a universal law common to

66. *Id.* at 209.

67. *Id.* at 211. An argument has been made that "workers displaced by import competition . . . may suffer greater hardship than other displaced workers." *Id.* The argument is based on the assumption that workers displaced by domestic competition will be able to find another job in another domestic firm, because "the demise of one domestic firm is typically accompanied by the expansion or creation of another (more competitive) domestic firm in the same line of business." *Id.* "The same cannot be said of workers displaced by import competition since relocation to find *employment overseas* is rarely an attractive or a viable option." *Id.* (emphasis added). This argument rests on the assumption that direct investment by foreign firms in the United States, for instance, would not be available or would not generate the same employment opportunities for displaced workers.

68. *Id.* at 209.

69. See generally Mark Janis, Comment, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AM. J. INT'L L. 405 (1984).

70. David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1, 8 (1986) "[T]he primitives do not distinguish municipal law from international law, nor the law which binds sovereigns in their relations with one another from that which binds their citizens or themselves in their relations with their citizens. The primitive text envisions a single law which binds sovereigns and citizens alike." *Id.* (emphasis added).

all⁷¹ (Romans and foreign).⁷² Legal scholars, such as Blackstone, defined the law of nations as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.”⁷³

This unified view of international law, as applicable to both states and individuals and encompassing both public⁷⁴ and private international law,⁷⁵ endured even after the emergence of nation-states in the seventeenth century. Although the “vested rights” doctrine coined by Dutch publicists in the newly independent Dutch Republic provided the theoretical foundation for Dutch courts to defer to notions of territoriality and national laws, as opposed to notions of internationality and universal law,⁷⁶ Dutch scholars nonetheless “described a unified field of international law and did not distinguish private from public international law.”⁷⁷

71. See, e.g., MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1 n.2 (1988) (citing *The Four Commentaries of Gaius on the Institutes of the Civil Law*, in 1 THE CIVIL LAW 81 (S. Scott ed., 1973)).

72. See Joel Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149, 155–56 (1988) (citing H. JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW 38–39 (1957)).

73. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2351 (1991) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *66).

74. International legal education routinely divides international law into public international law and private international law. Public international law generally consists of:

the sources of international law; the subjects of international law; application of international law by domestic and international tribunals; the enforcement of public international law; international organizations, including the United Nations, specialized agencies of the United Nations, and regional organizations; international dispute settlement, including non-judicial and quasi-judicial methods and international courts; the international law of treaties; the laws of war, including the rights of neutrals, belligerents and civilians; the law of the sea and the law of outer space; international protection of the environment; the rights of individuals under public international law, including the law of the U.N. Charter, regional human rights law, and international humanitarian law; state responsibility for injury to aliens; foreign relations law; diplomatic recognition; the Act of State doctrine; diplomatic and sovereign immunities; the responsibility of states for the acts of their nationals; state succession; and the right of states to make claims on behalf of their nationals.

Paul, *supra* note 72, at 150–51 n.3.

75. Private international law is generally considered the law that deals with international business transactions.

Private international law or international business transactions concerns domestic and international regulation of foreign investment and the movement of goods and workers across national borders. Subjects include export sales, licensing and distributorships, international loans, joint ventures, choice of law, the enforceability of arbitral agreements and awards, extraterritorial application of taxation, antitrust and securities laws, protecting investors from political risk, the General Agreement on Tariffs and Trade and other multilateral organizations concerned with trade, investment, and balance of payments, such as the OECD, EC, and IMF.

Id. at 151 n.4.

76. See Hessel Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 9 (1966). “The doctrine of comity, as developed in the Netherlands during the last quarter of the Seventeenth Century, for the first time posed in stark simplicity the basic dilemma of conflicts law in modern times to mediate between the *pretensions of territorial sovereignty* and the *needs of international commerce*.” *Id.* (quoting ULRIC HUBER, *DE JURE CIVITATIS*, Lib. III, Sec. IV, Cap. I, 14, 607 (3rd ed. 1968) (emphasis added)).

77. Paul, *supra* note 72, at 158 (1988). It should also be noted while Dutch courts used territoriality and vested rights to further Dutch national sovereignty, they did not rule out the fact that “each state may choose to apply foreign law within its domestic courts so long as such foreign laws do not conflict with the public policy of the forum state.” *Id.*, at 157–58; see also Koh, *supra* note 73, at 2351.

This unified and integrated approach to international law was also part of the colonial law⁷⁸ and was later incorporated into the domestic laws of the United States when the United States gained its independence from England. Article I of the Constitution granted Congress the power to “punish Piracies . . . committed on the high Seas; [and] Offences against the Law of Nations.”⁷⁹ Upon the Declaration of Independence and the entry of the United States into the community of nations, the Supreme Court declared that “the United States had, by taking a place among the nations of the earth, become amenable to the law of nations.”⁸⁰

Against this early background of a more unified approach to international law, U.S. courts did not feel compelled to reject cases that implicated the law of nations. The Supreme Court embraced what we would now term public international law cases and appeared to relish the opportunity to parse through the rich interstices of the “law of nations” without indulging in the distinctions of public and private cases. Thus, the Court heard and decided a wide variety of cases deemed offenses against the law of nations (for example, piracy,⁸¹ the seizure of ships deemed enemy ships,⁸² the status of private property in case of state succession,⁸³ and attacks on ambassadors).⁸⁴

In a series of nineteenth-century cases remarkable for their eloquent use of international law principles, the Supreme Court unabashedly embraced international law in a manner and spirit rarely seen in later decisions. Early courts regularly invoked the law of nations to decide eminently “public” or state issues without inhibition. In addition, where both “public” and “private” matters were intertwined, the courts made no attempt to bifurcate and isolate the public from the private dimensions. The courts did not make an attempt either to protect private commerce or to shy from “politically hot” issues.

In *The Peterhoff*,⁸⁵ the Supreme Court was faced with the politically thorny issue of the legality of an American blockade of neutral Mexico. Confronted in 1862 by a growing

78. International law had been part of the law of England, and through the “mother” country, part of U.S. colonial law. See *Barbuit’s Case*, 25 Eng. Rep. 777 (Ch. 1735) (the “law of nations . . . formed part of the law of England”); *Respublica v. De Longchamps*, 1 Dall. 111 (Pa. 1784) (law of nations invoked by the Chief Justice of Pennsylvania to hold an individual guilty of attack on a French ambassador).

79. U.S. CONST. art. I, § 8, cl. 10. Under Article III, section 2, clause 1, Congress extended judicial power of Article III courts to cases arising under treaties as well as cases affecting Ambassadors, public Ministers, admiralty cases, and cases involving foreign parties. U.S. CONST. art. III, § 2, cl. 1.

80. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

81. See *U.S. v. Smith*, 18 U.S. (5 Wheat.) 153 (1820). Justice Story affirmed that “piracy . . . [is] an offence against the law of nations” and that the individual responsible was liable. *Id.* at 162–63.

82. See *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191 (1815). Sugar carried on board a British ship destined for a commercial house in London was seized by the United States during the War of 1812 as enemy property. However, because the sugar had been manufactured in Santa Cruz, which belonged to Denmark but recently fell into British hands, the Danish owner argued that the produce of the plantation could not be considered British property. See *id.* at 195. In determining that the seizure of sugar by the United States was in accordance with “ancient principles” of law which had prevailed in other nations, Justice Marshall held that “[t]he law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional.” *Id.* at 198.

83. See *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). In an action against the United States, plaintiff Percheman claimed title to land in Florida pursuant to a grant made by Spain in 1815 to his predecessor. Despite a peace treaty between the United States and Spain in which Spain ceded Florida with the express proviso that private rights previously granted would be respected, a board of land commissioners held against the plaintiff. Justice Marshall held that “the modern usage of nations, which has become law,” required that private rights be protected against successor sovereigns.

84. See *Respublica v. DeLongchamps*, 1 Dall. 111 (Pa. 1784). Between the Declaration of Independence and the adoption of the Constitution, Chief Justice M’Kean of Pennsylvania invoked the law of nations to find an individual guilty of assault on the Secretary of the French Ministers. According to M’Kean, “this is a case of first impression in the United States. It must be determined on the principles of the laws of nations, which form a part of the municipal law of Pennsylvania . . .” *Id.* at 114.

85. 72 U.S. (5 Wall.) 28 (1866).

rebellion, the U.S. government responded by declaring that it would "set on foot a blockade of the ports"⁸⁶ of the Confederate states. In response to the argument that trade with the Mexican city of Matamoras was made unlawful by the American blockade of the mouth of the Rio Grande, the Supreme Court boldly enunciated two principles. First, as the Court declared, "[i]t must be premised that no paper or constructive blockade is allowed by international law."⁸⁷ Second, in holding that neutral commerce is to be free and protected by the law of nations, the Court reasoned that not only did prior "cases fully recognize the lawfulness of neutral trade to or from a blockaded country"⁸⁸ but "the general doctrines of international law [also] lead irresistibly to the same conclusion."⁸⁹

The Court concluded "that trade, between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and cannot be declared unlawful."⁹⁰ Significantly, although the Court recognized that "[t]rade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other,"⁹¹ it nonetheless declared that "we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence."⁹²

In *United States v. The La Jeune Eugenie*,⁹³ a decision which similarly embraced the rich intersections between "public" international law and "private" property rights, Judge (later Justice) Story did not shy away from applying "public" international law to hold that a French vessel engaged in the slave trade could be seized by the United States, even if seizure affected private property rights. The Court made no attempt to impose an ideological barrier between private and public international law, nor did it try to conceptualize the case as a private commercial law case to make it more amenable to judicial determination. Instead, the Court implicitly determined that the private or commercial nature of the transaction affected under the formal banner of a French vessel registered to French residents⁹⁴ did not convert the conflict into a "private" matter for determination by French domestic laws. In fact, the private or commercial nature of the transaction could not prevent the United States from asserting jurisdiction because, as the Court declared, the slave trade "begins in corruption, and plunder, and kidnapping"⁹⁵ and violates the universal law of nations existing independently from the will of any sovereign.⁹⁶

In a case pregnant with state-to-state implications and hence within the core of what later became "public" international law issues, the Supreme Court, in the *Prize Cases*,⁹⁷ looked to the law of nations to determine whether the American Civil War constituted a war under international law. The Court also determined whether or not the Union had the right

86. *Id.* at 50. A merchant ship of neutral British nationality sailing from London to the Mexican city of Matamoras was captured by the United States and condemned as a lawful prize of war on suspicion that its true destination was to the blockaded coast of the rebellious states.

87. *Id.* at 50.

88. *Id.* at 56.

89. *Id.* at 56.

90. *Id.* at 57.

91. *Id.* at 57. "Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast." *Id.*

92. *Id.* at 57.

93. 26 F. Cas. 832 (C.C.D. Mass. 1822).

94. The French claimants argued that there was no international law prohibiting the slave trade and additionally that the law of nations could not interfere with private commercial transactions, because private property rights could only be subjected to domestic laws. See *id.* at 835-38.

95. *Id.* at 845.

96. See *id.* at 846.

97. 67 U.S. (2 Black) 635 (1862).

to avail itself of the rights of a belligerent, including the right to blockade the ports of the enemy belligerent and the right to seize certain neutral vessels as prizes. After surveying the "laws of war, as established among nations,"⁹⁸ the Court found that a state of war existed and that "the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard."⁹⁹ In exercising "the right of a belligerent,"¹⁰⁰ the United States did not violate the laws of war and thus the "civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean."¹⁰¹

As those early decisions reveal, early U.S. courts adopted an unfragmented view of international law without distinguishing public from private law.¹⁰² The law of nations was truly a universal and comprehensive *jus gentium* common to all and broad enough to encompass "public" state interests as well as "private" commercial interests later associated with private international law. In *Swift v. Tyson*,¹⁰³ for example, Justice Story held that a federal court sitting in diversity jurisdiction must apply common law—in this case, the universal merchant law because "[t]he law respecting negotiable instruments may be truly declared . . . to be in a great measure, not the law of a single country only, but of the commercial world."

Ironically, the rise of international trade and commerce and the desire for greater predictability may have contributed to the eventual distinction by nineteenth-century scholars of private international law as a separate discipline. Merchant and maritime laws were extricated from their universal realm and domesticated into municipal law. The law merchant evolved from customary *jus gentium* to positive law, codified in the United States as domestic law in the form of the Uniform Commercial Code, and on the international plane, as international treaty law in the United Nations Conference on Contracts for the International Sale of Goods.¹⁰⁴ While the law merchant was absorbed into domestic law and privatized into the relatively predictable and friction-free system of commerce, public international law scholars increasingly disowned private international law as an integral part of international law,¹⁰⁵ and thereby widened the public/private split.

98. *Id.* at 667.

99. *Id.* at 671.

100. *Id.* at 672.

101. *Id.* at 673.

102. The early courts also embraced a monist, rather than dualist, approach to international law. The Restatement notes that "[f]rom the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, state and federal, have applied it and given it effect as the courts of England had done." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 2, introductory note, at 41 (1987).

103. 41 U.S. (16 Pet.) 1, 19 (1842). "[T]he courts of New York do not found their decisions upon this point, upon any local statute, or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law." *Id.* at 18.

104. Apr. 10, 1980, U.N. Doc. A/Conf. 97/18, Annex 1, 19 I.L.M. 668 (1980). The Convention entered into force for the United States on January 1, 1988, and through the Supremacy Clause, U.S. Const. art. VI, overrides the UCC where contracts for the sale of goods are between parties whose places of businesses are in different countries, if those countries are contracting parties.

105. See Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1952); Paul, *supra* note 72, at 163-72; Paula R. Rhodes, *Should We Continue to Distinguish Between Public and Private International Law?*, 79 AM. SOC'Y INT'L L. PROC. 352, 356 (1985).

B. *The Politicization of Public International Law*

As the twentieth century progressed and the public/private divide widened, public international law became associated with the hotly politicized issues of interstate relations and, hence, increasingly implicated in questions of state sovereignty and state autonomy. The imagery of a public international realm which is so chaotic and politicized and implicates so many sensitive interstate issues that no amount of law could tame, explains the courts' reluctance to determine the law of nations. Sovereign states themselves, whose acts within their territorial boundaries should not be judicially second-guessed by foreign courts, can best maintain order within this unruly space.

The identification of public international law with the discords of politics and power¹⁰⁶ prodded courts to invoke a number of "abstention" doctrines to refrain from proclaiming "what the law is."¹⁰⁷ The doctrine of comity, for example, has undergone a transformation, from a doctrine *empowering* courts to recognize (or to not recognize) "the legislative, executive or judicial acts of another nation,"¹⁰⁸ to one obligating courts to *disempower* themselves from any such determination. While comity was originally a doctrine of judicial engagement—because courts would, methodically, confront, evaluate, and then accept or reject foreign law if it contravened forum law—the doctrine has now become a doctrine of judicial evasion. The doctrine provides the judiciary with the shortcut needed to sidestep politically charged issues and "to defer to foreign sovereignty and to the executive in the conduct of foreign relations."¹⁰⁹

Like comity, the act of state doctrine¹¹⁰ has also increasingly become a vehicle for judicial abdication as courts transform the doctrine from a predominantly legal to a predominantly political formulation. In what has become a classic articulation of the act of state doctrine, the Supreme Court in *Underhill v. Hernandez*, stated that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."¹¹¹ The act of state doctrine could be and has in fact been conceived as a conflicts of law doctrine allowing courts to elaborate upon, apply, or reject the law of a foreign state.¹¹² But it has, over the years, transmogrified into a political doctrine in which

106. This image partly derives from the overemphasis placed on the international rules dealing with force and war. Professor Louis Henkin, for example, has noted that most of international law deals with concerns that have little to do with force and that, therefore, most nations obey international law most of the time. See generally LOUIS HENKIN, *HOW NATIONS BEHAVE* (1979).

107. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

108. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895). As a doctrine which is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other," *id.* at 163, the doctrine of comity granted courts a certain degree of latitude. Comity was originally "intended to give domestic courts greater latitude to *refuse* to apply foreign law or enforce foreign judgments . . ." Joel Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 1, 44 (1991) (emphasis added) [hereinafter Paul, *Comity*]. For example, Justice Story favored the doctrine because "[c]omity permitted each state to preclude the operation of another state's law if it violated the fundamental rights of its citizens Comity would not compel a free state to apply the law of a slave state over a fugitive slave." *Id.* at 22.

109. Paul, *Comity*, *supra* note 108, at 44.

110. A close relationship exists between comity and the act of state doctrine. See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–04 (1918). "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rest at last upon the highest consideration of international comity." *Id.* Comity is designed to avoid embarrassment to the foreign sovereign. The act of state doctrine is designed to avoid embarrassment to the domestic sovereign or the executive in its conduct of foreign affairs.

111. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (emphasis added).

112. See Michael Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826, 833–34 (1959) (arguing that the act of state doctrine should be conceived as a conflicts of law doctrine, thus allowing the forum court to utilize traditional conflicts principles such as the public policy exception to refuse to apply foreign law). This conflicts approach has in fact been used by the New York courts to support their refusal to give effect to foreign

courts, suddenly incompetent to declare the law of nations, defer to two overriding norms: executive authority in foreign affairs and the sovereignty of states.

The more public international law is deemed to be a zone of politics, the more it is thought incapable of legal resolution and the more the judiciary has retreated behind a facade of comity,¹¹³ sovereignty,¹¹⁴ and executive authority.¹¹⁵ In a series of cases that epitomize judicial abdication of its duty to declare law, the Supreme Court, relying on the act of state doctrine and executive supremacy in international politics, reversed the New York courts' refusal to give effect to a Soviet expropriatory decree.¹¹⁶ The New York Court of Appeals, applying traditional conflicts principles, had deemed the act to be contrary to New York public policy.¹¹⁷

Bound by Supreme Court precedent, Judge Learned Hand in *Bernstein v. Van Heyghen Freres Societe Anonyme*¹¹⁸ used the act of state doctrine to dismiss a complaint challenging the validity of the Nazi expropriation of the plaintiff's property. Although Judge Hand recognized that a conflicts approach would have invalidated the expropriation by the Nazi regime as "utterly odious to the accepted standards of justice of that state,"¹¹⁹ he believed that this conflicts approach would violate the act of state doctrine as interpreted by the Supreme Court.¹²⁰ Unless and until the executive acted, through the so-called *Bernstein* exception, "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials,"¹²¹ the Second Circuit felt obligated to apply the act of state doctrine to bar itself from determining the validity of the Nazi expropriation of a plaintiff's property.¹²² This new *Bernstein* twist, in effect, turned the act of state doctrine from a doctrine in which courts would negatively refrain into a doctrine in which courts would affirmatively act. The courts were to act,

law. See, e.g., *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 252 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947); *United States v. Belmont*, 85 F.2d 542, 543 (2d Cir. 1936), *rev'd*, 301 U.S. 324 (1937); *United States v. Pink*, 32 N.E.2d 552 (N.Y. 1940).

113. See *supra* notes 107-08 and accompanying text.

114. In an antitrust suit in which the actions of the Costa Rican government were directly implicated, Justice Holmes declared: "The very meaning of sovereignty is that the decree of the sovereign makes law." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909). Judicial elevation of sovereignty can also be seen in Justice Marshall's 1825 holding that a sovereign state could not impose and transport extraterritorially its domestic laws outlawing slavery on other equally sovereign foreign states, because "[n]o principle of general law is more universally acknowledged, than the perfect equality of nations." *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.).

115. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (Sutherland, J.).

116. See *United States v. Pink*, 315 U.S. 203, 222-23 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937). Pursuant to an executive agreement, the U.S. government would exchange American claims against the Soviet Union regarding expropriated property for Soviet claims against American nationals regarding debts owed to Soviet citizens. The Supreme Court reversed the New York courts' refusal to recognize and enforce the Soviet decree because of the supremacy of foreign policy and executive authority.

117. See *United States v. Pink*, 32 N.E.2d 552 (N.Y. 1940) (per curiam decision in accord with *Moscow Fire Ins. Co. v. Bank of New York and Trust Co.*, 20 N.E.2d 758, 764 (N.Y. 1939), *rev'd* 315 U.S. 203 (1942)). The New York Court of Appeals relied on traditional conflicts principles, in which nations are allowed to refuse recognition and enforcement of a foreign law under the public policy exception. A number of proposals have been made to convert the act of state doctrine into a conflicts of laws rule. See Zander, *supra* note 112, at 826. In addition to the public policy exception, an international law violation exception would be created to allow nations to refuse to recognize and enforce acts of state which violate international law. See *id.* at 833-34, 840.

118. 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947).

119. *Id.* at 249.

120. *Id.* at 249-50.

121. Department of State, *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers*, 20 DEP'T ST. BULL. 592, 593 (1949).

122. Upon receipt of the State Department's letter authorizing judicial review, the Second Circuit reversed itself and directed the district court to try the case on the merits. *Bernstein v. N.V. Nederlandsche-Amrikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954).

however, as a mere rubber stamp of an executive deemed eminently more competent to negotiate the realm of politics.¹²³

Similarly, in *Banco Nacional de Cuba v. Sabbatino*,¹²⁴ in a suit by Cuba for proceeds from the sale of sugar that had been expropriated by the Castro government, the Supreme Court, in an eight-to-one majority, declared that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, *even if the complaint alleges that the taking violates customary international law*."¹²⁵ Other parts of the opinion further suggest that because there was no law and there was only ideology, judicial declaration of law would be impossible. As the majority reasoned, "[i]t is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."¹²⁶ Against Justice White's vehement dissent—that "the executive of no other government seems to require such insulation from international law adjudications in its courts; and no other judiciary is apparently so incompetent to ascertain and apply international law"—the majority held that lack of consensus meant that it is incumbent upon the executive, rather than the judiciary, to define the law of expropriation.¹²⁷

Sabbatino could be read to mean simply that in the absence of a clear international law principle governing a particular issue,¹²⁸ the Court will apply the act of state doctrine. However, what is interesting about the opinion is that the majority identified as evidence of no standard law the fundamental tensions "between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system."¹²⁹

The *Sabbatino* majority thus equated an absence of consensus with an absence of the rule of law. To the dismay of Justice White, political differences and ideological rifts seemed to have provided the Court with the occasion to "declare the ascertainment and

123. In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), a number of justices found the Bernstein exception to be problematic. Justice Powell characterized the exception as requiring the "judiciary to receive the Executive's permission before invoking its jurisdiction." 406 U.S. at 773 (Powell, J., concurring).

The four dissenting justices held that acceptance of the Bernstein exception "would require us to abdicate our judicial responsibility to define the contours of the act of state doctrine so that the judiciary does not become embroiled in the politics of international relations." *Id.* at 778 (Brennan, J., dissenting). Although the dissenting opinion rejected the Bernstein exception as executive encroachment on the judiciary's autonomy, it was in favor of the act of state doctrine overall as a foreign policy/political question doctrine barring review of the foreign act of state. *Id.* at 785–90, 795–96 (Brennan, J., dissenting).

124. 376 U.S. 398 (1964).

125. *Id.* at 428 (emphasis added).

126. *Id.* at 430–31. A more benign reading of Justice Harlan's majority opinion would emphasize as the decisive factor the absence of a clear international law standard for expropriation and compensation. Had there been a "greater . . . degree of codification or consensus concerning [this] particular area of international law," *id.* at 428, the Court could have and would have applied international law. In fact, the Court cautioned that its decision should not prohibit U.S. courts from determining international law issues "which do not represent a battleground for conflicting ideologies." *Id.* at 430 n.34. Under that hypothetical scenario, the Court would have essentially engaged in a conflicts analysis; the Court could either recognize the foreign act of state, in essence, applying the foreign law, which would leave the expropriatory decree as is, or it could invoke either a public policy exception or an international law exception and refuse to recognize or enforce the decree. Under the facts of *Sabbatino*, however, that scenario was thwarted by the impossibility, according to the majority opinion, of ascertaining the international law of expropriation.

127. *Id.* at 432–33.

128. See *supra* note 126.

129. *Sabbatino*, 376 U.S. at 430.

application of international law beyond the competence of the courts.”¹³⁰ This idea is in stark contrast to the fact that historically, as Justice White observed, “[p]rinciples of international law have been applied in our courts to resolve controversies not merely because they provide a convenient rule for decision but because they represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof.”¹³¹

Judicial abstention because of a vague dislike of international politics is different from a legitimate use of the political question doctrine. “Inevitably, of course, international law cases will be politically charged. But as *Baker v. Carr* reminds us, the doctrine is ‘one of ‘political questions,’ not one of ‘political cases,’ and political heat alone does not a separation-of-powers violation make.”¹³² A more narrowly tailored question would thus ask whether a case poses a legitimate political question, rather than assume that an act by a foreign state—the quintessential public international law scenario—automatically creates an impenetrable zone of political questions.¹³³ Similarly, it would ask whether a particular case has been constitutionally committed to the political branch, as opposed to the judicial branch, rather than assume that any foreign policy implication triggered by an act of state incapacitates the judiciary from a determination of the law.¹³⁴

Comity and executive authority have indeed been invoked by courts to abstain from applying public international law. But comity and executive authority have *not* been invoked as doctrinal barriers to force courts to abstain from adjudicating private international law. This is attributable to, as I argue, the separation of public and private international law and the concomitant view that private international, but not public international law, is amenable to judicial review. Where the essential logic of a case is determined by reference to “private” or market considerations, as opposed to “public” considerations, courts have not been so restrained.

C. *The Domestication of Private International Law*

Unlike public international law, which has become one big political question doctrine, private international law has not been politicized but rather, privatized. Although a

130. *Id.* at 439 (White, J., dissenting).

131. *Id.* at 453 (White, J., dissenting).

132. Koh, *supra* note 73, at 2386 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Upon a determination by the court that the case touches upon a political question, in other words, that “the Constitution has textually committed to another governmental branch the power to make the determination now requested from a court,” *id.* “the court would not ‘abstain,’ but rather, interpret the Constitution and find the political branch’s determination to be conclusive.” *Id.* at 2386 n.200.

The Supreme Court’s decision in *W.S. Kirkpatrick & Co., Inc. v. Env. Tectonics Corp., Int’l*, 493 U.S. 400 (1990) has reduced the number of cases in which the act of state doctrine would be applicable. While the doctrine should no longer bar courts from deciding cases properly before them because those cases “may embarrass foreign governments,” it still means that “in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.” *Id.* at 409–10.

133. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 727 (1976) (Marshall, J., dissenting). “The act of state doctrine reflects the notion that the validity of an act of a foreign sovereign is, under some circumstances, a ‘political question’ not cognizable in our courts.” *Id.* The dissenters argued that Cuba’s “retention of and refusal to repay” the expropriated funds should therefore qualify as an act of state and that *Sabbatino* should bar review. *Id.* at 728–30. Under this view, the act of state doctrine would be indistinguishable from, and collapse into, the political question doctrine.

134. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J., concurring) (action by Israeli plaintiffs alleging multiple tortuous acts by the Palestine Liberation Organization and other defendants should be dismissed due to “the inherent *inability* of federal courts to deal with cases such as this one.” (emphasis added)); *Chicago & S. Air Lines Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (the nature of any act implicating foreign policy is “of a kind for which the Judiciary has neither *aptitude*, facilities nor responsibility. . . .” (emphasis added)).

public/private dichotomy exists between the national and the international market—so that the national market is generally deemed “private” if compared to the more “public” international market—*both* national and international markets as a whole are considered part of the private, rather than public international order. The depoliticization of market relations and private international law and the simultaneous extrication of the private from the public have created an interesting paradox. On the one hand, courts have relegated private international law from the public domain of international politics to the more sanitized private domain of international commerce. On the other hand, they have also had no hesitation enforcing private international transactions, precisely because private international law is viewed as consensus-driven, noncontentious, and hence more susceptible to the rule of law.

Even as public international law constitutes “a battleground for conflicting ideologies,”¹³⁵ private international law is considered to be remarkably uniform. Commenting on the multiplicity of culturally specific legal rules, for example, Professor Phillipp Trimble noted that “[t]here are many examples of different interpretations of linguistically identical treaty norms in different national courts, *even in nonpoliticized commercial law*, which is itself well rooted in a genuinely common subculture.”¹³⁶ Indeed, some suggest that the market as a whole is even more consensus-driven than the family: “uniformity is easier in trade law than family law, precisely because the subculture of international trade is more homogeneous than the multitudinous cultures of families.”¹³⁷

At the same time, however, the assumptions that private international law is undivided by politics and inhabits a nonpublic sphere have allowed courts to sidestep the politically charged zone of state sovereignty¹³⁸ without invoking either the doctrines of comity or act of state. Not only is commerce deemed to be essentially apolitical, but even commerce undertaken by sovereign states is deemed to be similarly private and freed from the difficult public law issues of sovereignty.

There are early cases, of course, that refused to uphold this private/public distinction and that held, for example, that the public law doctrine of sovereign immunity applied as much to a merchant ship owned by a foreign government as a warship owned by a foreign government, because commerce carried on by a state entity is as “public” a purpose as any other sovereign “public” acts.¹³⁹ The Supreme Court declared in *Berrizi Bros. Co. v. Steamship Pesaro* that sovereign immunity applied to “all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of

135. *Sabbatino*, 376 U.S. at 430 n.34.

136. Phillip Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 836–37 (1990) (reviewing LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE* (1989), RICHARD A. FALK, *REVITALIZING INTERNATIONAL LAW* (1989), and DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987)) (emphasis added).

137. *Id.* at 837–38.

138. See *supra* note 114 and accompanying text. As Chief Justice Marshall declared, “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . .” *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316–17 (1936). “Rulers come and go; governments end and forms of government change; but sovereignty survives. . . . Sovereignty is never held in suspense.” *Id.*

139. See *Berrizi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562, 574 (1926). After a thorough analysis of Justice Marshall’s decision in *The Schooner Exchange*, 11 U.S. at 116, holding that a French warship in U.S. waters was immune from attachment, the *Berrizi* Court concluded that the decision “cannot be taken as excluding merchant ships held and used by a government . . .” *Berrizi*, 271 U.S. 562, 574. Sovereign immunity attached whether the foreign government’s property was used for a military or a commercial purpose.

its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are."¹⁴⁰

Over time, however, as more states entered the field of commerce as commercial actors, the reasoning in the *Berizzi* court became increasingly less common and the public/private distinction accordingly expanded. Given the surge of state actors in the "private" realm of international commerce, it was deemed necessary to modify certain "public" law doctrines, such as the doctrine of sovereign immunity, from absolute to restrictive immunity to limit instances in which liability can be disclaimed by the foreign state. Given the pre-existing dichotomy between the public and the private, Congress decided that "a foreign state's immunity is 'restricted' to cases based on its public acts, and does not extend to cases based on its *commercial or private acts*."¹⁴¹ The enactment of the Foreign Sovereign Immunities Act of 1976¹⁴² thus represented the codification of commerce as private and essentially sealed the public/private distinction in international law. Courts are now deemed competent to judge the commercial conduct of a foreign sovereign for two reasons without embarrassing the executive or offending the foreign sovereign. First, a commercial act is now considered a private, not public, act. Second, it is now presumed that sovereignty is shed when a sovereign enters the market.¹⁴³

Perhaps even more significantly, the commercial activity exception has been increasingly relied on by courts to insulate the market from political conflicts and to prevent public international law from unleashing, as the Supreme Court termed it, "potential injury to private businessmen—and ultimately to international trade itself."¹⁴⁴ In *Russian Reinsurance Co. v. Stoddard*,¹⁴⁵ the New York Court of Appeals was faced with the question of how to resolve private commercial claims between a New York trustee and a Russian corporation whose corporate status and property had been extinguished by the new Soviet government, an entity unrecognized by the United States. The court's dilemma was thus the quintessential public/private dilemma: how to resolve a commercial private international law dispute that was inextricably intertwined with a foreign sovereign's noncommercial public act.

To decide whether the New York trustee was legally obligated to turn trust property over to the Russian corporation, the court confronted the "public" international law issue of whether an expropriatory decree issued by a government unrecognized by the executive of the United States had the legal effect of dissolving the corporation and confiscating its property. Although public issues such as recognition were implicated, the court simply declared that the status of the trust property itself "does not concern our foreign relations. It is not a political question, but a judicial question."¹⁴⁶

While the Russian corporation may be deemed to continue to exist despite a decree issued by an unrecognized government, the corporation, according to the court, "exists here

140. *Berrizi*, 271 U.S. at 573.

141. *Foreign Sovereign Immunities Act of 1976, Hearings on H.R. 11315 Before the Subcomm. on Adm. Law and Gov't Relations of the Comm. on the Judiciary*, 94th Cong., 2d Sess. 24, 26-27 (1976) (Testimony of the Legal Adviser of the Dep't of State) (emphasis added).

142. 28 U.S.C. §§ 1330, 1602-11 (1994).

143. A plurality of four Supreme Court Justices in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976), argued that the commercial activity exception to sovereign immunity, a jurisdictional doctrine, should be equally applicable to a prudential doctrine such as the act of state doctrine because of the innately non-political nature of commerce: "more discernible rules of international law have emerged with regard to the commercial dealings of private parties," *id.* at 704, and "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts." *Id.* at 703-04.

144. *Id.* at 703.

145. 147 N.E. 703 (N.Y. 1925).

146. *Id.* at 705.

solely by force of the juridical conception which . . . should not be carried beyond the limits of common sense and justice."¹⁴⁷ The court refused to order the New York trustee to turn trust property over to a corporation whose existence has been terminated by the Soviet government. The *Russian Reinsurance* court thus went out of its way to prevent the political ambiguities of recognition or nonrecognition from infecting private commercial expectations.

The public/private split in international law has thus created a number of interesting paradoxes. Once sovereignty becomes its leitmotif, public international law is deemed to be less about rationality and law than power and politics, provoking judicial retreat from the realm of State Department politics into a safer realm of comity and act of state. While politics dominates public international law, its counterpart, the market, dominates private international law and gives it the appearance of neutrality and consensus—thus, in effect, marginalizing it from the “politically hot” zone of international politics.

IV. PARADIGMS OF INTERNATIONAL ECONOMIC DEVELOPMENT

International economic development has been profoundly influenced by the intersections between the national/international market dichotomy and the public/private international law dichotomy. While the two dominant models of economic development appear diametrically opposed, both inherit a set of assumptions rooted in an atavistic division of the international world. Although the classical liberal model and the radical model adopt different postures toward the international and the national market, both accept the imageries and the ideological rifts caused by national/international market dichotomy. Similarly, although both models occupy different spaces within the international order—one occupying the space of private international law and the other the space of public international law—both are in fact uncritically entrenched within the public/private dichotomy.

The divisions in international law are replicated in a post-war order consisting of two institutions, the UN and the Bretton Woods systems, both of which are divided along the public/private line. Therefore, the conceptual framework inherited by the two dominant paradigms of international economic development has been similarly fractured by the same public/private split. It is thus not a surprise that the classical liberal model occupies the private component of international law governed by Bretton Woods in general and the GATT in particular. With its emphasis on commercial activities, market actors, and a more or less nonpolitical process, the model attempts to negotiate the international/national market divide in a manner that is as nonconfrontational and apolitical as possible. By contrast, the radical model occupies the public component of international law governed by the United Nations Charter, and accordingly incorporates the national/international market dichotomy with the characteristically state-oriented and politically charged sensibility of the public international sphere.

Equally significant, because the public international system has been characterized as chaotic and volatile, public international law has had to affirm sovereignty¹⁴⁸ as an antidote to disorder. By contrast, the Bretton Woods system and its constituent organs of the GATT, the International Monetary Fund (IMF), and the International Bank for Reconstruction and Development (IBRD) were designed less to enshrine sovereignty than to facilitate economic liberalism and interdependence. The domestication of commerce and the traditional identification of private international law with the rational, ordered, and

147. *Id.* at 707.

148. *See* U.N. CHARTER art. 2, para. 1. “The Organization is based on the principle of the sovereign equality of all its Members.” *Id.*

depoliticized nature of the public/private split have meant that the goal of private international law is not to maintain but to surmount sovereignty in order to integrate the national with the international market. Hence, while the post-war public order is supposed to prevent the recurrence of the natural tendency toward the abnormality and disorder of politics, the postwar private order is supposed to manage and maintain its natural tendency toward the normality and order of the market.¹⁴⁹ Toward this end, each constituent organ of the Bretton Woods system was assigned a different but interrelated task, each designed to maintain an equilibrium between the national and the international market.¹⁵⁰

The Bretton Woods regime restricts state behaviors deemed destructive. However, unlike the UN regime, its governing sensibility is not state, but market-oriented. As I discuss below, the developmental model that has essentially adopted the Bretton Woods regime is the classical liberal model. It is guided by the norms of private as opposed to public international law described in Part II.

A. *The Classical Liberal Model of International Economic Development*

The classical liberal model is founded on premises identical to those that define the “commercial activity” exception in public international law. In the two core areas that comprise the heart of the development debate—the cause of underdevelopment and the conditions necessary for economic growth—the model’s analysis and prescription are founded on an essentially “private” conception of market activities. First, the model assumes that economic development is synonymous with modernization, which consists of definable and historically determined stages through which all countries proceed. As a result, development is viewed as a relatively noncontentious process. Second, while the model assumes that a divide exists between the national and the international market, it attempts to reconcile the division by resort to a “private” logic. The model begins with the premises of liberal development economics,¹⁵¹ applies neoclassical market principles to the particularities of Third World underdevelopment, and utilizes the decidedly nonstate regime of the GATT to construct the requisite framework for economic growth.

1. Development Economics

According to the liberal school of development economics, the cause of underdevelopment lies in the isolation of developing countries from the international economic order. While the developed world consists of modern, industrial nations economically linked to one another and to the international market, the developing world consists of traditional, agrarian countries isolated from one another and from the international economic sphere. The objective of development is to transform isolation into integration and stimulate economic growth in the process. Through greater linkages of capital, technology, and production, developing countries can catapult themselves from “a

149. See Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 549 (1987).

150. The International Bank for Reconstruction and Development was charged with the financing of post-war reconstruction and development, the IMF with supervising the free flow of capital, and the GATT with maintaining the free flow of goods.

151. Development economics rejects the universalism of economics and claims that because “underdeveloped countries as a group are set apart, through a number of specific economic characteristics common to them, from the advanced industrial countries . . . , traditional economic analysis, which has concentrated on the industrial countries, must therefore be recast in significant respects when dealing with underdeveloped countries.” Hirschman, *supra* note 6, at 192.

traditional, stagnant, subsistence-oriented economy into a dynamic, capitalist economy based on wage-labour, capable of self-sustained growth and . . . rising real wages.”¹⁵²

In his classic and highly influential work *Economic Development with Unlimited Supplies of Labour*, Arthur Lewis discussed the causes of and solution to underdevelopment within a highly private, nonpolitical framework that emphasizes market as opposed to state action as the solution to underdevelopment. The model’s focus rests on factors generally considered to be quintessentially commercial in nature: distribution, accumulation, and growth.¹⁵³

At the heart of Lewis’ theory is his observation that subsistence economies with unlimited supplies of labor are characteristically low-productivity, low-income economies. The solution, according to Lewis, lies in the ability of such economies to produce an accumulation of capital and to create a capitalist class with the capacity to engage in the investment of capital surplus. Lewis identifies several strategic themes that continue to inform the development debate in general and the contours of the liberal strand of development economics in particular—for example, rural underemployment, mobilization of surplus rural labor, capital accumulation, economic growth, and industrialization.¹⁵⁴

Lewis analyzes the traditional agricultural sector of many developing countries and finds as the first and foremost problem, not necessarily its low productivity,¹⁵⁵ but its unlimited supplies of labor and low subsistence wages.¹⁵⁶ Although surplus labor exists in all sectors of agrarian economies, this surplus is exceptionally large in the subsistence as opposed to the capitalist sector.¹⁵⁷ Because surplus labor in the subsistence sector, in turn, has a depressing effect on wages in the capitalist sector,¹⁵⁸ the capitalist is able to take advantage of low wages by adding but a small margin above the minimum bottom to coax workers from the subsistence into the capitalist sector.

Low wages caused by unlimited labor present the most significant obstacle to economic development because, according to Lewis, they impede the very process which stimulates economic growth—capital accumulation. Because low wages mean no savings and no capital accumulation, Lewis’ thesis on the root cause of underdevelopment has provided the classical liberal model with its standard diagnosis: how to induce an increase in domestic savings and hence increase capital accumulation.¹⁵⁹

The transformation of surplus capital into investment capital constitutes an additional prerequisite for development. Because the majority 90% cannot save and the remaining 10%—which include the traditional class of landlords, traders, and moneylenders—save

152. HUNT, *supra* note 6, at 62.

153. W. Arthur Lewis, *Economic Development with Unlimited Supplies of Labour*, in PARADIGMS IN ECONOMIC DEVELOPMENT, *supra* note 6, at 59, 60.

154. *Id.* at 95–97.

155. Lewis noted also that the subsistence sector “is not fructified by capital” and hence its output per head is much lower than the capitalist sector. *Id.* at 64.

156. *Id.* at 61–62.

157. Lewis defined the capitalist sector as “that part of the economy which uses reproducible capital, and pays capitalists for the use thereof.” *Id.* at 64.

158. “Earnings in the subsistence sector set a floor to wages in the capitalist sector . . .” *Id.* at 67.

159. As Lewis states:

The central problem in the theory of economic development is to understand the process by which a community which was previously saving and investing 4 or 5 per cent. of its national income or less, converts itself into an economy where voluntary saving is running at about 12 to 15 per cent. of national income or more.”

Id. at 72.

but cannot productively invest, the only class with the ability to "tempt capital into productive channels rather than into the building of monuments"¹⁶⁰ is the capitalist class.

The model is thus startlingly provocative at the most basic level. Economic development entails first and foremost the creation of an indigenous capitalist class. Once a capitalist base exists, under Lewis' model, closed economies typical of developing-country economies—characterized by a capitalist core and a large supply of labor—will reinvest a portion of its profits, create new capital, and expand its capital base. In other words, according to Lewis, poverty then is not the original cause of underdevelopment. Developing countries fail to save "because their capitalist sector is so small" and "not because they are so poor."¹⁶¹

Thus, the process of capital accumulation, which is the very engine of economic development, will continue as long as a capitalist nucleus exists. The capitalist will reinvest surplus, and the capitalist sector will expand. The capitalist sector will draw laborers from the subsistence into the capitalist sector until the unlimited labor supply eventually disappears,¹⁶² and the subsistence sector is supplanted by a more modern, more dynamic capitalist sector.¹⁶³

Once the model identifies the absence of capital surplus and the absence of investment capability as a basic cause of underdevelopment, it is not a surprise that the model also prescribes the market and market activities as the predominant vehicle through which capital can be created and invested. Similarly, given the identification of international market activities with private international law, it is no surprise that the model views the market-based process of development as essentially uncoercive, apolitical, and, in fact, as Walter Rostow explains, predetermined by a historical process comprised of five stages of growth: first, traditional society marked by pre-modern agrarian subsistence;¹⁶⁴ second, the preconditions for takeoff, which may be triggered by various encounters with external forces;¹⁶⁵ third, the takeoff, characterized by the establishment of some industry and some economic growth;¹⁶⁶ fourth, the drive to maturity, marked by sustained economic productivity and increased integration with the international economy;¹⁶⁷ and finally, the age of high mass-consumption, in which consumption patterns transcend basic subsistence and resources shift to meet welfare and security needs.¹⁶⁸ While most developing nations are destined toward this final stage of growth, most developed nations are currently at or past this stage of economic development. The United States, Western Europe, and Japan, for example, experienced this particular sequence of growth in the 1950s.¹⁶⁹

160. *Id.*

161. *Id.* at 75. For a discussion of the various factors which either aid or impede the formation and expansion of the capitalist core, see *id.* at 76–87. Government may expand the supply of credit to aid in the finance of capital formation or use tax policy to contain the rise in income and productivity in the agrarian sector to ensure that agricultural improvements do not result in a resurgence of the agrarian sector. See *id.*

162. See *id.* at 68.

163. A crisis may occur when the economy reaches the point where labor is no longer infinite. See *id.* at 87. A safety valve may be available if the capitalist exports capital "to countries where there is still abundant labour at a subsistence wage." *Id.*

164. Because "a ceiling existed on the level of attainable output per head [traditional societies] had to devote a very high proportion of their resources to agriculture." W.W. Rostow, *The Five Stages-of-Growth—A Summary*, in PARADIGMS IN ECONOMIC DEVELOPMENT, *supra* note 6, at 99, 100.

165. Encounters with more advanced societies may set in motion modern economic activities such as banking, investment, and manufacturing. See HUNT, *supra* note 6, at 99. For Western Europe, preconditions for takeoff occurred in the seventeenth and eighteenth centuries, "as the insights of modern science began to be translated into new production functions in both agriculture and industry, in a setting given dynamism by the lateral expansion of world markets and the international competition for them." Rostow, *supra* note 164, at 101.

166. See *id.* at 102–03.

167. See *id.* at 103–04.

168. See *id.* at 105.

169. Some form of post-high mass-consumption, termed beyond consumption, also exists. See *id.*

Like Lewis, Rostow also identifies an increase in the rate of savings—"from 5% to 10% of the national income"¹⁷⁰—and productive investment of surplus savings in new industries¹⁷¹ (in essence, industrialization) as some of the more significant indicators of economic takeoff. Capital accumulation and investment remain the basis upon which stages of growth could be financed.

By presenting a theory of development as stages of growth culminating in a stage which most Western industrialized economies have either begun to reach, have already reached, or from which they are beginning to emerge, the model equates development with Western modernization and Western modernization with the condition of universality. Additionally, the delineation of economic development as stages of growth is further premised on the view that development is governed by a nonpolitical logic and hence predetermined along a linear, if not natural, progression.¹⁷² The classical liberal model, in effect, tends to bypass the ideological tensions that exist between the national markets of developing and developed countries, on the one hand, and the national market of developing countries and the international market, on the other hand.

2. The Neoclassical Market and GATT

The theoretical contours articulated by development economists such as Lewis, Rostow, and others¹⁷³ who saw rural underemployment as a cause of underdevelopment and the takeoff¹⁷⁴ toward industrialization as a solution, have in recent years been supplemented by a market-based approach. The model combines the diagnosis provided by the liberal strand of development economics with the market orientation of private international law. Although there was some question initially as to whether free market principles could be effectively transposed into developing-country economies, the model soon adopted as one of its primary objectives the creation of an efficient market for the purpose of achieving the objectives identified by economists such as Lewis and Rostow. Consequently, the classical liberal model typically urges the following: first, minimal state intervention in national markets; and second, reliance on the law of comparative advantage to negotiate the national/international market divide.

Although some scholars initially raised questions regarding the effectiveness of the market in developing countries entrenched in traditionally "backward" institutions not prone to economically rational behaviors, development economists now believe that producers in developing countries will act as rationally as their counterparts in developed countries to maximize profits and accumulate savings.¹⁷⁵ Thus, even "people in underdeveloped countries are generally well aware of such alternatives as are open to them

170. *Id.* at 102. Besides capital surplus, growth can also be induced by nurturing a leading or primary sector of the economy. Examples of leading sectors and their contributions to economic development include the textile industry in Britain, the railway industry in the United States, and the timber industry in Sweden. See HUNT, *supra* note 6, at 99.

171. See Rostow, *supra* note 164, at 103.

172. Rostow's "laws of motion" is eerily similar to Karl Marx's prediction that the "industrially most developed country does nothing but hold up to those who follow it on the industrial ladder, the image of its own future . . ." Hirschman, *supra* note 6, at 194. Thus, Marx extolled British colonialism in India because he hoped the shock effects would propel India from backwardness toward a similar progression of economic growth: modernity and industrialization.

173. For a discussion of subsequent refinements of Lewis' and Rostow's theses, see HUNT, *supra* note 6, at 101-12.

174. Development economics has emphasized the "deliberate, intensive, guided effort" required to achieve the "big push," "takeoff," "great spurt," "minimum critical effort," or "backward and forward linkages." See Hirschman, *supra* note 6, at 198.

175. See HUNT, *supra* note 6, at 297.

as sellers or buyers" and as a result, "many are prepared to take a long view and to postpone consumption for several years if the prizes are considered satisfactory."¹⁷⁶ Recent studies have in fact found that economic activities in "un-marketlike" informal economies are among the most entrepreneurial and dynamic of all economic activities in developing nations.¹⁷⁷

As a result, one of the objectives of the model is to put in place the apparatus necessary to allow the market in developing countries, like the market in developed countries, to function efficiently with minimal state intervention. Additionally, to the extent that the national market is to be integrated with the international market, the GATT provides the model with an established framework for the regulation of national/international market trade. Thus, contracting states, for example, are supposed to ensure that their tariff structures are not distorted by rates "diverging wildly and apparently irrationally between products,"¹⁷⁸ and that more intrusive forms of national market protection, such as quotas and other nontariff barriers, be eliminated to the greatest extent possible. The objective is to secure "an efficient deployment of available resources"¹⁷⁹ in order to achieve the goals of development through the establishment of a balanced national and international economic regime.

The state orientation of the UN and the rules of public international law thus have had a relatively minimal impact on the model. The impact is minimal precisely because the model essentially incorporates the norms of private international law and the assumptions of normality that define both the liberal strand of development economics and the liberal orientation of the GATT. These assumptions are the following: first, there is a normal progression of growth consisting of relatively well defined stages aimed at transforming subsistence economies into advanced, capitalist, industrial societies; and second, there is a normal balance to be struck between and maintained by the national and the international markets.

The model is quintessentially "private" in both its diagnosis of the causes of and solutions to underdevelopment. The focus on generating the right conditions for capital formation to catapult developing economies from one stage of growth to the next—by using the nonstate, market-oriented sensibility of the Bretton Woods, as opposed to the UN regime—places it within the very center of activities governed by private international law.

B. *The Counterreaction: The Radical Model of Development*

In response to liberal assertions of neutrality, normalcy, nonintervention, and integration, the radical model lays claim to the exact opposite sensibility: politicization, intervention, and extrication of the national from the international market. Because the structuralist and the dependency schools, which are both associated with the radical model, adopt the language of public international law, they embrace a notion of development that promotes first and foremost economic nationalism and economic sovereignty. Furthermore, because the model identifies the systemic and highly politicized tensions of

176. *Id.* (quoting PETER T. BAUER & BASIL S. YAMEY, *THE ECONOMICS OF UNDERDEVELOPED COUNTRIES*, 97, 159 (1957)).

177. Hernando de Soto studied the informal economy in Peru and found that whereas the formal economy is marred by a government bureaucracy which favors the elites and hampers the growth of entrepreneurial activities, the informal economy is characterized by informal trades remarkable for their high degree of ingenuity. *See generally* HERNANDO DE SOTO, *THE OTHER PATH* (1989). Instead of seeing the informal sector as a problem to be suppressed, De Soto sees that "the problem itself offers the solution—to use the energy inherent in the phenomenon to create wealth and a different order." *Id.* at 239.

178. HUNT, *supra* note 6, at 304–05.

179. *Id.* at 296 (quoting BAUER, *supra* note 176, at 154).

the international market as barriers to economic development, the model is fiercely dedicated to the construct of an autonomous national market and fiercely hostile to what it considers to be the zero-sum nature of international commerce. Meanwhile, to the extent that the radical model attempts to alter the rules governing the relationship between the national and the international markets, the international regime it relies upon is not the private international law regime of the Bretton Woods; rather, it is the public international law regime of the UN.

1. The Structuralist Orientation

Associated with the developmental strategies of Latin America, the structuralists perceive the neoclassical tradition of a noninterventionist free market as inapplicable to the economic conditions facing developing countries in general and Latin American countries in particular. Instead of emphasizing capital accumulation, surplus, and investment, the structuralists emphasize the politics of structural inequality that permeates the international economic system.

A study conducted by Raoul Prebisch, who questioned comparative advantage as an effective development strategy, found that the terms of trade for Latin America declined the more Latin America traded its primary commodity exports for Europe's manufactured imports.¹⁸⁰ According to Prebisch, the reasons behind such export-earning declines were purely structural. International demand for agricultural commodities tends to fluctuate in wild swings and, because Latin American countries exported goods in which they had a comparative advantage (agricultural goods), their economy fluctuated whenever agricultural commodity prices fluctuated in the international market.

Other factors cast similar doubt on the liberal theory of comparative advantage. Prebisch found that despite an overall increase in manufactures produced by manufacturing countries, a concomitant decline in the price Latin America paid for manufacturing goods did not occur. There was no decline because productivity increases were internally absorbed by the more powerful manufacturing countries to create higher wages and profits for their own nationals. Higher wages then prevented lower prices for Latin American importers.¹⁸¹ To make matters worse, while the prices of manufactured imports rose, earnings from exports of agricultural products declined.¹⁸² Additionally, primary commodities tend to be faced with low-income elasticities of demand while manufactured products tend to enjoy high-income elasticities of demand.¹⁸³ According to Prebisch, such

180. The 1949 study, entitled "The Economic Development of Latin America and Its Principal Problems," was prepared for the Economic Commission for Latin America, an organization founded in 1948. See HUNT, *supra* note 6, at 130.

The structuralist school has been promoted by a number of theorists. See, e.g., CELSO FURTADO, *DEVELOPMENT AND UNDERDEVELOPMENT* (Ricardo W. de Aguiar & Eric Charles Drysdale trans. 1964); HANS W. SINGER & JAVED A. ANSARI, *RICH AND POOR COUNTRIES* (4th ed. 1988).

181. See HUNT, *supra* note 6, at 131.

182. See *id.* at 130. Because of the lack of technological progress in developing nations, there was little increase in productivity. Hence, one should have seen no significant decrease in the price of primary products. Nonetheless, declines in the terms of trade meant that developing countries had to export more and more primary commodities to earn more and more foreign exchange needed to purchase the same amount of manufactured goods. See WALTERS & BLAKE, *supra* note 9, at 45.

For a critique of Prebisch's theory, see David Osterfeld, *The Liberating Potential of Multinational Corporations*, in PERPETUATING POVERTY 284-93 (Doug Bandow & Ian Vasquez eds., 1994).

183. Low income elasticity of demand for most primary commodities means that

the percentage increase in quantity demanded will rise by less than the percentage increase in national income. On the other hand, for fuels, certain raw materials, and manufactured goods, the

structural inequities, resulting from the very nature of primary commodity production and manufactured goods production, call into question the universality of the law of comparative advantage.¹⁸⁴

As a result of Prebisch's conclusions, a number of development strategies were pursued, each based on a deliberate separation of the national from the international market. Instead of aligning their national economies in accordance with their comparative advantages to accommodate the needs of the international market, developing countries decided to shift from outward strategies relying on exports to inward strategies relying on import substitutes. At the same time, given the declining terms of trade in primary product exports, countries shifted from producing raw commodities to producing manufactured goods. Industrialization would be pursued in order to move beyond commodity production, although not by export promotion, but by import substitution.

Thus, although the structuralist school, like the liberal school, favors transforming subsistence agrarian economies into industrial ones, the structuralist strategy was decidedly different. The structuralist strategy advocated insulation from, rather than integration with, the international economy. Import substitution, however, also involved the deliberate development of certain domestic industries regardless of whether a comparative advantage existed or whether the industry could be efficiently established and managed. Thus, import-substitution industrialization tends to be marked by a highly protectionist posture involving high tariffs, quotas, extensive licensing requirements, as well as some form of state subsidization of and financing for state-planned investments.¹⁸⁵ In addition, besides the normative preference in favor of a state-oriented economic framework, given the general dearth of private domestic capital in most developing countries, the model places its emphasis on state actors.

A major paradox, however, existed for the structuralists. Import-substitution industrialization "is itself heavily import-dependent. Increased self-sufficiency in the long term requires, as a precondition, increased imports and, hence, increased access to foreign exchange."¹⁸⁶ Import substitution required active state involvement in the economy as well as heavy mobilization of capital resources, primarily debt, to finance the new industrial infrastructure.¹⁸⁷

Import-substitution industrialization had several ramifications. In the absence of either private or state capital reserves, state-led development meant a "borrowing-for-growth"¹⁸⁸ strategy that culminated in the Latin American debt crisis of the 1980s. As a result, a strategy designed to lessen the dependence of the national economy exacerbated national dependence on the international market. The model in effect deepened the national/international market divide to the detriment of the national market it was supposed to protect.

income elasticity is relatively high Consequently, when incomes rise in rich countries their demand for food, food products, and raw materials from the Third World nations goes up relatively slowly whereas their demand for manufactures, the production of which is dominated by the developed countries, goes up very rapidly.

Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 232 (quoting MICHAEL P. TODARO, *ECONOMIC DEVELOPMENT IN THE THIRD WORLD* 375 (4th ed. 1989)).

184. See HUNT, *supra* note 6, at 132-33.

185. See Carrasco, *supra* note 183, at 229.

186. HUNT, *supra* note 6, at 133.

187. See Carrasco, *supra* note 183, at 234.

188. *Id.* at 244 (quoting RIORDAN ROETT, *BRAZIL: POLITICS IN A PATRIMONIAL SOCIETY* 166 (4th ed. 1992)).

Second, active state involvement in industrialization and foreign investment meant increased potential for the politicization of conflicts with multinationals. Consequently, economic development began to look more like international politics, and both national and international markets became a battleground for Third World assertion of sovereignty. Developing country governments began issuing regulations designed to control multinationals. Governments mandated joint ventures with foreign minority ownership, prohibited excessive repatriation of profits, required certain levels of technology transfers, or permitted nationalizations of foreign-dominated industries.¹⁸⁹ A number of states additionally claimed that concession agreements between a foreign investor and a state with long-term stabilization clauses should be removed from the private international law realm and placed into the public international law realm. In a public international law realm, a host of "public" international law principles such as the principle of permanent state sovereignty over natural resources¹⁹⁰ would permit state nullification of the contract term.

Although the structuralists embraced a state-oriented sensibility that promotes home market nationalism and sovereignty, the structuralist school was ultimately oriented toward adaptation, not total rejection, of the international market. Prebisch himself had been trained as a neoclassical economist, and the structuralists did not downplay the importance of international economic relations as a long-term development strategy. Thus, structuralists were interested in national autonomy and insulation of the national from the international market primarily as a temporary measure.

2. The Neo-Marxist Dependency Orientation

In stark contrast to both the classical liberal model and the structuralists, the dependency school completely rejects a positive-sum view of international economic relations. Because the private international order is as politicized and coercive as the public international order, long-term insulation of the national market from the politics of the international market is deemed preferable to international economic integration. Moreover, due to the overwhelming political and economic force that exists in the international order in general and in the developed world in particular, the dependency school also assumes that the only force that could potentially act as a countervailing presence is the force of an intensely nationalist, state-dominated, and state-financed economic regime.

Under this logic, the causes of and solutions to underdevelopment are both politically rooted and historically discrete. "Underdevelopment is not a phase through which every growing economy passes, but a specific historical condition."¹⁹¹ According to dependency theorists, European capital accumulation (credited with creating the preconditions for economic development and industrialization in Europe) is not an apolitical "process of capital accumulation" but rather, "plunder thinly veiled as trade"¹⁹² in which "the treasures captured outside Europe by undisguised looting, enslavement and murder flowed back to the mother-country and transformed themselves into capital."¹⁹³

While Europe went through the cycle of capital accumulation and the necessary progressions of economic growth, the now developing nations went through a reverse process of deliberate underdevelopment. According to Paul Baran, a neo-Marxist theorist,

189. See *id.* at 235.

190. See G.A. Res. 1803, U.N. GAOR, 18th Sess., Supp. No. 17, at 15, 15, U.N. Doc. A/5217 (1963).

191. HUNT, *supra* note 6, at 123.

192. Paul Baran, *On the Roots of Backwardness*, in PARADIGMS IN ECONOMIC DEVELOPMENT, *supra* note 6, at 131.

193. *Id.* (quoting KARL MARX, CAPITAL 826 (Kerr ed.)).

only the violent destruction of traditional economies waged by European colonialists as they hurried to accumulate capital matched the massive transfusion of capital into Europe. As Baran notes, "[b]y breaking up the age-old patterns of their agricultural economy, and by forcing shifts to the production of exportable crops, Western capitalism destroyed the self-sufficiency of their rural society that formed the basis of the pre-capitalist order in all countries of its penetration, and rapidly widened and deepened the scope of commodity circulation."¹⁹⁴ In other words, the economies of the colonized were deliberately underdeveloped in order to benefit the economies of the colonizers.¹⁹⁵

Besides viewing underdevelopment as historically unique, rather than simply another sequence in an apolitical and predetermined sequence of growth, dependency theorists also view colonialism as being a similarly unique and "specific mode of production, neither feudal nor capitalist though 'resembling' both at different levels."¹⁹⁶ Unlike Marx, who predicted that colonial penetration would break up traditional feudalistic structures, unleash the productive forces of capitalism, and lay the foundation for capitalist development,¹⁹⁷ dependency theorists generally consider colonialism to be a particularly negative mode of production. According to dependency theorists, colonialism failed to create the preconditions for true capitalism and instead "transmitted to the colonies the pressures of the accumulation process . . . without unleashing any corresponding expansion in the forces of production."¹⁹⁸ As a result, colonialism became a vehicle for "thwarted industrialisation," in which nonproductive modes of investment, such as money lending and trade, along with foreign industries, were nurtured and favored.¹⁹⁹

For dependency theorists, the colonial mode of production produced "a backward dependent capitalism whose own horizon of reproduction is infinitely more restricted than that which faced the nascent bourgeoisie of Europe."²⁰⁰ Even though low per capita income and low savings in developing nations are significant barriers to economic growth, dependency theorists see the objective condition of dependency—dependent capitalism—as a more primary cause of underdevelopment. For Baran, for example, low savings can be traced not simply to poverty, but to the neo-colonial mode of production reproduced in developing country economies even after independence. This mode of production includes the establishment of an indigenous but dependent capitalist class which squanders surplus capital for nonproductive uses.²⁰¹

While liberal development economists such as Lewis saw the establishment of an indigenous capitalist as the key to economic development, dependency theorists view this capitalist core as antithetical to development because it is highly dependent on and tightly controlled by the international market. According to Andre Gunder Frank, a well-known dependency theorist, dependent capitalism is characterized by an ongoing and continuing

194. *Id.* at 131–32.

195. To protect and develop England's nascent textile industry, Indian silk and cotton products were not allowed to enter England unless subjected to prohibitive tariffs. To underdeveloped Indian manufacturers, English goods were allowed to enter India either duty free or upon the payment of a nominal tariff. *See id.* at 134.

196. Jairus Banaji, *For a Theory of Colonial Modes of Production*, in PARADIGMS IN ECONOMIC DEVELOPMENT, *supra* note 6, at 179–80.

197. *See* S. Amin, *The Origin and Development of Underdevelopment*, in PARADIGMS IN ECONOMIC DEVELOPMENT, *supra* note 6, at 162; *see also* Banaji, *supra* note 196, at 186.

198. Banaji, *supra* note 196, at 183.

199. *See id.* at 185.

200. *Id.* at 187. Neo-Marxist characterization of capitalist development in developing nations as backward and incapable of productive growth has been critiqued by more orthodox Marxists. *See generally* BILL WARREN, IMPERIALISM: PIONEER OF CAPITALISM (1980). Warren sought to revive Marx's thesis that in spite of its destructiveness, colonial capitalism would set in motion the preconditions for capitalist growth and in the process, set the stage necessary for socialism.

201. *See* HUNT, *supra* note 6, at 166.

process of extraction, whereby the indigenous capitalist class actively and continually transfers surplus capital to the core of world capitalism.²⁰²

The only way out of dependency is complete severance of developing country markets from an international market dominated by developed nations.²⁰³ Instead of integration with the international market in order to effectuate a transfer of capital, resources, and technology from the developed core to the underdeveloped periphery, dependency theorists argue that "in the underdeveloped countries economic development can now occur only independently of most of these relations of diffusion."²⁰⁴

Thus, while dependency theorists embrace structuralist skepticism of the classical liberal model, their understanding of the historical as well as current causes of underdevelopment has meant that complete de-linkage from the international market constitutes the only effective exit from perpetual dependency. But at the same time, both schools—structuralist and dependency—are united in their determination that the rules of international economic relations should be shifted from the Bretton Woods system, dominated by the developed world, to the UN regime which is more sympathetic to the needs and concerns of the newly independent states. To that extent, the radical model has attempted to transform the very terms of the economic development debate—from private to public international law and from the market orientation of GATT to the state orientation of the UN and to various UN constituents such as the United Nations Conference on Trade and Development (UNCTAD).²⁰⁵

3. The United Nations and UNCTAD

Because the radical model assumes that the state is the only entity capable of protecting the home market from a hostile international market, the state occupies a central position and is accordingly charged with the task of transforming the national economy from a dependent, subsistence economy into an autonomous industrialized one. As I previously discussed, as economic development became synonymous with state plans and state directives, it began to take on the characteristics of "acts of state"—public commands issued by a foreign sovereign—and thus the sensibility of public as opposed to private international law.

To the extent that this state-centered orientation is projected from the national to the international level, it has similarly induced a paradigmatic shift—from the apolitical market-based norms of private international law to the more politicized state-based norms of public international law. Thus, UNCTAD, founded in 1964 as a conceptual alternative to GATT, functioned as the "international sovereign" or the international counterpart to the "national sovereign" that dominates the domestic economic plane.

Through UNCTAD, a group of approximately 120 developing nations endeavored to alter the terms of the development debate by proposing an agenda of positive rights and

202. See *id.* at 65.

203. Hence the following observation: "[M]anufacturing within colonies developed most rapidly only in periods of world capitalist crisis, when the bonds tying the colonial nations to imperialism were temporarily relaxed. As long as these bonds remained firm, due partly to their reinforcement by the colonial modes of production, the accumulation process suffered a permanent blockage . . ." Banaji, *supra* note 196, at 185.

204. Andre Gunder Frank, *The Development of Underdevelopment*, in PARADIGMS IN ECONOMIC DEVELOPMENT, *supra* note 6, at 150. Frank claimed that Latin America experienced its greatest levels of growth when it was most isolated from the metropolis—during the Napoleonic Wars, World War I, the Depression of the 1930s, and World War II. See *id.* at 154–55.

205. For a discussion of UNCTAD, see Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67 (1992).

obligations designed to alter structural barriers to development. With the support of the UN General Assembly,²⁰⁶ UNCTAD was able to utilize its authority as a UN organ to undertake a number of affirmative structural reforms that would not have been permissible under the more noninterventionist norms of GATT.²⁰⁷

Because export earnings constitute the primary source (75%) of foreign exchange for developing countries,²⁰⁸ improvement of the terms of international trade became a prominent issue within UNCTAD. To that extent, UNCTAD played a major role in highlighting the structural barriers faced by developing countries. For example, GATT's inequitable tariff structure has reduced the average level of tariffs on manufactured products to less than 5%, while leaving intact the high tariff levels imposed on agricultural commodities primarily exported by developing countries.²⁰⁹

At UNCTAD's urging, a new Part IV entitled "Trade and Development" was added to GATT in 1965²¹⁰ to address the development-specific needs of developing nations. GATT's adoption of a Generalized System of Preferences (GSP),²¹¹ for instance, gave developed countries discretionary authority to grant duty-free treatment to developing country exports without requiring the latter to grant reciprocal concessions "inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments."²¹²

However, more sweeping calls for a new international economic order (NIEO)²¹³ did not succeed to the extent that they represented a radical and complete departure from GATT's norms of liberal trade. Aimed at removing politically rooted barriers that have worked to the disadvantage of developing nations, the NIEO issued a number of demands designed to redistribute global resources through state, as opposed to market mechanisms.

206. U.N. CHARTER art. 9, para. 1. "The General Assembly shall consist of all the Members of the United Nations." *Id.* Because developing countries constitute a numerical majority, they constitute a numerical majority in the General Assembly.

207. As Raúl Prebisch remarked, the GATT

does not reflect a positive conception of economic policy On the contrary, it seems to be inspired by a conception of policy which implies that the expansion of trade to the mutual advantage of all merely requires the removal of the obstacles which impede the free play of these forces in the world economy. These rules and principles are also based on an abstract notion of economic homogeneity which conceals the great structural differences between industrial centres (sic) and peripheral countries with all their important implications.

UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, TOWARD A NEW TRADE POLICY FOR DEVELOPMENT: REPORT OF THE SECRETARY-GENERAL OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, at 6, U.N. Doc. E/Conf. 46/3 (1994) (Raúl Prebisch, Secretary-General of the United Nations Conference on Trade and Development).

208. See WALTERS & BLAKE, *supra* note 9, at 40.

209. See *id.* Tariff levels imposed on such products are two to four times the 5% average for manufactured goods typically exported by developed nations. *Id.*

210. Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, Feb. 8, 1965, 17 U.S.T. 1977, 572 U.N.T.S. 320.

211. See Generalized System of Preferences, June 25, 1971, GATT B.I.S.D. (18th Supp.) at 25 (1972) (temporary waiver), *clarified in* Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203 (1980) (GATT Decision).

212. PATRICK LOW, TRADING FREE: THE GATT AND US TRADE POLICY 181 (1993) (citing art. XXXVI, para. 8). However, a number of factors might have diluted GSP benefits. First, the authority to grant GSP benefits resides in the developed nations themselves, is not legally binding, and has become increasingly politically motivated. See Gregory O. Lunt, *Graduation and the GATT: The Problem of the NICs*, 31 COLUM. J. TRANSNAT'L L. 611 (1994). Second, maximum quotas have been imposed on developing-country imports that can enter under the GSP program. And third, certain products, for example, textiles and others in which developing countries have a comparative advantage, have been exempted from GSP treatment.

213. See *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, 6th Spec. Sess., Supp. No. 1 at 3, U.N. Doc. A/9559 (1974).

The NIEO, for example, called for an absolute increase in developing countries' share of the world's industrial output to 25% by the year 2000;²¹⁴ greater access to IMF and commercial loans, with more liberal repayment terms and less conditionality; more technology at less than market cost; and greater international regulation of multinational corporations.

The attempt by developing countries to shift the economic development debate from the GATT to the UN system represents an effort to exercise greater influence over international economic matters in a forum more accommodating to their numerical advantage.²¹⁵ It also represents an attempt to transform the terms of the debate away from the apolitical sphere of private international law to the more political sphere of public international law. The politicization of economic conflicts represents an attempt by the radical model to utilize the political and economic power of the state as a sword against the international market, by catapulting the discourse from the "idyllic" world of private international law to the ideologically messy world of public international law described by Justice Harlan in *Sabbatino*.²¹⁶ The radical model thus represents a complete rejection of the liberal model's premise that economic development could be achieved by maintaining a proper balance between the national and the international market.

V. FOUNDATIONS FOR A NEW MODEL OF INTERNATIONAL ECONOMIC DEVELOPMENT

As I discussed, the public/private dichotomy has profoundly influenced the manner in which both development models view the relationship between the national and the international market. This public/private fault line has endured and, in many respects, impoverished the normative framework that guides the interaction between the national and international markets and hence the conduct and management of international economic development itself. In other words, both models take for granted the national/international market dichotomy and simply negotiate the divide according to either a "public" or a "private" sensibility without much cross-pollination of norms.

Ironically, the reconfiguration of the international order has not had any significant impact on the terms of the development debate or the way in which either model views the interaction between the international and the national market. Nor has it led to any meaningful reassessment of the two dominant paradigms of economic development.

In this section, I revisit both the national/international market dichotomy and the public/private international law dichotomy incorporated by both models of development to explain why both have been unsatisfactory from a normative standpoint and why both have

214. Developing countries accounted for only 9% of the world's industrial output in 1979. See WALTERS & BLAKE, *supra* note 9, at 218.

215. By contrast, decision-making in the IBRD and the IMF, for example, is heavily influenced by a system of weighted voting formula which in effect grants greater authority to economically stronger states, since a member's voting power corresponds proportionately to its financial contribution. See Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566, 577 (1980).

Similarly, although the GATT's requirement of a two-thirds majority for any amendment or addition appears to benefit developing nations to the extent that they could withhold their assent, this has been eroded as developed nations increasingly relied on side codes to resolve their own trading concerns. See ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 81-90 (1987). The implementation of side codes and "conditional MFN" meant that adherence to a particular code was not only optional, it was also applicable only to code signatories, not non-code-signatory GATT members. For instance, the separate Tokyo Round side code to cover dumping, subsidies, and countervailing duties resulted in the codification of developed country trading norms outside the conventional GATT framework, without having to address the needs or objections of developing countries. See LOW, *supra* note 212, at 159.

216. See *supra* notes 124-31 and accompanying text.

failed in their understanding of the international order. In Part A, I examine the global transformation of national production and the diffusion of control from national economies to more globalized structures and explore why such transformations should alter our conception of the dichotomy between the national and the international market. In Part B, I examine the public/private international law dichotomy and explore why this dichotomy has impeded the development of a more integrated approach to international economic development.

A. *The Decline of Nation-State Hegemony and the National/International Market Dichotomy*

Recent transformations should call into question any discourse on economic development that uses the state as its foundation for distinguishing the national from the international.²¹⁷ Despite protests to the contrary,²¹⁸ the state-based system has constituted the ontological foundation for international law. Since the Treaty of Westphalia of 1648, the state has displaced the supremacy of the church and asserted itself as the absolute authority within its territorial boundaries.²¹⁹

The crisscrossing of transnational economic forces, however, has radically altered the relationship between the national and the international market and transformed the traditional statist order into a "multi-centric world composed of diverse 'sovereignty-free' collectivities . . . apart from and in competition with the state-centric world of 'sovereignty-bound' actors."²²⁰ International economics has become less influenced by territorial tendencies than by globalizing tendencies. "While the former is discernible in activities intended to upgrade the state and other organizations which promote the well-being of a territorially proscribed area, the latter is manifest in a large array of activities that extend across territorial jurisdictions in response to the world's greater interdependence."²²¹

In recent years, "almost every factor of production—money, technology, factories, and equipment—moves effortlessly across borders . . ."²²² Hence, the prediction is made that "[t]here will be no *national* products or technologies, no national corporations, no national industries. There will no longer be national economies, at least as we have come to understand that concept."²²³ Consequently, neither the classical liberal model of development nor the radical model, both of which are premised on some dichotomy between the national and the international market, is fully equipped to accommodate the globalization of international economics. The radical model, which is dedicated to the insulation of national sovereignty from the intrusions of the international market, is based

217. My analysis in this section is not applicable to the "security structure," which Susan Strange defines as "the framework of power created by the provision of security by some human beings for others." SUSAN STRANGE, *STATES AND MARKETS* 45 (2d. ed. 1994). Given the continued need for a "security structure," the state is still considered the entity most suited to protect citizens within its borders from external threats posed by other states in an international system.

218. See, e.g., Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

219. See Mark W. Zacher, *The Decaying Pillars of the Westphalian Temple: Implications for International Order and Governance*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 59 (James N. Rosenau & Ernst-Otto Czempiel eds. 1992) [hereinafter GOVERNANCE WITHOUT GOVERNMENT]. The decline of the state system has been marked by a concurrent erosion of several factors underlying the system: high toleration for wars, insignificant contacts among states, limited extraterritorial damage due to extraterritorial contacts, authoritarian governments, and a high degree of heterogeneity among states.

220. James N. Rosenau, *Citizenship in a Changing Global Order*, in GOVERNANCE WITHOUT GOVERNMENT, *supra* note 219, at 282.

221. *Id.* at 281.

222. REICH, *supra* note 13, at 8.

223. *Id.* at 3.

on a territorial logic that is clearly antithetical to the emerging global logic. Nonetheless, even the classical liberal model that incorporates liberal trade norms of the GATT fails to keep up with the global norms that define the "increasingly borderless economy."²²⁴

In recent years, "the development of a global production system, gradually taking over and supplanting separate national production structures"²²⁵ has transformed home corporations into global corporations that produce for and invest in both the home and the global markets.²²⁶ Development strategies espoused by both the classical liberal model and the radical model are aimed in varying degrees at improving the competitiveness of national industries. This aim is based on the deeply ingrained "notion that products have national origins"²²⁷ and that corporations have territorially based nationalities tied to the territorial boundaries of the home market. These models no longer reflect the global reality.

Globalization of production, or "world-wide sourcing,"²²⁸ has had several decentralizing effects on the international economic regime. First, increased mobility of productive capacities cross-border meant that the economic order had become more globally based. As the state loses its ability to control the movement of national actors both inside and outside its territory, sovereignty—the classic construct of public international law—is becoming increasingly obsolete.²²⁹ Foreign markets once served by exports from the United States or from another developed nations are increasingly served by a locally based corporation that is a foreign subsidiary of a parent corporation headquartered elsewhere. Other countries confront the same global reality. Asea Brown Boveri, Inc., the electrical engineering company (owned jointly by a Swedish and a Swiss entity) considers itself "as a company without any regard to national boundaries"²³⁰ and thus equally committed to its global web of operations worldwide. Even among Japanese corporations, which historically have tended to be more territorially tied to the Japanese economy than U.S. or European corporations,²³¹ the realities of the global economy have meant an increasing erosion between Japanese corporations and the Japanese economy. Increasingly, even Toyota Motor Corporation and Sony are waving the global flag, moving operations

224. KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* 8 (1995).

225. STRANGE, *supra* note 217, at 73.

226. *See id.* A number of theories have been developed to explain transnational production. According to the "product cycle" theory, although a company's monopoly over a new product allows it to extract a rent, this ability is lost once competition in the home market increases, forcing the company to export the product abroad, then produce the product abroad in order to extract a rent with each new cycle. *See id.* at 77. Other theories focus on preferences granted by most countries to locally produced products over imports, thus encouraging producers to adopt a global production strategy. *See id.* at 78. Increased competition has also been cited as one factor for the globalization of production. Investment in the home country of one's competitor may cause the competitor to retract inward to defend its home market rather than expand outward into international markets. *See WALTERS & BLAKE, supra* note 9, at 115.

227. REICH, *supra* note 13, at 118.

228. STRANGE, *supra* note 217, at 82.

229. Although my discussion is focused on globalization of the production structure, globalization of other structures, for instance, the financial and information structures, has contributed equally to the erosion of state sovereignty and the state's ability to control activities within its territory. Capital markets are not only mobile but intensely intertwined with other capital markets. *See OHMAE, supra* note 224, at 2. Indeed, the foreign exchange market in one day alone has been estimated to be worth approximately \$600 billion. *See Zacher, supra* note 219, at 85.

Similarly, technical innovations as well as the development of advanced modes of electronic communication have led to the unification of national markets into an instantaneously accessible global market unconstrained by the limits of national geography. *See STRANGE, supra* note 217, at 131. No longer can the state exercise authority over the type of information that can or cannot be allowed to cross its territorial boundaries.

230. Charlene Marmer Solomon, *Transplanting Corporate Cultures Globally*, PERSONNEL J., October 1993, at 78, 80 (statement by Richard P. Randazzo, ABB's vice-president of Human Resources).

231. *See* Brenton R. Schlender, *Japan Hits the Wall*, FORTUNE, Nov. 1, 1993, at 128.

and jobs out of Japan. Toray, Japan's largest synthetic fiber manufacturer, has adopted the label "Made in Toray" to suggest the multinational nature of its product.²³²

Globalization has had an impact on the economies of developed nations as well. The corollary to the export of American jobs abroad of course, is the export of foreign jobs into the United States, although this phenomenon has not been as widely noted. For example, while General Motors and Chrysler laid off 18,063 U.S. autoworkers between 1987 and 1990, Japanese car manufacturers with plants in the United States hired 11,050 American workers.²³³ By 1990, Sony, for example, exported its various products from its plants in Dothan, Alabama and Fort Lauderdale, Florida; Sharp exported approximately 100,000 microwave ovens annually from Memphis, Tennessee; Toshiba America exported television sets to Japan from Wayne, New Jersey; while Matsushita exported cathode-ray tubes from Ohio.²³⁴ By 1990, 25% of all products officially considered exports from the United States came from "foreign" corporations.²³⁵

Outsourcing²³⁶ and the globalization of production have meant that traditional distinctions used to distinguish the national market from the international market are no longer accurate. Increased mobility of productive capacities has meant that the very concept of nationality itself, the very foundational division used to distinguish the national from the international sphere, is becoming increasingly meaningless. A product can no longer be unambiguously categorized as the product of a particular state because of the simple fact that its component parts are likely to be internationally sourced and produced. For example, the vice president of Caterpillar Tractor Corporation, as early as the 1970s described Caterpillar as a global corporation with a global orientation, owned by approximately 48,000 shareholders, with stocks traded on all major stock exchanges of the world, and employing 65,000 employees, 22% of whom worked abroad.²³⁷

'Thus, while we export from the U.S., our views as to transportation, markets, and product are worldwide. For example, there is no U.S.-made Caterpillar tractor. A Caterpillar product—wherever it is built—is just that—a Caterpillar product—graphic evidence that people of different national origins and political interest can achieve common objectives.'²³⁸

Thus, the fact that precision ice hockey equipment was "designed in Sweden, financed in Canada, and assembled in Cleveland and Denmark for distribution in North America and Europe, respectively, out of alloys whose molecular structure was researched and patented

232. See Andrew Pollack, *Breaking Out of Japan's Orbit*, N.Y. TIMES, Jan. 30, 1996, at D1.

233. See REICH, *supra* note 13, at 128 (citing Joseph White, *Chrysler to Shut St. Louis Plant, Third Since 1987*, WALL ST. J., Feb. 21, 1990, at A3); see also Constantinos C. Markides & Norman Berg, *Manufacturing Offshore Is Bad Business*, HARV. BUS. REV., Sept.-Oct. 1988, at 113 (noting that as of 1988, there are more than 600 Japanese automotive plants in the United States); John Greenwald, *Toyota Road USA: Business*, TIME, Oct. 7, 1996, at 73, 73-74 (the "Americanization of Toyota" has revitalized communities in Kentucky by creating 22,000 jobs in the state and pumping \$1.5 billion into the state's economy).

234. See REICH, *supra* note 13, at 128-29.

235. *Id.*

236. International sourcing can be either inter- or intrafirm. See Paul M. Swamidass & Masaaki Kotabe, *Component Sourcing Strategies of Multinationals*, in J. OF INT'L BUS. STUDIES, Mar. 22, 1993, at 81, 81. See also Solomon, *supra* note 230, at 81. Each division of Asea Brown Boveri, the electrical engineering conglomerate, composed of 1,300 national companies, is directed to act "locally in response to customers and employees But managers are required to think globally about sourcing. For example, if the dollar is strong relative to the Swedish krona, then the company sources more from Sweden because goods and services are cheaper there. When that changes, sourcing also changes." *Id.*

237. WALTERS & BLAKE, *supra* note 9, at 112-13 (citing U.S. Multinationals: The Dimming of America, report prepared for the AFL-CIO Maritime Trades Department, Executive Board Meeting, February 15-16, 1972, at 12).

238. *Id.* at 112-13.

in Delaware and fabricated in Japan”²³⁹ means that regardless of its official “nationality,” it is in fact a global product resulting from global composites. Similarly, a Pontiac Le Mans—an ostensibly General Motors product of American nationality—is in fact a product generated by a global process involving South Korean assembly, advanced Japanese components such as engines, transaxles and electronics, West German design and style engineering, Taiwanese, Singaporean and Japanese small components, British advertising and marketing, and Irish and Barbadian data processing.²⁴⁰

This confounding combination of cross-nationalities means that neither the classical liberal nor the radical model of development, both of which are premised upon bright-line distinctions between the national and the international market, reflects the global shift. To the extent that the radical model aims to force a separation between the national and the international market, its objective is anachronistic. To the extent that the classical liberal model aims to negotiate a balance between the national and the international market, it represents an awkward attempt to reconcile the two by resorting to conceptual premises that are increasingly obsolete. The global nationality of a product, for example, has stymied the efforts of trade specialists to administer import-restraining measures on products originating from the international market.²⁴¹ Both a liberal regime founded on a constant balancing between the national and the international market and a radical regime founded on furthering the national/international market dichotomy are anachronistic in the face of a global economy where the national and the international can no longer be distinguished with precision or accuracy.

Following an investigation of an antidumping action, the U.S. Department of Commerce confessed that “strictly speaking, there was no such thing as a U.S. forklift, or a foreign forklift for that matter.”²⁴² The Department nonetheless decided that a forklift would be considered a U.S. forklift if its frame is manufactured in the United States, even if the remainder of its parts is made abroad.²⁴³ Similarly, when France tried to limit Japanese

239. REICH, *supra* note 13, at 112; see also Murray Weidenbaum, *The Business Response to the Global Marketplace*, WASH. Q., Winter 1992, at 173, 180 (observing that United Technologies’ French division was responsible for the company’s elevator door system; its Spanish division handled small-gear parts; the German subsidiary handled the electronics; the Japanese division worked on the special motors drives; the Connecticut group was in charge of the systems integration).

240. See REICH, *supra* note 13, at 113; see also Pico Iyer, *The Global Village Finally Arrives*, TIME, Sept. 22, 1993, at 86. “When an Iowan purchases a Pontiac from General Motors, 60% of the money goes to South Korea, Japan, West Germany, Taiwan, Singapore, Britain and Barbados.” *Id.* See also Shelby D. Hunt & Robert M. Morgan, *Relationship Marketing in the Era of Network Competition*, MARKETING MANAGEMENT, Winter 1994, at 19, 19. The Mazda MX-5 Miata, a global product, “was designed in California, financed in Tokyo and New York, and prototyped in Worthing, England. It currently is assembled in Michigan and Mexico from components produced in both the United States and Japan.” *Id.*

241. It has also resulted in the proliferation of intrafirm trade, which also means that trade statistics, for example, those on American trade deficits, create the misimpression that such deficits are caused by an imbalance between the national and the international markets: that more “foreign” products were sold to “us” than “American” products were sold to “them.” See Weidenbaum, *supra* note 239, at 173.

In fact, the American trade deficit can be partially explained by the fact that American-owned firms have been outsourcing globally—producing outside the United States what they once produced within—and then exporting from abroad such products back into the United States. Such outsourcing by American firms was responsible for more than one-third of Taiwan’s trade surplus and more than 20% of Mexico, Singapore, South Korea and Japan’s trade surplus with the United States. See REICH, *supra* note 13, at 134; Swamidass & Kotabe, *supra*, note 236, at 82 (noting that in 1988, intrafirm trade constituted about 30% of United States exports and 40% of United States imports); Weidenbaum, *supra* note 239, at 173 (observing that 50% of all imports and exports, officially considered “foreign trade,” is in fact internal transactions between domestic or foreign parents).

242. REICH, *supra* note 13, at 115–16 n.4 (citation omitted).

243. See *id.* With similar irony, an “American” manufacturer with plants already in Malaysia and Singapore, announced that it would move even more of its assembly work from New York to Mexico, because it did not get the help of the Bush administration in its efforts to have antidumping duties imposed on a “Japanese”

automobile imports to 3% of the French market, it faced the wrath of Margaret Thatcher, who came to the defense of the Nissan Bluebirds, a product assembled in Britain, from parts 80% of which came from Europe.²⁴⁴ When Taiwan included Toyotas assembled in the United States in its ban on Japanese auto imports, it was the Bush administration who came to Toyota's defense and forced Taiwan to back down.²⁴⁵

The concept of nationality has been further muddled by the tendency toward cross-ownership among transnational producers. Like product nationality, corporate nationality has also become increasingly globalized, creating what has been called a "mixed-nationality corporation."²⁴⁶ By the 1990s, Chrysler, for example, owned 12% of Mitsubishi Motors and, indirectly, through Mitsubishi Motors, a part of South Korea's Hyundai Motors. By 1990, Ford owned 25% of Mazda, and both Ford and Mazda owned part of South Korea's Kia Motors; General Motors owned more than 40% of Japan's Isuzu and 50% of South Korea's Daewoo Motors and Sweden's Saab.²⁴⁷ Similarly, rapid globalization has also led to a shift from the traditional tendency toward "establishing dominance in all of [a] business system's critical areas"²⁴⁸ to a new tendency among corporate players to forge "genuinely strategic alliances"²⁴⁹ that transcend traditional notions of corporate nationality.

The result of such globalization of "product nationality" and "corporate nationality" is a convoluted crisscross of cross-ownership, cross-production, and cross-border intrafirm transactions in which the traditional distinctions between a domestic and a foreign product, a domestic or a foreign corporation, or a national and a non-national market are becoming increasingly blurred. Because globalization has fundamentally transformed the two traditional preoccupations of the international order—sovereignty and nationality—as long as the question that guides economic development remains "[i]s it a 'foreign' or a 'domestic' product"²⁵⁰ or "is it a foreign or a domestic corporation," the end result will be a strategy based on favoring a "domestic" product or a "domestic" corporation that can no longer be defined with precision and may no longer exist in the current global reality. For example, the liberal model imposes a separate and unequal treatment standard against foreign players in an attempt to ease the injury sustained by the home market. But its efforts on behalf of the home corporation against the foreign corporation would not necessarily benefit the home market, if the home corporation is global rather than nationally

typewriter company with manufacturing operations in Bartlett, Tennessee. See Keith Bradsher, *Smith Corona Plant Mexico Bound*, N.Y. TIMES, July 22, 1992, at D11.

244. See REICH, *supra* note 13, at 118.

245. See *id.*

246. John M. Kline, *Inter-MNC Arrangements: Shaping the Options for U.S. Trade Policy*, WASH. Q., Fall 1985, at 57, 57.

247. REICH, *supra* note 13, at 126–27. In April 1996, Ford raised its interest to a third, giving Ford effective control of Mazda. See Keith Bradsher, *Ford Moving to Tighten Control Over Mazda Motor*, N.Y. TIMES, Apr. 12, 1996, at D1; Kline, *supra* note 246, at 57 (46% of American Motors owned by Renault); Weindenbaum, *supra* note 239, at 180 (describing General Motor's partial ownership of Sweden's Saab, Korea's Daewoo, Japan's Isuzu and Suzuki).

248. Kenichi Ohmae, *The Global Logic of Strategic Alliances*, HARV. BUS. REV., Mar.-Apr. 1989, at 143, 143.

249. *Id.* (alliances for distribution purposes as well as research and development in diverse industries ranging from automobile and pharmaceutical to semiconductor and construction industries). See also Hunt & Morgan, *supra* note 240, at 19. In addition to global cross ownership, the trend toward global cross alliances among companies also means an increase in webs of "[n]etwork competition" among networks of entities, each independently owned and each specialized in "such areas as marketing, production, finance, purchasing, and R&D." Although each firm is independently owned, the extent of cooperation and coordination among the firms is so great that company boundaries become "fuzzy." *Id.* See also Weindenbaum, *supra* note 239, at 179 (noting that strategic alliances include those between: Philips N.V. (Dutch) and Matsushita (Japan); Sweden's Volvo and France's Renault cooperating in parts purchasing, transportation, and product development; and American Digital Equipment Corp. and Italian Olivetti & Co.).

250. REICH, *supra* note 13, at 118.

based. Similarly, the radical model remains hostile to foreign corporations and foreign goods and attempts to impose barriers to keep out the international market. But it will in essence attempt to preserve a nationally based economy that does not or could not truly exist in the current global age.

Additionally, as the global economy shifts from the traditional high-volume to the more cutting-edge, high-value mode of production,²⁵¹ the very structure of the corporation has also become less territorially bound and more decentralized and diffused. Hence it is more in accord with a global, as opposed to a territorial logic. Once intellectual property displaces real property as the new global currency, high-volume production of standardized commodities requiring relatively immobile machineries and factories has been supplanted by high-value production of nonroutine, specially tailored products and services requiring neither fixed machinery nor factory.²⁵² Just as globalization of production resulted in a proliferation of subsidiaries and branches outside the corporate home base, this diffusion of high-value economic activities has also resulted in a proliferation of decentralized corporate webs composed of globally dispersed independent or semi-independent entities, each engaged in high-value activities.²⁵³ Thus, the corporation (no longer confined to its traditional pyramid-like structure of headquarters and subsidiaries)²⁵⁴ is now composed of an aggregation of small, mobile webs that are increasingly less vertical and more decentralized.

To the extent that globalization represents the pull outward toward internationalism and economic interdependence, it constitutes a countervailing force to the territorial pull inward toward economic nationalism and autonomy, which have, in varying degrees, contributed to the distinctions between "home" and "world" adopted by both the classical liberal model and the radical model of international economic development. The "building block concepts appropriate to a 19th-century, closed-country model of the world no longer hold."²⁵⁵ It has become increasingly difficult to distinguish between "us" and "them." Taken together, these emerging tendencies have begun to create a globally based network

251. See Peter F. Drucker, *Management and the World's Work*, HARV. BUS. REV., Sept.-Oct. 1988, at 65, 65 (describing the decline of full-time farming and blue-collar manufacturing and the corresponding rise of information industry in the United States); Siew Meng Leong & Chin Tiong Tan, *Managing Across Borders*, 24 J. INT'L BUS. STUDIES 449, 449 (describing the shift in "volume to value production").

252. Even in traditional manufacturing industries such as steel, the cutting edge lies not in the production of standard steel ingots, but the production of particular types of steel designed to meet the needs of particular subsectors, for instance, corrosion-resistant steel or specific types of alloys designed to withstand high temperature. See REICH, *supra* note 13, at 82; see also Solomon, *supra* note 230, at 80 (describing the federation of national companies that make up Asea Brown Boveri and its "matrix structure with worldwide business activities grouped into seven business segments that comprise 65 Business Areas . . . responsible for regional profits, research and development, capacity, product design and more.").

253. See William W. Lewis & Marvin Harris, *Why Globalization Must Prevail*, MCKINSEY Q., Mar. 22, 1992, at 114 (describing "the web-like interconnectedness of modern transnational firms"). The traditional corporate structure—the pyramid composed of a base at the bottom and a corporate headquarters at the top—has been replaced by a host of decentralized corporate webs: independent profit centers (problem solvers supported by headquarters but granted a high degree of independence); spin-off partnerships (independent businesses partially owned by headquarters after the spin-off); spin-in partnerships (independent units spinning into partnership with headquarters); licensing (headquarters contracting with independent businesses to license its trademark and technology); brokering (purely contracting relationships involving headquarters and independent units of problem solvers). See REICH, *supra* note 13, at 92–93; Leong, *supra* note 251, at 449 (noting the transformation of 1970s-type global corporations composed of an aggregate of "overseas subsidiaries" to truly "stateless organizations operating in a borderless world"); see also WNET *Special* (network television broadcast Dec. 21, 1993) (transcript available from Journal Graphics Transcripts, WNET Educational Broadcasting Co.), [hereinafter *Broadcast*] (describing the global/local synergy of a globally-designed product).

254. See Statement by Percy Barnevik, CEO, Asea Brown Boveri, in *Broadcast*, *supra* note 253. "I don't believe in headquarters. You have, of course, to have some sort of coordination center in a country or in the world, but . . . I've seen so many big headquarters which cost money . . . , and we made up our mind to keep this down to an absolute minimum." *Id.*

255. OHMAE, *supra* note 224, at viii.

or web of interests that transcend the nation-state and the division between the national and the international market. As I discuss in Part V, by weakening the territorial foundation of nationalism, these global changes provide inadvertent but potentially positive openings for international economic development.

B. The State and the Market: The Public/Private International Law Dichotomy

While the national/international market dichotomy no longer makes sense given the global transformations described above, the public/private international law dichotomy is also inaccurate, though for different reasons. As I demonstrated in Part II, as a result of the public/private international law dichotomy, public international law is deemed to be about politics, not law, and private international law is deemed to be about markets, not politics. One of the core assumptions of private international law and the classical liberal model is that an efficient, competitive market is capable of insulating market activities from the irrationalities of nonmarket institutions and behaviors. With a correct framework, national and international market activities could be balanced and at the same time maintained within a separate and differentiated sphere of activity separate from the sphere of international politics. By contrast, one of the core assumptions of the radical model is that the market, whether national or international, could not be segregated from nonmarket institutions. As a result, only the state could protect the national market from international politics. As I demonstrate below, neither assumption captures the complex realities of the international economic order.

According to the classical liberal model, once a market is birthed, its progression is marked by a tendency toward autonomy and normality and away from the irrational constraints of nonmarket structures. The assumption is that even though economic activities in premarket societies are heavily influenced by and embedded in social relations, with modernization, the market has the capacity to be an autonomous sphere defined less by social and political relations than by the self-interested calculations of rational economic behaviors.²⁵⁶

As a result, ensuring that the market in developing economies functions in truly competitive-market conditions neutralizes the potential for disorder that afflicts the public international order. In other words, in a Hobbesian state of nature, "repressive political structures are rendered unnecessary by competitive markets that make force or fraud unavailing."²⁵⁷ Whereas kinship relations in traditional societies might provide a breeding ground for noncompetitive behaviors such as price-fixing, the market, by contrast, will attract a congregation of strangers more interested in profits than social obligations.²⁵⁸ The model aims to construct the right institutional structure in order to reinforce the autonomy of the market²⁵⁹ and introduce economically rational behaviors into developing-country societies.

256. According to the model, the development of a market allows "large numbers of price-taking anonymous buyers and sellers supplied with perfect information . . . [to] function without any prolonged human or social contact Under perfect competition there is no room for bargaining, negotiating, remonstrance or mutual adjustment and the various operators that contract together need not enter into recurrent or continuing relationships as a result of which they would get to know each other well." Albert Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. OF ECON. LIT. 1463, 1473 (1982).

257. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. OF SOCIOLOGY 481, 484 (1985).

258. See ADAM SMITH, THE WEALTH OF NATIONS 195-210 (R.H. Campbell et al. eds., Clarendon Press 1976).

259. Various institutional arrangements can be instituted to limit the potential for force and fraud. Contract law enhances the likelihood that agreements between strangers will be honored, or else penalties will be imposed; rules of corporate governance ensure that managers will be subjected to the discipline of non-

The model is thus founded on an atomized market that should be insulated from the complications of tradition and politics. Indeed, it is precisely the assumption that insulation is possible and desirable that has led to both the depoliticization and universalization of development itself. The model's assumption of certain norms of economic development and the model's prescription for greater integration between the national and the international market within the GATT order have two premises. First, the model is premised on the institution of an autonomous market at both the national and the international level. Second, it is premised on the implementation of a "normal" progression of economic development through the market. "Markets are studied in economics on the assumption that they are not going to be disrupted by war, revolution, or other civil disorders,"²⁶⁰ or that they will not be embedded in a broader background of structural power.²⁶¹

GATT rules, for example, represent the epitome of what sociologists have called an "undersocialized conception of human action [that] disallow[s] by hypothesis any impact of social structure and social relations on production, distribution, or consumption."²⁶² The principle of nondiscrimination, enshrined in Article XIII, requires contracting parties to treat imports and exports alike. The principle of national treatment, enshrined in Article III, prohibits contracting parties from treating the products of other contracting parties less favorably than their own products. The principle of reciprocity grants contracting parties which offer trade concessions the right to expect reciprocal concessions from other contracting parties. And finally, the principle of most favored nation treatment, enshrined in Article I, ensures that contracting parties treat like products of all other contracting parties alike.²⁶³

On a micro level, the above norms seem perfectly neutral and have been instrumental in the establishment of a relatively predictable rule-oriented economic order. On a macro level, power relations have emanated from GATT from its very inception. The fact that the International Trade Organization (ITO)²⁶⁴ and its prodevelopment agenda was displaced by the GATT is indicative of the intensely political reality of the post-World War II world.

managerial owners; and international agreements are designed to enhance economic cooperation, tame the tendency toward force and fraud and minimize the extent of its externalization into the transnational sphere.

260. STRANGE, *supra* note 217, at 14. The economist K.W. Rothschild, for example, remarked:

[a]s in other important social fields we should expect that individuals and groups will struggle for position; that power will be used to improve one's chances in the "economic game;" and that attempts will be made to derive power and influence from acquired economic strongholds.

Power should, therefore, be a recurrent theme in economic studies of a theoretical or applied nature. Yet if we look at the main run of economic theory over the past hundred years we find that it is characterized by a strange lack of power considerations.

K.W. ROTHSCHILD, *Introduction to POWER IN ECONOMICS* 7 (K.W. Rothschild ed., 1971).

261. Structural power . . .

is the power to shape and determine the structures of the global political economy within which other states . . . have to operate Structural power, in short, confers the power to decide how things shall be done, the power to shape frameworks within which states relate to each other, relate to people, or relate to corporate enterprises.

STRANGE, *supra* note 217, at 24-25.

262. Granovetter, *supra* note 257, at 483.

263. Thus, goods of one contracting state have the right to enter the markets of all other contracting states at tariffs no less favorable than those imposed on similar goods from any other contracting state. See GATT, *supra* note 40, art. I.

264. See *Havana Charter for an International Trade Organization*, Mar. 24, 1984, arts. 8-10, U.N. Doc. E/Conf. 2/78 (1948) [hereinafter *ITO Charter*].

The ITO specifically included provisions that would have required the organization to address development issues, "especially of those countries that are still relatively underdeveloped."²⁶⁵ The ITO adopted a benevolent view of economic intervention "to promote the establishment, development or reconstruction of particular industries or branches of agriculture . . ."²⁶⁶ and allowed special treatment for developing-countries industries such as primary commodity production.²⁶⁷

Although the ITO was initiated by the United States, "a mixture of economic and nationalistic considerations"²⁶⁸ led to its demise in the U.S. Congress. As the unintended successor of the ITO,²⁶⁹ GATT stands in stark contrast to the prodevelopment agenda of the ITO. Despite the unrelenting rhetoric about normal trade and the virtues of trade liberalization, until the conclusion of the Uruguay Round of multilateral trade negotiations,²⁷⁰ the GATT in fact institutionalized a number of exemptions (agriculture in particular) that have had a disproportionately negative impact on developing countries.

While GATT does allow national markets to take protective measures by invoking escape valves²⁷¹ and other exceptions based on balance of payment difficulties,²⁷² such exceptions are supposed to be used sparingly, narrowly, and nondiscriminatorily.²⁷³ However, from the outset, GATT exempted agriculture from two of its most basic prohibitions: the Article XI prohibition against quantitative restrictions and the Article XVI prohibition against export subsidies.²⁷⁴

Both subsidies and quantitative restrictions have been used by developed nations to protect their domestic farm policies, with severe long-term consequences for developing nations. Because subsidies generate surplus that must be artificially protected from a decline in price, developed countries have resorted to comprehensive price support programs to ensure a minimum floor. As a result, such farm products tend to be "priced too high to compete freely in international agricultural markets"²⁷⁵ and must be disposed of either as food aid to developing nations or simply dumped on the world market.²⁷⁶ Subsidies and quantitative restrictions have thus caused a severe depression of international prices with disastrous consequences for rural communities.²⁷⁷

265. *ITO Charter*, art. 10(3).

266. *ITO Charter*, art. 13(1).

267. *ITO Charter*, arts. 55-65.

268. Low, *supra* note 212, at 42.

269. The GATT was created in 1947 in Geneva, following an American suggestion that a multilateral tariff negotiation be pursued outside the framework of the ITO, to be subsequently incorporated into the trade charter of the much more comprehensive ITO. Although it could have been shelved pending ratification of the ITO, it was decided that the GATT should be swiftly implemented to preempt protectionist sentiments. It came into force on January 1, 1948.

270. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1140 (1994).

271. Members may withdraw or renegotiate tariff concessions if imports cause injury to domestic industries. See GATT, *supra* note 40, arts. XIX, XXVIII.

272. To ensure that a contracting party is in fact facing true balance-of-payments difficulties, the IMF is assigned the task of balance of payments determinations. See GATT, *supra* note 40, art. XV(2).

273. See GATT, *supra* note 40, arts. XIII, XIV.

274. GATT, *supra* note 40, arts. XI, XVI. Although Article XVI, as supplemented by the 1979 Tokyo Round Code on Subsidies and Countervailing Duties, prohibits export subsidies on manufactured goods, there was no prohibition on export subsidies for primary goods such as agricultural commodities. Indeed, a 1955 amendment permits export subsidization of primary product exports, unless they cause the subsidizing nation to have "more than an equitable share of world export trade in that product." GATT, *supra* note 40, art. XVI(B)(3).

275. WALTERS & BLAKE, *supra* note 9, at 21.

276. See Jonathan Carlson, *Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimensions of a Political Problem*, 70 IOWA L. REV. 1187, 1211 & n.90.

277. See *id.* at 1211. Surplus food production and subsidized disposal have been rationalized on at least two grounds. First, that developing nations pay less to import agricultural commodities; and second, that a world reserve could be used as food aid and price stabilization. Despite their short-term benefits, in the long run,

Equally important, while developed nations have managed to achieve comparative advantages in a wide variety of industries, developing nations have only gained their comparative advantages in a limited number of industries.²⁷⁸ The persistently interventionist regime of agricultural supports established by the developed world are notable not just because they flagrantly contravene GATT norms, but, more importantly, because they were designed to reverse the one narrow but important sector in which developing countries have the comparative-advantage upper hand. Instead of accommodating themselves to structural changes in the international economic regime that has bestowed certain comparative advantages on developing nations, developed countries have taken the exact opposite path—interference with the operation of market forces to reverse the law of comparative advantage for political purposes.

The public/private international law dichotomy has essentially created two radically separate spheres, each with its own insular and sharply distinguished norms deemed antagonistic to and separate from the other. Lack of dialogue between the two spheres has prevented an effective synthesis of the public and the private, so that the market, “undersocialized” and idealized by the classical liberal model as essentially autonomous, “could be imagined to suppress force and fraud”²⁷⁹ in the public political sphere.

In a similar vein, the public/private international law dichotomy has also produced what sociologists call an “oversocialized” conception of the market, in which social and political relations are so overwhelming and pervasive that market institutions are essentially irrelevant. Despite their apparent differences, however, the two views are in fact similar in their mechanistic analysis of the interaction between state and market. By exaggerating the degree in which the market can neutralize the politics of brute force in the political sphere, the classical liberal model presents social and political structures as more or less irrelevant. Similarly, by exaggerating the degree in which the market is embedded in social and political institutions, the radical model presents an equally narrow, deterministic conception of political behaviors, in which competitive and well-regulated markets are similarly irrelevant.

From the basic starting point that economic development is essentially politicized, the radical model proceeds to remove the market and replace it with the state. In essence, by adopting wholesale the logic of public international law, the radical model could propose only one antidote to international politics—neutralization of the politicized market through the assertion of state sovereignty. The model’s answer to globalization and to international politics is, in essence, a return to economic nationalism and the territorial state.

There are several fundamental flaws with the radical model. First, while the classical liberal model sees mechanistic sequences of economic progression, the radical model sees only nonsequences and nonprogression. It generally assumes a static, nonmaneuverable system in which power exists in essentially the same form today as in the nineteenth-century colonial era, when developed nations produced manufactured goods and developing nations produced raw materials. Second, it also assumes that the only entity capable of confronting the international market is the state. Thus, the state is viewed not just as the opposite of the market but also as a panacea for market flaws. By presenting the process of development as either structurally flawed or permanently dependent, the only doctrinally honest solution the radical model can prescribe is delinkage from the

artificially depressed prices for agricultural commodities and circumscribed access to the agricultural market of the developed nations have injured the development of rural communities and adversely affected the efforts of developing countries to achieve self-sufficiency in local food production. *See id.* at 1215.

278. For a discussion of developed nations’ deviation from GATT norms in the textile industry, see Henry R. Zheng, *Defining Relationships and Resolving Conflicts Between Interrelated Multinational Trade Agreements: The Experience of the MFA and the GATT*, 25 STAN. J. INT’L L. 45, 77 (1988).

279. Granovetter, *supra* note 257, at 488.

international economy. As a result, the model is simply incapable of reconciling its basic premises with the growing body of accumulated evidence that points to the possibility of economic development for a growing number of developing nations.²⁸⁰

The economic success of a number of newly industrialized countries (NICs)—including South Korea, Indonesia, Hong Kong, Taiwan, and Singapore, based on an export-oriented model of development²⁸¹ antithetical to the radical model's import-substitution orientation—directly contradicts radical prescription that economic development is impossible without fundamental structural changes in the national and the international markets. Moreover, it also demonstrates that the international economic system is less static and more open to the possibility of change than the radical model would allow. Many developing nations, for example, have moved beyond primary commodity production to higher levels of industrialization, and as a result, the “old notion of developing countries as exporters of raw materials from which they earned the revenue to pay for imports of manufactured goods from the West”²⁸² has become inaccurate. While manufactured goods constituted 5% of developing country exports in 1955, they accounted for 60% of developing country exports in 1994 and 22% of the world's export in manufactured goods in 1993.²⁸³

Furthermore, in stark contrast to the radical premise that development, if at all possible for developing countries, will be mere dependent development, “developing countries have become an independent source of growth in the world economy.”²⁸⁴ Developing-country growth, which at one time closely mirrored and reflected developed-nation growth, took a significantly independent turn. For example, developing countries experienced an economic boom even as the industrial, developed world was struck with a severe economic recession.²⁸⁵ A relatively strong domestic market as well as an increase in trade among developing nations themselves accounted for the continuing growth in the developing nations despite the drop in demand in the developed countries' economies.²⁸⁶

Faced with the empirical fact that many developing countries have been relatively successful in their outward-oriented, export-promotion economic development strategies, the radical model now predicts that changes in the structure or system of world capitalism, which have occurred subsequent to the achievements of some NICs, have once again made development impossible for the remaining developing nations. The prescription, again, is the same recycled prescription for economic autonomy that has been tried and failed:

280. Due to better technology and increased communications, the pace of economic development appears to have accelerated over the years. It took Great Britain fifty-eight years from 1780, after the industrial revolution occurred, to double its real income per capita. It took the United States, from 1839, forty-seven years to do the same. From 1884, it took Japan thirty-four years; from 1966, it took South Korea eleven years; and for China, it took less than ten years. It has been estimated that by 2020, China, India, and Indonesia could rank among the world's five biggest economies. See *War of the Worlds, A Survey of the Global Economy*, ECONOMIST, Oct. 1, 1994, at 1, 6 [hereinafter *War of the Worlds*].

281. Critics of the classical liberal model have argued that although “the rates of growth achieved through export promotion were superior to those achieved under import-substituting regimes,” STEPHAN HAGGARD, *PATHWAYS FROM THE PERIPHERY: THE POLITICS OF GROWTH IN THE NEWLY INDUSTRIALIZING COUNTRIES* 13 (1990), the state has been more involved than contemplated by the classical liberal model. State involvement in the East Asian NICs' development, however, has been “less extensive than in Africa, South Asia, and Latin America,” and the sensibility that characterizes the development path of the NICs is one that accommodates rather than opposes the current global logic. See *id.* at 13–14.

282. *War of the Worlds*, *supra* note 280, at 4.

283. See *id.*

284. *Id.* at 10.

285. See *id.*

286. See *id.*

“[r]ather than increase their reliance on a hostile world environment, developing countries should try to reduce this dependence and diversify trading partners and products.”²⁸⁷

To the extent that there is any international trade at all, the radical model’s strategy is founded on a notion of hierarchy of acceptable trade.

What cannot be produced locally is produced nationally. What cannot be produced nationally is purchased from regional partners—which suggests the importance of revitalizing regional integration institutions. Only for those products for which regional producers cannot satisfy demand is trade necessary with countries on the other side of the globe.²⁸⁸

Economic nationalism and home market autonomy constitute the highest level and most preferred form of economic development. But to the extent that inter-nation trade is utilized at all, it should be conducted at the regional level. The one acceptable concession to a loss of sovereignty, then, is a concession to regionalism, with international trade a measure of last resort.

One of the more significant indicators that developing nations could indeed develop economically can be found in the dramatic shift in the way developing nations themselves are viewed—as a potential threat to the economic prosperity of the developed world.²⁸⁹ Indeed, “the fact that people in rich countries now fret about developing countries’ success, not their poverty, is itself a remarkable tribute to those countries’ economic reforms.”²⁹⁰ Similarly, although comparative advantage would seem to dictate that developing nations would now engage in high-volume manufacturing while developed nations would specialize in high-value production, it would be an oversimplification to think that developing countries will “make only low-tech, labour-intensive goods while industrial countries keep the high-tech goods.”²⁹¹ Computer programming and equipment-design centers have proliferated in developing countries such as China, India, Singapore, Hong Kong, and Taiwan. American banks, accounting firms, and insurance firms have also begun to explore ways in which they too can globalize the preparation and handling of tax

287. Robin Broad & John Cavanagh, *No More NICs*, in *CREATING A NEW WORLD ECONOMY*, *supra* note 2, at 386–87.

288. *Id.* at 388.

289. Indeed, anxieties expressed by the developed world about trade with developing countries resemble, paradoxically, developing nations’ anxieties in the 1950s and 1960s regarding trade with developed nations. *War of the Worlds*, *supra* note 280, at 5.

290. *Id.* This anxiety has also been colorfully expressed by Ross Perot, who described the loss of jobs from high to low-wage countries as a “giant sucking sound.” The cheap-labor comparative advantage, however, has been exaggerated. Labor has become but one factor in a company’s decision to relocate. With the increasing significance of capital costs, research and development costs, and marketing costs, labor costs constitute only 3% of total costs in the production of semiconductors, 5% of color television production, and 10 to 15% in automobile production. *See id.* at 23. Indeed, corporations still employ 61 million workers in the developed world, as compared to 12 million in developing countries. *See id.* at 20–21. Almost 50% of all foreign direct investment in developing countries can be found in two sectors, mining and services, which by their nature, cannot be “exported” and thus cannot be blamed for the relocation of jobs from the rich to the poor world. *See id.* at 23. Moreover, globalization has occurred fastest not in the traditional sectors such as the extractive or manufacturing industries, but in the service industry, such as banks, insurance, advertising, consultancy and databank services. *See STRANGE*, *supra* note 217, at 77.

291. *War of the Worlds*, *supra* note 280, at 24. It was assumed in the 1960s, for example, that Japan would produce only cars and consumer durables as America and Europe moved on to the production of more high-tech products. Japan, of course, is now producing high-tech goods as well. Similarly, as competitive pressure is being exerted by newcomers such as China, the NICs, for example, have had to move the chain of production “upward,” into the computer sector, for example. Taiwan is now the world’s second-biggest maker of notebook computers. *See id.*

returns and insurance claims.²⁹² Sealand Services, Inc., for example, has announced plans to shut down its Elizabeth, New Jersey division and subcontract the work performed by its 325 New Jersey employees to programmers in India and the Philippines. Texas Instruments has announced plans to expand its operation by 40% in Bangalore, India, which has also attracted high-tech companies such as the Digital Equipment Corporation, the Hewlett-Packard Company, IBM and the Compaq Computer Corporation.²⁹³

The international economic system, then, is much more fluid and much less static than the radical model assumes. Similarly, although the market is not an "undersocialized" sphere of rational "interests" separate from the nonrational political sphere where the "passions" are located,²⁹⁴ it is also not the case that the market is so "oversocialized" that economic transactions are overwhelmed by ideological and political struggles. In that most fundamental sense, the radical model is the exact opposite of the liberal model. While the radical model sees politics at the international level and argues for depoliticization through a retreat from the international into the sovereign boundaries of the national, the classical liberal model sees no politics at all and argues for the incorporation of the national economy into an international economic system defined by normal rules of conduct. At the same time, the radical model is also quite compatible with the classical liberal model. The assumption that there is no possibility for either independent development or even economic growth within the structure or the "system" as it currently exists, reveals a static, essentially ahistorical understanding of economic development. Ironically, this understanding is not much different from the liberal model's view of development as ahistorical progressions of growth.

Both models thus are essentially mirror images of one another. Both uncritically accept the public/private international law dichotomy and the national/international market dichotomy. As a result, their only difference lies in the way that they navigate the divide between the national and the international market. Both, however, remain out of touch with the global logic of the international economic system. While the radical model is clearly incapable of reconciling its preference for sovereignty over interdependence with the increasing globalization of the market (as discussed in Part III), even the liberal model is unequipped to accommodate the rapid transformations that are taking place in the new global order.

292. See Keith Bradsher, *Skilled Workers Watch Their Jobs Migrate Overseas*, N.Y. TIMES, Aug. 28, 1995, at A1.

293. See *id.*; Sanjoy Hazarika, *An Indian City of the Future With the Lure of the Past*, N.Y. TIMES, Aug. 28, 1995, at D6. "Where physical contact with customers is not essential, there is increasing scope for outsourcing to countries with cheap, but relatively well-educated workforces. People can be employed anywhere to carry out labour-intensive computer programming and data processing, keeping in touch with head office by computer network and satellite. Routine accountancy work, for example, could be subcontracted to developing countries." *War of the Worlds*, *supra* note 280, at 24.

Lower wages alone, however, do not account for the globalization of intellectual property sites in developing countries. The fact that the project can be worked on during the day in the United States and then sent electronically to another part of the world while American workers sleep also accounts for the exodus of white collar jobs to developing nations. Equally, if not more significant, is the change in the once-dominant attitude that foreigners cannot be trusted with certain high-skilled jobs. As Edith Holloman, a representative of the American Engineering Association said, "The arrogance that we used to have, that nobody could be as good as we were, except maybe a European, is all going away now." Bradsher, *supra* note 292, at D6.

294. The public/private dichotomy arose "in part on account of the arbitrary separation that arose historically . . . in the 17th and 18th centuries, between the 'passions' and the 'interests,' the latter connoting economic motives only." Granovetter, *supra* note 257, at 506 (quoting ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* (1977)).

VI. TOWARD A NEW SENSIBILITY FOR INTERNATIONAL ECONOMIC DEVELOPMENT

As discussed in Parts I through IV, the international order is divided into a national and an international market. Both markets are generally deemed to be part of the private international order separate from the public international law order. As a result, the two dominant paradigms of international economic development are each separately divided by a public and a private international law sensibility. Neither sensibility is fully capable of synthesizing the divisions between the national and the international market with the diffusion of economic power in the current international economic system. My proposal suggests first, that the national/international market dichotomy should be transformed, and second, that this transformation be undertaken by embracing a sensibility that is neither "public" nor "private," but a cross-fertilization of the two.

Because globalized production and the crisscrossing of economic forces have made it difficult to define with precision the nationality of a corporation, a product, and consequently a national economy, the current international economic order is clearly more in keeping with a global, rather than a territorial logic. Additionally, this global logic keeps with the notion of a free flow of market forces more than with the notion of either the territorial state or its corollary construct, sovereign authority. Where narrow national interests that centered around the construct of sovereignty have prevented the formation of an integrated, postwar international order, the erosion of nationalism and of a state-centered orientation constitutes a fundamental change. That change is crucial for the economic development of the developing nations. I base my proposal on the premise that a new sensibility for international economic development must work with, rather than go against, the direction of the new global order.

Currently, however, neither model of economic development encompasses the sensibility required to fully take advantage of the global diffusion of economic power. On the one hand, the radical model—with its state-oriented sensibility aimed at severing the national from the international market—is in direct opposition to the market logic of the international economic order. On the other hand, the classical liberal model—which continues to resort to traditional but obsolete indicators to distinguish between the national and the international and to protect the national from "too much" international competition—is similarly, although less obviously, out of touch with current global transformations. My argument is that by using orthodox but obsolete indicators (corporate nationality and product nationality) to shore up the national market, the classical liberal model continues to regulate international economic activities by navigating a national/international market dichotomy that no longer in fact exists.

The assumption of normal trade that remains at the core of the classical liberal model prevents the model from fully reconciling the division between the national and the international market. The notion of an international economic order is defined by an archipelago of separate or insular "national" economies and national industries, each to be protected by its respective nation-state and balanced against the demands of the international market. This notion constitutes yet another example of anachronistic thinking that associates the economic activities of corporate entities with the economic prosperity of their state of incorporation.

The erosion of bright-line boundaries, which have been used to identify "our interests" and "our industries,"²⁹⁵ has resulted in a resurgence of nationalistic cries for quotas and tariffs to keep out foreign goods or retaliatory actions to punish "unfair" foreign

295. See OHMAE, *supra* note 224, at 7.

acts.²⁹⁶ As a result, a new paradox has emerged in which developed nations now call for home market protection or home market retaliation against the international market with the frequency and vehemence once reserved for newly independent developing nations. And yet, given the ease with which goods and capital move across national boundaries, "it is no easy matter to attach to them an accurate national label."²⁹⁷ As a result of the global logic, the traditional linkage presumed between the home corporation (or its products) and the home market is becoming increasingly tenuous, and hence the national/international market dichotomy is becoming increasingly obsolete.

Nevertheless, the prevailing discourse on economic development remains essentially unaffected by transformations in the international market. Given the increased global mobility of almost every factor of production, the only factor in the production process that does not regularly move across national boundaries is the national work force.²⁹⁸ Indeed, the competitiveness of the home market is becoming less linked to its home corporation than to its people and their productivity. To that extent, any new model of economic development should aim at not simply oscillating between the competing demands of the national and the international market but at truly integrating the two in order to institute a regime that would in fact ensure economic development in a manner productive to and beneficial for the home work force.

The national/international market dichotomy should be reconceptualized in the following way. Given a new global order characterized by an increasing divergence between the national corporation and the national economy, the role of the state must change from its more traditional objective of protecting the competitiveness of national industries to protecting the competitiveness of its national labor force. National regulation of economic activities should not be designed to keep out "foreign" economic activities or even to open up foreign markets for home corporations, but rather, to draw in "foreign" economic activities of the sort best suited to the economic needs of their respective citizens.

This conceptual shift would create at least three different scenarios from the one currently prevailing in the development debate. First, eradicating the national/international market dichotomy would cause a different "litmus" test to emerge. The "litmus" test would focus less on the relationship between foreign competition and domestic industry and more on the relationship between foreign competition and the domestic citizenry. Unlike current trade laws, which allow the national market, for instance, to take retaliatory measures such as antidumping actions based on the presumption that foreign-sourced competition is simultaneously more injurious and less beneficial than domestic-sourced competition, the shift I propose would transform the debate from one mired in the identity of the competitor²⁹⁹ to one more concerned with the general impact of competition on the domestic consumers. Intricate finetunings such as those mandated by the antitrust statutes

296. See Craig Gordon, *Protectionist Poised to Pounce*, *NEWSDAY*, Mar. 5, 1996, at A37. And yet, "the growth of M-NCs [mixed-nationality corporations] will make it increasingly difficult to apply discriminatory nationalistic policies, thereby helping to check the harsher forms of neo-mercantilism." *Id.*

297. See OHMAE, *supra* note 224, at 13.

298. See Kenichi Ohmae, *The Perils of Protectionism* in Kenichi Ohmae, et al., *The Boundaries of Business: Commentaries from the Experts*, *HARV. BUS. REV.*, July-Aug. 1991, at 127, 128. [hereinafter *Boundaries of Business*]. "In a borderless world, only a well-educated population can be economically strong." *Id.* Similarly, among the three primary factors needed for business, "technology, capital, and competent employees[.] . . . well-educated workers are not only the most important but also the one [resource] that developing countries can create on their own." James E. Austin, *The Developing-Country Difference*, in Ohmae, *supra*, at 135; see also REICH, *supra* note 13, at 8.

299. See *supra* notes 52-68 and accompanying text; see also Karen Handelsman, *Russia: State Regulation of Foreign Trade Activity*, *E. EUROPEAN BUS. L.*, Dec. 1995, at 12, 12. Russia, for example, allows the imposition of antidumping duties to protect domestic industry upon a mere showing of "material damage" without even the need to satisfy a fair-value test.

should be adopted so that price discrimination, even if undertaken by a foreign firm, is not outlawed if it benefits consumers without injuring competition overall.

Second, this conceptual shift would also force a reexamination of the objective behind national economic policies. Are they broadly designed to aid national industries in opening up foreign markets for national products, or should they be narrowly tailored to ensure that public resources utilized for market-opening or any other economic purposes be linked to some benefit that such measures would bring to the home economy? The fact that the United States under the Bush Administration used the threat of Section 301³⁰⁰ to force Japan to open up its market to Motorola,³⁰¹ an "American" corporation, demonstrates the extent to which formalistic categorization continues to dominate our thinking. Even though Motorola officially carries American corporate nationality, its production facilities and its production workers (at least as of 1989 when the threat of Section 301 was issued) were in Kuala Lumpur, Malaysia. Thus, the direct beneficiaries of United States action were Malaysian engineers, Malaysian workers, and Motorola shareholders in the United States and abroad.³⁰²

Third, the conceptual shift I advocate would cause national economic policies to be focused on "market-opening" measures for all corporations, whether national or foreign, that undertake to perform productive economic activities in the home economy and generate investment, employment, and economic growth. As discussed in Part IV, cross-border linkages have resulted in cross-ownerships and multiple alliances among corporate entities. If the objective is to develop the home economy, the granting or withholding of public benefits on the basis of formal corporate nationality would not accomplish this aim. For nation-states today and for developing countries in particular, the development strategy that reflects the global reality and at the same time constitutes an effective "home" market "protection" is one which exposes the home market to economic units of whatever "nationality," as long as they constitute a vehicle for employment,³⁰³ on-site training,³⁰⁴ capital, technology, and know-how.

Given the capital shortage faced by developing countries and the necessity of using privatization as a revenue-raising mechanism for countries with an inefficient, bloated, and bankrupt state sector, "[t]he prospect of too little rather than too large capital inflows is the

300. See Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 2011 (1975).

301. See REICH, *supra* note 13, at 164.

302. See *id.*; see also Louis Uchitelle, *U.S. Businesses Loosen Link to Mother Country*, N.Y. TIMES, May 21, 1989, at A1.

303. The two top auto exporters from the United States in 1995, for example, were Honda Motor Co. and Toyota Motor Corp. See Keith Naughton & Amy Borrus, *America's No. 1 Car Exporter is . . . Japan?*, BUS. WK., Feb. 26, 1996, at 113, 113. Japanese companies shipped 167,000 cars from North America while General Motors, Chrysler and Ford exported a combined 162,553. More than half of the Japanese North American exports—manufactured in the United States employing American workers—are exported to the Japanese market. And yet, because the spotlight continues to be focused solely on market-opening measures for American companies in foreign markets, this trend has been downplayed by United States trade officials, despite the beneficial impact on the United States economy. As Marjory E. Searing, Deputy Assistant Secretary for Japan at the U.S. Commerce Department stated, "We did not get into a trade negotiation [with Japan] to make sure the Japanese market would be open to Toyota and Honda." *Id.*

304. When Bridgestone, a Japanese company, took over Firestone's factories, it planned to invest more than \$1 billion in its American factories—an investment which could only benefit U.S. workers—prompting Firestone's chairman to declare that "[t]he order of magnitude is close to twice what Firestone could have invested as an independent company." Jonathan P. Hicks, *Foreign Owners are Shaking Up the Competition*, N.Y. TIMES, May 28, 1989, at F9.

Japanese automakers in the United States have determined that they could utilize the American workforce more productively and efficiently than U.S. automakers could. Under Toyota management, productivity in General Motor's factory in Fremont, California increased by 50% while absenteeism fell from 25% to 3 to 4%. See REICH, *supra* note 13, at 146-47 (citations omitted).

worrisome prospect."³⁰⁵ A foreign investment law, for instance, should be less concerned about keeping global capital from the national market³⁰⁶ than on attracting foreign capital and, if control is a concern, controlling it through means other than limiting equity ownership.³⁰⁷

By contrast, public subsidies for private research and development routinely granted to home companies on the presumed links between the home corporation and the home economy should be challenged if such companies fail to demonstrate a credible intention to perform value-added work in the home economy. As the U.S. government searched for American corporations to grant some of its \$30 million in annual subsidies to American companies willing to engage in research and development of high-definition television, it refused to include Japan's Sony, Holland's Philips, and France's Thomson in the research project. The rationale was that "[i]t is vitally important for us to be in the forefront of this emerging technology."³⁰⁸ Zenith, who was the only remaining American television manufacturer by 1989, employed a mere 2500 Americans because most of its assembly operations had been moved to Mexico.³⁰⁹ By contrast, 15,000 Americans, employed by Sony, Matsushita, Philips, and Thomson, were in fact involved in television manufacturing and designing in the United States that same year. Only recently, however, has the United States begun "to grapple with such questions as whether to give research and development incentives to an American company that is likely to manufacture the resulting product abroad"³¹⁰ or engage in research and development outside of the United States.

The above examples serve as an illustration of the type of economic development policy that should *not* be implemented by developing countries because they are premised on a certain construct of the national economy which has become antiquated. Developing countries eager to draw in foreign capital, technology, and know-how should learn from the experiences of developed nations so that ineffective and flawed regulations based on a doomed national/international market dichotomy will not be replicated. Instead of agonizing over the "takeover" of one's national economy by "foreign" entities, whose nationalities cannot be truly determined in any meaningful sense, states should instead invest in enhancing the capabilities of their citizens³¹¹ to become productive workers,

305. Ulrich Hiemenz, *Comment on András Inotai, "Experience with Privatization in East Central Europe,"* in *PRIVATIZATION: SYMPOSIUM IN HONOR OF HERBERT GIERSCHE* 183,184 (Horst Siebert ed., 1992).

306. As part of its indigenization policy, Nigeria once enforced Nigerian majority ownership of most foreign-invested enterprises, which foreign investors were able to counteract quite easily by maintaining "silent" Nigerian owners acting as "fronts" for foreign investors. See MARGARET M. PEARSON, *JOINT VENTURES IN THE PEOPLE'S REPUBLIC OF CHINA* 12 (1991). Other developing countries such as Mexico also prohibited foreigners from owning over 49% of certain enterprises because of the fear that foreign majority ownership would mean undue foreign control. See FOLSOM, *supra* note 42, at 752. India limited foreign equity to 40% except in "core" sectors, in which 74% was allowed. See PEARSON, *supra*, at 285 n.3. By contrast, in order to attract as much needed foreign currency as possible, China preferred "foreignization" to "indigenization," and "the Chinese government began to press for a greater percent of foreign equity in the late 1980s." *Id.* at 94.

307. See China's Equity Joint Venture Law, in which no limit is set on foreign equity ownership. In order to prevent foreign majority equity interest from exercising undue control, Chinese law requires that certain major actions undertaken by a foreign-invested enterprise be subjected to unanimous consent by the board of directors. See PEARSON, *supra* note 306, at 168.

308. REICH, *supra* note 13, at 161 (quoting Robert Mosbacher, Secretary of Commerce, at a news conference held Dec. 18, 1988) (emphasis added).

309. Philips had constructed a \$100 million facility in the United States and was working jointly with NBC and France's Thomson to develop a high-definition television system for the United States. Philips, Matsushita, and Sony had created, separately, research and manufacturing facilities for high-definition technologies in the United States. See REICH, *supra* note 13, at 162; see also Hobart Rowen, *Thinking of 'Us' As U.S. Workers, Not as U.S. Firms*, WASH. POST, Mar. 25, 1990, at H1.

310. Andrew Pollack, *Breaking out of Japan's Orbit*, N.Y. TIMES, Jan. 30, 1996, at D7.

311. In many cases, educational levels will be more decisive than low wages in the overall decision processes of most multinationals. Where the average worker in developed nations has had eleven years of schooling, her or his counterpart in China and Mexico has had only five. Where there are 85 scientists and 19

therefore attracting the highest-value "foreign" economic activities into their territorial boundaries.

Because cross-national linkages among corporations have contributed to an increasing dispersion of economic activities, the challenge for developing countries is to institute a regime capable of attracting as well as channeling this global propensity. Most significantly, the current international economic order would, in fact, accommodate and even facilitate such a policy. Although multinational corporations have always had multinational operations, "most of their high value-added activities—such as product design, manufacturing, and R&D—took place in the headquarters' nation."³¹² The proliferation of "national local compan[ies],"³¹³ however, has meant that "all of the activities of the emerging global corporations, including high value-added activities, are disbursed worldwide"³¹⁴ and can be attracted to any territory, including developing-country territory, which meets the strategic needs of the global corporation and the global economy.³¹⁵

In other words, enhancing the standard of living of a nation's citizen's no longer depends on the competitiveness of "home" corporations vis-à-vis foreign corporations, but on the competitiveness of its home workers. The key to a new sensibility for international economic development, then, is to enhance the living standards of the nation by investing in human resources. Investment in human resources will ensure that one's home workers have sufficient educational and skill levels necessary to attract the global economy.³¹⁶

The competitiveness and the type of skill levels that one's home work force would require to draw in the global economy will necessarily correspond with the level of economic development of different nations. For some developing nations, competitiveness requires the maintenance of skill levels necessary to perform routine production or assembly-line jobs at comparatively lower costs;³¹⁷ for more developed nations,

university graduates for every 1000 people in developed countries, there are only nine scientists and one graduate per 1000 in developing nations. See *War of the Worlds*, *supra* note 280, at 23–24. The skills gap, of course, is also narrowing. South Korea, for example, has a higher proportion of 20–24 year-olds in education than most European countries. See *id.* at 24.

312. Hunt & Morgan, *supra* note 240, at 19.

313. Broadcast, *supra* note 253 (describing a corporation which is both a global company, which gives the company access to globally-sourced technology, and a "national local company," which gives the company local community ties). According to Mr. Percy Barnevik, CEO of Asea Brown Boveri, "in each country, you're a national citizen. . . . [Y]ou have many home countries, not just one. I happen to have 25." *Id.* See also *Those Educated Asians*, *ECONOMIST*, Sept. 21, 1996, at 33, 33 (The economic success of some countries in East Asia can be traced to "their emphasis on raising the educational standards of the whole population rather than an elite." Singapore and Taiwan were rated first and third in a 1995 report on "the ability of their educational systems to meet 'the needs of a competitive economy.'")

314. Hunt & Morgan, *supra* note 240, at 19.

315. Half of Xerox's 110,000 employees are outside the United States. Less than half of Sony's employees are Japanese. More than 50% of Digital Equipment's revenues derive from overseas operations. IBM's thirty research divisions are located worldwide. See Weindenbaum, *supra* note 239, at 173; see also Solomon, *supra* note 230, at 78. The global mindset means that corporations are "nationality-blind," according to Patrick Morgan, human resources manager for special projects at Bechtel, an engineering-construction firm with operations in more than seventy countries. To Morgan, "[a] person's passport is about as meaningful to us as the name of the bank on their savings-account passbooks." *Id.*

316. See *Boundaries of Business*, *supra* note 298, at 128 (advocating public investment in human capital). "In a borderless world, only a well-educated population can be economically strong," especially because "the real value-added comes in knowledge-intensive industries, industries that need the education- and skill-rich environment of the advanced economies." *Id.* at 129. Although South Korea and Singapore have relatively poor natural resources, both "created comparative advantage by investing in education." David E. Austin, *The Developing-Country Difference*, in *Boundaries of Business*, *supra* note 298, at 135. South Korea spends one-fifth of its national budget on education, and businesses routinely invest in worker training. *Id.*

317. While low wages serve as a significant comparative advantage available for many developing countries, it is also important not to overstate the wage-gap advantage. A company which relocates to lower-cost jurisdictions solely as a "stop-gap response" to "immediate competitive threats" will not tend to be able to

competitiveness might require the skill levels needed to undertake routine data processing or keypunch operations³¹⁸ or even computer programming;³¹⁹ for others, especially in the more economically advanced nations, comparative advantage lies less in routine, high-volume production of goods than in the high-value production of ideas and intellectual property.

In the long run, because the shift from high-volume to high-value production means that "knowledge, . . . —instead of bricks and mortar—has become the center of capital investment" and society's chief resource,³²⁰ the most critical challenge for the purpose of economic development is to move from a low-wage comparative advantage to a high-skill comparative advantage through the creation of an educated workforce. The challenge for poor countries in particular, but for all countries in general, lies in integrating the national market with the international market by linking the skills of their work force with the needs of the global economy.³²¹

Rather than oppose, directly or indirectly, the current configuration of the international economic map, a different sensibility keeping with the new international economic order would utilize the openings provided by the global diffusion of economic activities to bridge the gap between the national and the international market.

One basic question remains. To the extent that the national/international market dichotomy should be bridged rather than expanded, should it be done by resorting to the logic of public or private international law? Even in their reform efforts, both models of development work toward an entrenchment, rather than relaxation of the public/private dichotomy. The radical model aims to entrench the public/private international law dichotomy by directing its reform efforts toward creating a supersovereign with sufficient power to alter the relationship between the national and the international market. By contrast, the classical liberal model aims to entrench the public/private international law dichotomy by constructing a private order supposedly unimpeded by "the potential for politics outside the traditional discourses of public authority."³²²

maintain its lower-cost competitive edge. Andrew Bartmess & Keith Cerny, *Building Competitive Advantage through a Global Network of Capabilities*, CAL. MANAGEMENT REV., Winter 1993, at 78, 87. Such a "move [would] not enhance [the company's] capability in low-cost manufacturing, but rather only gave it access to lower labor costs (which were also instantly available to any other company who moved overseas)." *Id.* at 88. See also Austin, *supra* note 316, at 136. Cheaper labor presents only a temporary comparative advantage, which "erodes as a country develops and wages rise" whereas the skill and education level of a country's workforce is a better source of "sustainable competitive advantage." See *id.* See also Kent Chen & Ray Heath, *Getting a Jump on the 21st Century*, S. CHINA MORNING POST, Sept. 2, 1993, at 4; see generally Markides & Berg, *supra* note 233 (noting that the extra costs relating to transportation, communication, paperwork may offset lower labor costs, especially if labor is but a small component of the total costs).

318. See John Maxwell Hamilton, *A Bit Player Buys Into the Computer Age*, N.Y. TIMES BUS. WORLD MAG., Dec. 3, 1989, at 22, 22. Workers in Manila, for example, have contracted with United States firms to perform routine data processing services.

319. See Udayan Gupta, *U.S.-India Satellite Link Stands to Cut Software Costs*, WALL ST. J., Mar. 6, 1989, at B2. Bangalore, India, for example, has become a significant software development center, with increasing linkages to companies such as Texas Instruments headquartered in Texas.

320. See Drucker, *supra* note 251, at 67.

321. The argument has been even more emphatically stated. According to Peter Drucker, "because of automation information and advanced technology . . . [and] because of the demand for trained people in all areas of management, development requires a knowledge base that few developing countries possess or can afford." See *id.* at 71. Thus, if developing countries were to embark on development based on a nineteenth century model focusing first on industries and production, they may be able to catch up but not surpass the currently developed nations. See also *Those Educated Asians*, ECONOMIST, Sept. 21, 1996, at 33 (The economic success of East Asia can be traced to "their emphasis on raising the educational standards of the whole population rather than an elite." Singapore and Taiwan were rated first and third in a 1995 report on "the ability of their educational systems to meet 'the needs of a competitive economy.'").

322. David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 11.

Neither sensibility is effective or accurate. The compartmentalization of the "public" from the "private" and vice versa has resulted, first, in the artificial submersion of international political considerations from the market-oriented sensibility of the classical liberal model and second, in an exaggerated and ahistorical antimarket, statist orientation of the radical model. The alternative posture I advocate would combine a market and efficiency focus of private international law with a regulatory regime capable of facilitating the activities of the global economy in a manner beneficial to the public interest. This regulatory regime, however, would work with, rather than against, the global logic and the market-based norms that define the current international economic order. Equally significant, national/international market integration would be accomplished by exploiting the already existing fact of global economic integration rather than resorting to the top-down, state-centered approach used in public international law to construct a post-war community of nations.

Because the radical model places its hope for economic development in the more nationalistic sensibility of the sovereign state, it is implicitly devoted to the continuation of the public/private split. Efforts aimed at creating a different contextual fabric for international law have been directed primarily toward reinvigorating the public sphere. The radical model has emphasized the institution of a more effective UN system or for the establishment of some supersovereign entity.³²³ Working from the premise that the evolution of public international law has been unduly restricted by a dedication to *national* sovereignty, public international lawyers' efforts to renew the field have replicated traditional constructs of authority and order by projecting sovereignty from the national to the international plane.

Termed "metropolitan" by Professor David Kennedy,³²⁴ this sensibility is characterized by a desire for and awareness of "triggers, conditions, and opportunities for intervention in the national."³²⁵ The very concept of sovereignty it finds wanting, however, restricts the reform effort aimed at achieving an integrated community of states. The paradox has been noted as early as 1948. A horizontal system characterized by "rugged individualism of territorial and heterogeneous states, balance of power, equality of states and toleration . . . ill accommodates itself to the international rule of law reinforced by necessary institutions."³²⁶

More significantly, prior attempts to create an overarching international order have been aimed at the establishment of an authoritative sovereign enforcer with the power to issue commands in the vertical Austinian sense. Such attempts have created an uneasy dynamic, particularly in the economic realm, because the presuppositions underlying such efforts contradict the essentially horizontal basis of the international order itself.³²⁷ The predominant perspective rooted in both "public" and "private" international law is one founded on restraint.³²⁸ In the public international law order, for example, the command

323. These efforts tend toward proposal to "rejuvenate public order and eradicate sovereign form." *Id.*

324. Professor Kennedy's "metropolitan" sensibility is slightly different from what I have termed the "public" international sensibility derived from the public/private split in international law. Although the "metropolitan" sensibility is similar to the sensibility I associate with "public" international law, in the sense that both can be located in the universe of the UN and its constituent bodies, it does not capture one of the main characteristics—politicization—which I associate with the "public" fragment of the public-private split.

325. Kennedy, *supra* note 322, at 13; see also Lewis & Harris, *supra* note 253 (contrasting top-down measures with the process of globalization which "is not the result of a fitful lunge by government or military power toward ever larger geopolitical entities. Nor is it the product of some growing ideological conformity on how we should live.").

326. Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 40–41 (1948).

327. The international system is theoretically composed of sovereign and equal states. See U.N. CHARTER art. 2(1).

328. At the same time that austere principles of sovereignty and restraint define the UN order, the Charter is also infused with a wholly different logic and charged with the sweeping task of "solving international problems

against force enshrined in Article 2(4)³²⁹—modified only by the self-defense exception of Article 51³³⁰—along with the principle of nonintervention,³³¹ is premised on an overall negative duty to refrain from acts that threaten international peace. Similarly, in the private international law order, the underlying perspective that governs the Bretton Woods regime in general and GATT in particular is one that favors market normality as opposed to public intervention in the market.

Efforts to transform predominantly horizontal into predominantly vertical norms have encountered significant resistance. Designed to circumvent the essentially noninterventionist logic of the international order, the UN has declared new norms of “intergovernmental interventions, cultural representations, and universal rights”³³² in order to create a more sweeping affirmative ethos deemed more conducive to the economic needs of the developing world. The adoption of the International Covenant on Economic, Social and Cultural Rights,³³³ the declarations to establish a new international economic order³³⁴ and a right to development,³³⁵ as well as other major interrelated efforts have placed international economic development at the forefront of the international agenda. The first attempts to impose an obligation on the state to meet certain economic obligations to its own citizens. The second and the third attempt to impose economic obligations on the part of the rich states toward the poor states. Although both categories of economic rights have been declared a formal right,³³⁶ their expressions have been stunted by an international order dominated by an overall regime of restraint.

Given the failure of this public international law sensibility to create, through the auspices of the UN General Assembly, legally enforceable economic rights that would entail a global redistribution of resource, the reality remains stark but true: rich states are capital and technology exporting states and, to the extent that poor states are capital and technology importing states, the success of economic development requires the ability to harness market forces to attract the capital and technology needed to establish and sustain a regime of economic development. One of the main arguments of this Article is that where global economic integration is capable of transcending the narrow constructs of national

of an economic, social, cultural, or humanitarian character.” U.N. CHARTER art. 1(3). This affirmative agenda, however, is generally considered to be aspirational rather than legally obligatory.

329. “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” *Id.* art. 2(4).

330. “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” *Id.* art. 51.

331. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. Rep. 14 ¶ 202 (citations omitted). “The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.” *Id.* at 106.

332. Kennedy, *supra* note 322, at 14.

333. Dec. 16, 1966, 993 U.N.T.S. 3.

334. *See Declaration on the Establishment of a New International Order*, *supra* note 213, at 3.

335. *See Declaration on the Right to Development*, G.A. Res. 41/128 U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986). The Declaration on the Right to Development is a General Assembly declaration, not a treaty or convention, and the degree to which it is legally binding is uncertain. *See generally* OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 84–91 (1995).

336. Economic rights have also caused conceptual difficulties. First, “[a]s used in the Charter, ‘human rights’ doubtless referred to those rights trampled by Hitler, the rights identified with the liberal state, the freedoms and immunities now known as ‘civil and political rights.’” HENKIN, *supra* note 14, at 190. Second, economic rights by their very definition require certain preconditions for their fulfillment. Third, “[i]t is not always certain that designating a social end as a ‘right’ makes its achievement more likely.” SCHACHTER, *supra* note 335, at 334.

Economic rights have been particularly problematic for the developed world, which feared that recognition of such rights “would give weight to demands for foreign aid and for a new economic order to enable poor states to realize the economic-social-cultural rights of their inhabitants.” HENKIN, *supra* note 14, at 191.

self-interest and national sovereignty, it presents a more plausible strategy and offers more realistic hopes for international economic development than vertically based approaches designed to declare new rights or implement "overarching political strategy."³³⁷

While I reject the vertical command structure constructed by public international law and the statist orientation of the radical model as ineffective, I also reject the essentially laissez-faire approach favored by private international law and the classical liberal model. Although in a much less conspicuous manner, the classical liberal model has also been similarly committed to the separation of the public and the private. While the radical model preserves the public/private dichotomy by creating a public space governed by the sensibility of the state and the UN, the classical liberal model preserves the public/private dichotomy by constructing an autonomous and atomized market (both at the national and the international level through which the public sphere could be segregated from the private sphere). In a reversal of the radical model's basic premise, this private sensibility constitutes a countervailing force or a buffer zone, which insulates the normal market from the abnormal forces of international politics and "reduces the transaction costs that would be required by continuous politics"³³⁸

Despite its flaws, the classical liberal model is more capable of flowing with the global logic. My argument here is based on a basic assumption that without institutional discipline, nationalism and sovereignty present barriers generally incompatible with international integration, cooperation, and economic development.³³⁹ By contrast, the global web of interlocking economic interests, in the form of capital, investment, and production, resulting in an inability of the state to control the activities and movements of economic actors beyond their territories, has created a de facto regime of economic integration and interdependence that is either absent from or much more diluted in the public international law realm.³⁴⁰

For the purpose of international economic development, global economic integration, under the auspices of the World Trade Organization, and regional economic integration such as the European Union, represent a potentially positive step toward the integration of economically poor nations. The institutional apparatus that would most facilitate and further economic development would consist of a balance of incentives and regulation designed to attract the energy of the global economy and at the same time control it in a manner compatible with the developmental requirements of particular states.³⁴¹

337. See Joel P. Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L L. J. 459, 459 (1992).

338. *Id.* at 461.

339. See Nathaniel Berman, *Economic Consequences, Nationalist Passions: Keynes, Crisis, Culture, and Policy*, 10 AM. U. J. INT'L L. & POL'Y 619, 623 (1995) (describing how one interwar economist, John Maynard Keynes, viewed the relationship between economics and nationalism, in which "he first sought to exclude nationalism as incompatible with economic reconstruction, then to enlist it as an ally, or even an agent, of economic planning, and finally, to subject it, as a 'cultural' force, to international discipline, along with 'economic' forces.").

340. See Trachtman, *supra* note 337, at 465. "State-centered public international law discourse in the world at large has been far less successful than the EC in enhancing peace and prosperity. The EC has used a different method: regional economic integration through functionalism." *Id.* The economic integration of the European Union has fulfilled one of the original objectives of the union, to ensure that the community integration of coal and steel production would make it economically infeasible for France and Germany to wage war. See also Lewis & Harris, *supra* note 253, at 114. Globalization is "the organic result of [a] virtuous cycle . . . by which economic convergence and the diffusion of innovation raise standards of living over time [T]he operation of the cycle multiplies the economic, political, and cultural connections and interdependencies [C]onvergence leading to innovation transfer, leading to both integration and more convergence" *Id.*

341. The desire to attract and control the movement of the international market is not a new one. Even before the market became as global as it currently is, John Maynard Keynes had struggled during the interwar years with "the emergence of an autonomous business 'libido,' uncommitted to particular investments, the productive economy generally, or national borders." Berman, *supra* note 339, at 638, quoting JOHN MAYNARD

While the "private" global market constitutes the most effective vehicle³⁴² through which to increase economic productivity and maximize wealth, national economic development policies should remain "public," in the sense that attracting as well as controlling global economic entities require state expenditures of public resources.³⁴³ Public spending to ensure that the national citizenry possess the education and skills capable of attracting global webs of capital, technology, and investment may generate additional benefits for the workforce in the form of on-site training³⁴⁴ and on-site or local sourcing.³⁴⁵

Developing countries could also institute regulations that encourage private, particularly foreign, investors to comply with a range of "performance requirements." To ensure that its nationals would be included among the managerial ranks, China, for example, stipulated "shadow" management provisions whereby foreign managers in joint ventures must be shadowed by Chinese nationals to ensure that managerial know-how would be passed from the foreign to the Chinese "trainee."³⁴⁶ Pursuant to the purchase agreement, the new owners of the recently privatized Teléfonos de México ("Telmex"), for example, must comply with the terms of the concession agreement. The agreement requires Telmex to upgrade its telephone network³⁴⁷ by improving the number of lines by a specified percentage annually, expanding telephone service to rural areas, and reducing the wait involved in connecting telephone service to a certain threshold.³⁴⁸ Rather than wait until the benefits of economic development "trickle down" to the domestic citizenry, some developing countries have formulated an institutional framework with built-in control to ensure that the infusion of capital, technology, and know-how will confer immediate corresponding benefits to the local population. Vietnam, for example, requires that foreign joint ventures set aside a certain percentage of joint venture profits for contribution into a number of reserve funds for the benefit of workers.³⁴⁹

These types of "performance requirements" imposed by the public sector or through regional organizations³⁵⁰ are precisely the sort that are necessary to prevent a backlash

KEYNES, CLISSOLD (1927), *reprinted in* IX THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES 315, 320 (Donald Moggridge ed., 2d ed. 1973). As Keynes recognized, national anxieties with international capital were often accompanied by a virulent strain of anti-Semitism. *See id.* at 646. Keynes concluded that such erratic, unconstrained business energy must be tamed by "nationalist temperament" so that "internationalism must again defer to existing state frontiers." *Id.* at 651.

342. As a result of the information revolution, technological innovations can be quickly diffused. By contrast, in pre-industrial economies, "the spread of innovations across continents often took centuries. Potatoes were cultivated for 4,000 years in the Andes before diffusing to Europe in the 16th century . . ." *See* Lewis & Harris, *supra* note 253, at 114.

343. Sylvia Ann Hewlett, The Human Resource Deficit, *in* *Boundaries of Business*, *supra* note 298, at 133.

344. *See* Lewis & Harris, *supra* note 253, at 114 (describing the "virtuous, upward-ratcheting cycle of economic convergence and technology transfer, driven in large measure by the actions of transnational corporations and the expectations of well-informed consumers. . .").

345. For reasons related to lower transportation costs, convenience, proximity, tariffs or lack thereof, foreign manufacturers tend to develop relationships with local component suppliers so they can source locally, which benefit local manufacturers. Developing-country sourcing "is generally suitable for manufacturing standardized products, low in technology or past the maturity stage in the life cycle." *See* Swamidass & Kotabe, *supra* note 236, at 86.

346. *See* PEARSON, *supra* note 306, at 169.

347. *See generally* First Draft, Prospectus of Teléfonos de México, S.A. de C.V. (June 17, 1991) at *24, available in LEXIS, Company Library, Prosp file (cited in prospectus of an international mutual fund which maintained Teléfonos de México stock in its portfolio).

348. *See id.*

349. *See* Law on Foreign Investment in Vietnam, art. 30 (1987), *reprinted in* 30 I.L.M. 930, 937 (1991). Similarly, China requires that before profits could be distributed, allocations must be made to expansion funds, reserve funds and bonus and welfare funds for workers, which usually constitute 10-15% of a joint venture's after tax profits. *See* PEARSON, *supra* note 306, at 142.

350. Regional integration and regional harmonization of minimum environmental or labor standards could also act as a "brake" to the "race to the bottom," as developing countries vie to attract foreign capital.

against what could be deemed excessive intrusion of the global economy into the national sphere. At the same time, these regulatory mechanisms are palatable to most foreign investors because they do not represent attempts at control by measures such as nationalization or limits on profit repatriation. Of course, where the market is unable to provide an adequate framework for correcting either market or nonmarket difficulties, additional adjustments may be instituted and, if they do not propose to alter the fundamentals of the international economic system, are less likely to be opposed by the rich states.³⁵¹

For the reasons discussed above, a new sensibility for international economic development would allow for a cross-fertilization of "public" and "private" norms designed to synthesize and reconcile the national/international market dichotomy with the global, post-sovereign sentiment of the "private" international economic system. Instead of establishing vertically-based rights to impose certain obligations on the part of the international toward the national, the focus should be on "harnessing public and private actors to the management of complex forces—public, private, governmental, and commercial—which constitute the international market."³⁵² From this perspective, the nation-state is less a source of economic authority, sovereignty less a protector of economic wealth, and the UN at the supersovereign level is less capable of enunciating legally binding economic rights. The new logic, therefore, recognizes the Bretton Woods commitment to the market and international resistance to economic rights. Its commitment, as stated above, is not toward a heightened economic order of vertically delineated economic obligations but toward the effective management and harnessing of a diffused and globalized international market. My argument is that by not directly confronting or opposing the noninterventionist logic of international economic law, the new sensibility is more likely to achieve the goal of economic development than the vertically based approach associated with the public international law sensibility.

VII. CONCLUSION

I have argued in this Article that the two currently dominant models of international economic development have been distorted by a set of dichotomous premises concerning the national versus the international market and public versus private international law. First, the national market has been viewed as a separate sphere composed of distinctly identifiable national economic interests to be protected from or balanced against the international market. Compared to the international market, the national market, or the "home" market, is deemed to be a "private" realm of economic activities performed by "our" economic players intimately linked to our sense of "national sovereignty." Both U.S. and international trade laws assume that a dichotomy exists between the national and the international market, and the laws aim simply to negotiate between the two.

Intertwined with the national/international market dichotomy is yet a second dichotomy between public and private international law. While a divide exists between the

351. For example, although the demand for debt forgiveness has not been agreed to, negotiations for debt-reducing schemes such as "debt-for-nature" swaps have been relatively successful. Under such schemes, a creditor state may forgive or reduce the debt of a debtor state if the debtor state agrees to assume certain environmental obligations. The United States Congress, for example, adopted a law in 1992 which allowed nine debtor states to reduce part of their debt to the Agriculture Department if they consented to various domestic environmental projects. *See* Enterprise for the Americas Initiative Act of 1992, Pub. L. 102-532, 106 Stat. 3509 (codified in scattered sections of 7 U.S.C.). Another version of "debt-for-nature" swaps would allow an environmental nongovernmental organization to purchase from the creditor the debts of a developing country at below-market value. The nongovernmental organization would then enter into a contract with the debtor state to retire the debt in exchange for the adoption, by the debtor state, of certain environmental commitments.

352. Kennedy, *supra* note 322, at 13.

national and the international market, both national and international markets are deemed part of "private," rather than "public" international law. The public/private international law dichotomy has resulted both in the association of "public" international law with international politics and state sovereignty not easily susceptible to judicial determination and in the concomitant association of "private" international law with "apolitical" commercial activities considered to be eminently justiciable.

The existence of these two intersecting dichotomies has been overlooked in the debate on international economic development. The effect that these dichotomies have on the ideological and conceptual premises which underlie both the classical liberal and the radical models of economic development has also been overlooked. While both models appear diametrically opposed, both are in fact quite similar. Both models uncritically accept the dichotomy between the national and international market. Their difference lies in the fact that the classical liberal model uses the conceptual tools of "private" international law, while the radical model uses the conceptual tools of "public" international law to navigate the national/international market divide. Neither model has attempted to nor is capable of resolving the deep tensions posed by, on the one hand, the national versus the international, and on the other hand, the statist preoccupation of public international law versus the nonstate orientation of private international law.

My proposal to eradicate the national/international market dichotomy would have more than theoretical appeal. On one level, the eradication of barriers between the national and the international market would make practical sense: the global logic that characterizes the international economic order means that products and corporations are now more likely to have global identities. The assumption that the home market is linked to or defined by its home corporations and home products is no longer apposite. On another level, this shift would also transform the very basic, normative framework in which the discourse in international economic development has been conducted—from one devoted to a precarious balancing of the national/international market divide to one devoted to the integration of the two. Rather than "balance" the national against the international market, or protect home industry and home products from international competition, the aim would be to bring in the international market to aid in the development of and investment in human capital. Eradicating the national/international dichotomy from the discourse on economic development would alter the terms of the debate from one premised upon the link between a home market, its corporations, and its products to one premised upon the link between a home market and its labor force.

Although market solutions are more in keeping with the globalizing tendency of the international economic order, they cannot be seen as simply "private" commercial activities insulated from the concerns of "public" international law. Ultimately, this Article argues that market and state are both formidable forces that cannot be ideologically compartmentalized according to a "public" or "private" line. My proposal to integrate the national and the international market is based on a similar proposal to reconceive the relationship between "private" and "public" international law. The challenge is to enact an institutional framework capable of simultaneously attracting and regulating the global market and, in the process, further the development of an interdependent and integrated international economic order.