

## **Territory and Territoriality in the Global Economy<sup>1</sup>**

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The general question organizing this paper concerns the impact of economic globalization on the territorial jurisdiction, or more theoretically, the exclusive territoriality of the nation state. It is an effort to respond critically to two notions that underlie much of the current discussion about globalization. One is the zero-sum game: whatever the global economy gains, the national state loses, and vice-versa. The other is that if an event takes place in a national territory it is a national event, whether a business transaction or a judiciary decision.

Both of these notions presuppose a unitary spatio-temporal concept of sovereignty and its exclusive institutional location in the national state. It also can be seen as an analysis of economic globalization that rests on standard theories about sovereignty and national states. But a less state-centered analysis of economic globalization allows us to capture the historical specificity of this concept of sovereignty and it allows us to recognize the possibility that certain components of sovereignty have under current conditions been relocated to supra and subnational institutions, both governmental and nongovernmental institutions, and both old and newly formed institutions.

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<sup>1</sup>This is part of a larger research project on governance and accountability in the global economy (and this paper reflects the fact that I am far from done with this research). The first phase of the larger project was partly published as the 1995 Leonard Hastings Schoff Memorial Lectures ([Losing Control? Sovereignty in an Age of Globalization](#). Columbia University Press 1996). I want to thank the Schoff Memorial Fund for their support.

The proposition that I draw out of this analysis, and my argument in this paper, is that we are seeing processes of incipient de-nationalization of sovereignty --the partial detachment of sovereignty from the national state. The particular forms of power and legitimacy that we have associated with national sovereignty have been transformed, but only partly. The larger system of political and economic power that has evolved over the last decade has secured some forms of this power and legitimacy for its own purposes. It would seem that sovereign power remains the single most efficient way of securing legitimate authority, even when it entails overriding certain elements of national state sovereignty as is the case, for instance with the World Trade Organization. Whether this de-nationalizing of sovereignty signals a destabilizing of the meaning, historically constructed, of sovereignty (cf. Weber 1996) or a re-stabilizing of a new meaning, is for me still an open question for research and theorization. And whether this represents a reconfiguring of the inside-outside duality as analyzed in Walker (1995) is a similarly open question.<sup>2</sup>

### Elements for a New Conceptualization

My argument rests on an understanding of economic globalization that is quite different from many of the standard accounts. There are two key propositions organizing my discussion. One of these is that the global economy needs to be produced, reproduced, serviced, financed. It cannot be taken simply as a given, or merely as a function of the power of multinational corporations and financial markets. There is a whole vast array of highly specialized functions that

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<sup>2</sup> This is part of my larger five-year research project "Governance and Accountability in the Global Economy." See footnote 1 here.

need to be ensured. These have become so specialized that they can no longer be contained in corporate headquarter functions. Global cities are strategic sites for the production of these specialized functions to run and coordinate the global economy. Inevitably located in national territories, these cities are the organizational and institutional location for some of the major dynamics of de-nationalization. While such processes of denationalization --for instance, certain aspects of financial and investment deregulation-- are institutional and not geographic, the geographic location of many of the strategic institutions --for instance, financial markets and financial services firms-- means these processes are embedded geographically.

The second proposition, partly connected to the first, is that the global economy to a large extent materializes in national territories. Its topography is one that moves in and out of digital space and national territories. This requires a particular set of negotiations which have the effect of leaving the geographic boundaries of the national state's territory unaltered, but do transform the institutional encasements of that geographic fact, that is the state's territorial jurisdiction or, more abstractly, exclusive territoriality.

Precisely because global processes materialize to a large extent in national territories, many national states have had to become deeply involved in the implementation of the global economic system and have, in this process, experienced transformations of various aspects of their institutional structure. This would mean that the global economy and the national state do not relate to each other as in a zero-sum situation. My working hypothesis is that while globalization leaves national territory basically unaltered, it is having pronounced effects on the exclusive territoriality of the national state--that is, its effects are not on territory as such but on the institutional encasements of the geographic fact of national territory. Economic globalization

entails a set of practices which destabilize another set of practices, i.e. some of the practices that came to constitute national state sovereignty.

Implementing today's global economic system in the context of national territorial sovereignty required multiple policy, analytic and narrative negotiations. These negotiations have typically been summarized or coded as "deregulation." There is much more going on in these negotiations than the concept "deregulation" captures. The encounter of a global actor--firm or market-- with one or another instantiation of the national state can be thought of as a new frontier. It is not merely a dividing line between the national economy and the global economy. It is a zone of politico-economic interactions that produce new institutional forms and alter some of the old ones. Nor is it just a matter of reducing regulations. For instance, in many countries, the necessity for autonomous central banks in the current global economic system has required a thickening of regulations in order to de-link central banks from the influence of the executive branch of government --and the possibility of deeply "national" political agendas. The case of the central banks also illustrates another key aspect in the process whereby national economies accommodate a global economic system: "national" institutions, i.e. central banks, become home to some of the operational rules of the global economic system. Further, the fact that we cannot simply reduce these negotiations to the notion of deregulation is also illustrated by the privatization of public sector firms. Such privatization is not just a change in ownership status, but also a shift of regulatory functions to the private sector where they re-emerge under other forms, most notably, private corporate legal and accounting services. In this shift the emperor has clearly changed clothes.

Economic globalization is indeed a major transformation in the territorial and institutional

organization of economic activity and of politico-economic power. But to posit, as is so often done, that economic globalization simply has brought with it a declining significance of the national state is inadequate. Neither is it adequate simply to focus on the fact of the often minimal share of foreign inputs in national economies: in most countries the share of foreign in total investment, the share of international in total trade, the share of foreign in total stock market value, is very small. However, to infer from this that economic globalization is not really a significant issue, misses a crucial feature of this current phase of economic globalization: the fact that most global processes materialize in national territories and do so to a large extent through national institutional arrangements, from legislative acts to firms, and thereby not necessarily counted as "foreign." Conversely, for that same reason we cannot simply assume that because a transaction takes place in national territory and in a national institutional setting it is ipso facto national. In my reading, the imbrications of global actors and national institutions is far more ambiguous. One key implication is that economic globalization has actually strengthened certain components of national states, notably those linked to international banking functions, such as ministries of finance, even as it has weakened many others.<sup>3</sup>

How does the globalization of national economies reconfigure the territorial exclusivity of sovereign states and what does this do to sovereignty, and to a system of rule based on sovereign states? Has economic globalization over the last ten or fifteen years contributed to a major institutional discontinuity in the history of the modern state and the modern inter-state system, and

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<sup>3</sup> A second important implication, not discussed here, is that insofar as certain components of national states are engaged in the implementation and governing of the global economy, there is a bridge for citizens to exercise some of their powers vis a vis the global economy. Clearly, this would require significant innovation and initiative.

particularly, in the system of rule?

We can begin to address these questions by examining major aspects of economic globalization that contribute to what I think of as a new geography of power. One of these components concerns the actual territories where much of globalization materializes in specific institutions and processes. And the question here is, then, what kind of territoriality is this? The second component of the new geography of power concerns the ascendance of a new legal regime to govern cross-border economic transactions. One can see here at work a rather peculiar passion for various kinds of "legality" driving the globalization of the corporate economy. There has been a massive amount of legal innovation around the growth of globalization. The third component of the new geography of power is the fact that a growing number of economic activities are taking place in electronic space. This growing digitization of economic activity, particularly in the leading information industries such as finance and specialized corporate services, may be contributing to a crisis in control that transcends the capacities of both the state and the institutional apparatus of the economy. The speed of transactions made possible by the new technologies is creating orders of magnitude, for instance in the foreign currency markets, that escape the governing capacities of private and government overseers.

Adding these three components of the new geography of power to the global footlooseness of corporate capital reveals aspects of the relation between global economy and national state which are not adequately, or usefully captured in the prevalent notion of a duality global-national. This duality is conceived as a mutually exclusive set of terrains where what the global economy gains the national economy or the national state loses. It is this type of dualization that has fed the proposition of a declining significance of the national state in a globalized economy. Such a

dualistic perspective also resists the recognition that we may be dealing with a new bundle of practices that are stabilizing new meanings of sovereign power and constituting new institutional locations for components of this power (cf. Sassen 1996, chapters 1 and 2).

Let me elaborate now on these three components of the new geography of power. I will begin with the question of the spaces of the global economy, or the strategic geography of globalization, or more conceptually, the particular form of territoriality we see taking shape in the global economy today.

My starting point is a set of practices and institutions: global financial markets; ascendance of Anglo-American law firms in international business transactions; the Uruguay round of Gatt and the formation of the World Trade Organization (WTO); the role of credit rating agencies in international capital markets; various provisions in GATT, NAFTA and other free trade agreements.

### Strategic Spaces: The Ascendance of The Sub-National

Much attention has gone to the dispersal trends associated with globalization and telematics--the off-shoring of factories, the expansion of global networks of affiliates and subsidiaries, the formation of global financial markets. What is left out of this picture is the other half of the story. This worldwide geographic dispersal of factories and service outlets takes place as part of highly integrated corporate structures with strong tendencies towards concentration in control and profit appropriation.<sup>4</sup> For instance, it is well known that a very high share, about 40%

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<sup>4</sup> Elsewhere I have examined in great detail what contributes to the importance of centrality in economic systems with immense technological capacities for global dispersal to the most advantageous sites. It is through these information-based production processes that centrality is constituted. But centrality emerges as significant precisely because it is a

of international trade is actually intra-firm trade, and, according to some sources, it is even higher than that.<sup>5</sup>

There are two major implications here for the question of territoriality and sovereignty in the context of a global economy. First, when there is geographic dispersal of factories, offices and service outlets in an integrated corporate system, particularly one with centralized top level control, there is also a growth in central functions. One way of saying it is that the more globalized firms become, the more their central functions grow --in importance, in complexity, in number of transactions.<sup>6</sup>

We can make this more concrete by considering some of the staggering figures involved in this worldwide dispersal and imagining what it entails in terms of coordination and management for parent headquarters. For instance, in the early 1990s US firms had over 18,000 affiliates overseas; less known is the fact that German firms have even more affiliates, 19,000, up from 14,000 in the early 1980s. Or that firms such as Ford Motors, GM, IBM, Exxon, have well over

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function of the vast global network of operations of the leading industries in the current phase of globalization. We can say that the global economy materializes in a worldwide grid of strategic places, uppermost among which are major international business and financial centers. We can think of this global grid as constituting a new economic geography of centrality, one that cuts across national boundaries and across the old North-South divide. It signals, potentially, the emergence of a parallel political geography. An incipient form of this is the growing intensity in cross-border networks among cities and their mayors. It is, then, precisely the combination of the spatial dispersal of numerous economic activities **and** telematic global integration which has contributed to a strategic role for major cities in the current phase of the world economy (Sassen 1991).

<sup>5</sup>See United Nations Centre on Transnational Corporations; UNCTAD, various years.

<sup>6</sup>I have elaborated these issues in Sassen 1991; 1994. This process of corporate integration should not be confused with vertical integration as conventionally defined. See also Gereffi on commodity chains and Porter's value added chains, two constructs that also illustrate the difference between corporate integration at a world scale and vertical integration as conventionally defined.



50 percent of their workforce overseas.<sup>7</sup> All of this represents a massive task of coordination and management for the firm involved. Let me clarify promptly that a lot of this has been going on for a long time; and, secondly, that this dispersal does not proceed under a single organizational form --rather, behind these general figures lie many different organizational forms, hierarchies of control, degrees of autonomy.<sup>8</sup>

Of importance to the analysis here is the dynamic that connects the dispersal of economic activities with the ongoing weight and often growth of central functions. In terms of territoriality and globalization this means that an interpretation of the impact of globalization as creating a space economy that extends beyond the regulatory capacity of a single state, is only half the story; the other half is that these central functions are disproportionately concentrated in the national territories of the highly developed countries.

I should perhaps clarify that by central functions I do not only mean top level headquarters; I am referring to all the top level financial, legal, accounting, managerial, executive, planning functions necessary to run a corporate organization operating in more than one country, and increasingly in several countries. These central functions are partly embedded in headquarters, but also in good part in what has been called the corporate services complex, that is, the network of financial, legal, accounting, advertising firms that handle the complexities of operating in more than one national legal system, national accounting system, advertising culture, etc. and do so

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<sup>7</sup>More detailed accounts of these figures and sources can be found in my 1994 book. I should note here that affiliates are but one form of operating overseas. There are today multiple forms, ranging from new temporary partnerships to older types of subcontracting and contracting.

<sup>8</sup>See, e.g. Harrison, 1994.

under conditions of rapid innovations in all these fields.<sup>9</sup> Such services have become so specialized and complex, that headquarters increasingly buy them from specialized firms rather than producing them in-house. These agglomerations of firms producing central functions for the management and coordination of global economic systems, are disproportionately concentrated in the highly developed countries --particularly, though not exclusively, in the kinds of cities I call global cities. Such concentrations of functions represent a strategic factor in the organization of the global economy, and they are situated right here, in New York, in Paris, in Amsterdam.<sup>10</sup>

One argument I am making here is that it is important to unbundle analytically the fact of strategic functions for the global economy or for global operation, and the overall corporate economy of a country.<sup>11</sup> For the purposes of certain kinds of inquiry this distinction may not matter; for the purposes of understanding the global economy, it does. Further, to operate a worldwide network of factories, offices and service outlets, major and minor legal innovations were necessary, a subject I return to later.

Another instance today of this negotiation between a transnational process or dynamic and

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<sup>9</sup> See Sassen 1991; 1994; Knox and Taylor 1995; Brothie et al. 1995.

<sup>10</sup>We are seeing the formation of an economic complex with a valorization dynamic that has properties clearly distinguishing it from other economic complexes whose valorization dynamic is far more articulated with the public economic functions of the state, the quintessential example being Fordist manufacturing. Global markets in finance and advanced services partly operate through a "regulatory" umbrella that is not state-centered but market-centered. This in turn brings up a question of control linked to the currently inadequate capacities to govern transactions in electronic space.

<sup>11</sup>These global control and command functions are partly embedded in national corporate structures but also constitute a distinct corporate subsector. This subsector can be conceived of as part of a network that connects global cities across the globe. In this sense, global cities are different from the old capitals of erstwhile empires, in that they are a function of cross border networks rather than simply the most powerful city of an empire. There is, in my conceptualization, no such entity as a single global city as there could be a single capital of an empire; the category global city only makes sense as a component of a global network of strategic sites. The corporate subsector which contains the global control and command functions is partly embedded in this network. (See Sassen 1991).

a national territory is that of the global financial markets. The orders of magnitude in these transactions have risen sharply, as illustrated by the 75 US trillion in turnover in the global capital market, a major component of the global economy. These transactions are partly embedded in telecommunications systems that make possible the instantaneous transmission of money /information around the globe. Much attention has gone to the capacity for instantaneous transmission of the new technologies. But the other half of the story is the extent to which the global financial markets are located in particular cities in the highly developed countries; indeed, the degrees of concentration are unexpectedly high.

Stock markets worldwide have become globally integrated. Besides deregulation in the 1980s in all the major European and North American markets, the late 1980s and early 1990s saw the addition of such markets as Buenos Aires, Sao Paulo, Bangkok, Taipei, etc. The integration of a growing number of stock markets has contributed to raise the capital that can be mobilized through stock markets. Worldwide market value reached 13 trillion dollars in 1995. This globally integrated stock market which makes possible the circulation of publicly listed shares around the globe in seconds, is embedded in a grid of very material, physical, strategic places-- that is, cities belonging to national territories. Again, as in the case of firms with global operations, major and minor legal innovations were necessary for the deregulation and global integration of stock markets.

The specific forms assumed by globalization over the last decade have created particular organizational requirements. The emergence of global markets for finance and specialized services, the growth of investment as a major type of international transaction, all have contributed to the expansion in command functions and in the demand for specialized services for

firms.

A central proposition here is that we cannot take the existence of a global economic system as a given, but rather need to examine the particular ways in which the conditions for economic globalization are produced. This requires examining not only communication capacities and the power of multinationals, but also the infrastructure of facilities and work processes necessary for the implementation of global economic systems, including the production of those inputs that constitute the capability for global control and the infrastructure of jobs involved in this production. The emphasis shifts to the *practice* of global control: the work of producing and reproducing the organization and management of a global production system and a global marketplace for finance, both under conditions of economic concentration.<sup>12</sup>

### The State and the New Space Economy

The analysis presented above points to a space economy for major new transnational economic processes that diverges in significant ways from the duality global/national presupposed in much analysis of the global economy.<sup>13</sup> The shrinking capacity of the state to regulate these industries cannot be explained simply by the fact that they operate in "the global economy" rather than in the "national economy." The spatial organization of the leading information industries

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<sup>12</sup>The recovery of place and production also implies that global processes can be studied in great empirical detail: there is a sociology and an anthropology of economic globalization.

<sup>13</sup>There are a number of scholars who are working along these new lines in a variety of fields. See for example, Mazlish and Bultjens (1993); Appelbaum and Gereffi (1994); Castells (1989) Smith and Timberlake (1995) Beneria (1989).

makes it clear that these are not mutually exclusive spaces. Rather, the globalization of finance and corporate services is embedded in a grid of strategic sites which are partly embedded in national territories. Further, firms which operate globally still require the guarantees of rights of property and contract they expect within their national territories.

But the analysis of these industries also makes it clear that insofar as transnationalization and deregulation have been a key to their growth and distinct contemporary character they have reduced the regulatory role held by the national state until quite recently. This is illustrated by the worldwide pressure experienced by national states to deregulate their financial markets in order to allow integration into the global markets. Thus London saw its "big bang" of 1984 and Paris saw "le petit bang" a few years later under governments as diverse as the Tories in England and the Socialists in France.<sup>14</sup> The declining regulatory role of national states can be quite different between highly developed countries and less developed countries. This is illustrated by the case of the December 1994 Mexican crisis and the different roles played by the U.S. and Mexican governments.

Finally, advanced information industries make it clear that unlike the prior eras of the world economy, the current forms of globalization do not necessarily contribute to reproduce or strengthen the inter-state system. International finance especially reveals the extent to which the forms of internationalization evident in the last two decades have produced regulatory voids that

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<sup>14</sup>Globalization restricts the range of regulatory options of national governments as these and many other cases, notably the Mexico crisis, illustrate. Aman, Jr. (1995) shows how a global perspective on domestic regulatory politics helps explain the absence of radical differences in the regulatory outcomes of different US administrations over the last fifteen years. The pressures of global competition, the nature of corporate entities involved, and domestic political pressures to minimize costs and maximize flexibility militate in favor of new, more market-oriented forms of regulatory reform.

lie beyond not only states but also the inter-state system. This can be illustrated with the case of the foreign currency markets which have reached orders of magnitude that have weakened the regulatory role of central bankers, notably the impact of concerted international action on foreign exchange rates.

Some of the features of economic globalization associated with the declining regulatory role of the state are by now well known. Globalization has contributed to a massive push towards deregulation across the board in many of the highly developed countries. Aman, Jr. (1995) notes that though not all industries in a nation are equally subject to intense global competition, the existence of such competition in general contributes to an overall political context that encourages domestic regulatory reform in all industries. "Political movements and regulatory trends do not tend to discriminate among industries once the momentum for certain reforms is underway" (Aman, Jr. 1995: 433).<sup>15</sup> The impact of global competition on the domestic politics of regulation goes well beyond the industries in which this competition is most intense. Economic globalization pushes local jurisdictions into the competition for industries that operate nationally and/or transnationally. The possibility of moving from one to another jurisdiction with lower regulatory demands, puts downward pressures on regulations across all jurisdictions--the quintessential race to the bottom. Whole countries are now engaged in this competition. (For some recent formulations in what is a vast literature see Gereffi, this volume; Sklair, 1991; Bonacich et al., 1994; Social Justice 1993; Bose and Acosta-Belen 1995).

In the case of finance and the advanced corporate services, globalization was a key feature

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<sup>15</sup>This spread effect can also work in the opposite regulatory direction, as was the case with reform in the New Deal era (see Hawley 1969).

of their expansion, not simply a matter of raising profits and lowering costs as with many manufacturing industries. And reducing the existing regulatory role of states was the necessary mechanism. We have seen country after country in Latin America and Asia deregulate its stock market and other financial markets to become integrated into the global financial market.

### New Legal Regimes

Firms operating transnationally need to ensure the functions traditionally exercised by the state in the national realm of the economy, notably guaranteeing property rights and contracts. We need to examine the particular forms of legal innovation that have been produced and within which much of globalization is encased, framed; and, further, how these innovations interact with the state, or more specifically, with the sovereignty of the state. As with the discussion of territory in the global economy, my beginning point is a set of practices and minor legal forms, micro histories, which can however accumulate into major trends or regimes.

Insofar as economic globalization extends the economy beyond the boundaries of the national state and hence its sovereignty, various guarantee would appear to be threatened. In fact, globalization has been accompanied by the creation of new legal regimes and legal practices and the expansion and renovation of some older forms that bypass national legal systems.

Globalization and governmental deregulation have not meant the absence of regulatory regimes and institutions for the governance of international economic relations. Among the most important ones in the private sector today are international commercial arbitration and the variety of institutions which fulfill rating and advisory functions that have become essential for the operation of the global economy.

Over the past 20 years, international commercial arbitration has been transformed and institutionalized as the leading contractual method for the resolution of transnational commercial disputes.<sup>16</sup> There has been enormous growth of arbitration centers. Excluding those concerned with maritime and commodity disputes--an older tradition--there were 120 centers by 1991, with another seven created by 1993; among the more recent centers created are those of Bahrain, Singapore, Sydney and Vietnam. There were about 1000 arbitrators by 1990, a number that had doubled by 1992.<sup>17</sup> In a major study on international commercial arbitration, Dezalay and Garth

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<sup>16</sup>It represents one mechanism for business disputing. The larger system includes arbitration controlled by courts, arbitration that is parallel to courts, and various court and out-of-court mechanisms such as mediation. The following description of international commercial arbitration is taken from Dezalay and Garth (1994); for these authors, today "international commercial arbitration" carries a different meaning from what it did 20 years ago. It has become increasingly formal and more like US style litigation as it has become more successful and institutionalized. Today international business contracts for, e.g. the sale of goods, joint ventures, construction projects, or distributorship, typically call for arbitration in the event of a dispute arising from the contractual arrangement. The main reason given today for this choice is that it allows each party to avoid being forced to submit to the courts of the other. Also important is the secrecy of the process. Such arbitration can be "institutional" and follow the rules of institutions such as the International Chamber of Commerce in Paris, the American Arbitration Association, the London Court of International Commercial Arbitration, or many others. Or it can be "ad hoc", often following the rules of the UN Commission on International Trade Law (UNCITRAL). The arbitrators are private individuals selected by the parties; usually there are 3 arbitrators. They act as private judges, holding hearings and issuing judgments. There are few grounds for appeal to courts, and the final decision of the arbitrators is more easily enforced among signatory countries than would be a court judgment (under the terms of a widely adopted 1958 New York Convention)

<sup>17</sup>(Dezalay and Garth, 1995; Aksen, 1990). Yet it is a tight community, with relatively few important institutions and limited numbers of individuals in each country who are the key players both as counsel and arbitrators. There is a kind of "international arbitration community," a "club." The enormous growth of arbitration over the last decade arising out of the globalization of economic activity has produced sharp competition for the arbitration business. Indeed, it has become big legal business (Salacuse 1991). Dezalay and Garth (1995) found that multinational legal firms further sharpen the competition since they have the capacity to forum shop among institutions, sets of rules, laws and arbitrators. The large English and American law firms have used their power in the international business world to impose their conception of arbitration and more largely of the practice of law.

This is well illustrated by the case of France. While French firms rank among the top providers of information services and industrial engineering services in Europe and have a strong though not outstanding position in financial and insurance services, they are at an increasing disadvantage in legal and accounting services. (See Le Debat 1994). French law firms are at a particular disadvantage given the difference between their legal system (the Napoleonic Code) and Anglo-American law in a context where the latter dominates in international transactions. Foreign firms with offices in Paris dominate the servicing of the legal needs of firms operating internationally, both French and foreign firms operating out of France (Carrez 1991).



conclude that it is a delocalized and decentralized market for the administration of international commercial disputes, connected by more or less powerful institutions and individuals who are both competitive and complementary.<sup>18</sup> It is in this regard far from a unitary system of justice, and I quote Dezalay and Garth, "organized perhaps around one great *lex mercatoria*-- that might have been envisioned by some of the pioneering idealists of law."<sup>19</sup>

Another instance of a private regulatory system is represented by debt security or bond rating agencies which have come to play an increasingly important role in the global economy.<sup>20</sup> Ten years ago Moody's and Standard and Poor had no analysts outside the U.S.; by 1993 they each had about 100 in Europe, Japan and Australia. In his study of credit rating processes, Sinclair found that these agencies function as mechanisms of 'governance without government.'<sup>21</sup> He found that they have leverage because of their distinct gate-keeping functions with regard to investment funds sought by corporations and governments. In this regard they can be seen as a

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<sup>18</sup> Summarized in Dezalay and Garth 1995; see also Dezalay 1992)

<sup>19</sup>(Dezalay and Garth 1995; see also Carbonneau 1990).Anglo-American practitioners tend not to support the continental, highly academic notion of a *lex mercatoria* (see Carbonneau 1990). The so-called *lex mercatoria* was conceived by many as a return to an international law of business independent of national laws (Carbonneau 1990; de Ly 1992). Insofar as they are "Americanizing" the field, they are moving it farther away from academic law and *lex mercatoria*.

<sup>20</sup>There are two agencies that dominate the market in ratings, with listings of US\$3 trillion each. They are Moody's Investors Service, usually referred to as Moody's, and Standard & Poor's Ratings Group, usually referred to as Standard & Poor. While there are several rating agencies in other countries, these are oriented to the domestic markets. The possibility of a European based rating agency has been discussed, particularly with the merger of London-based agency (IBCA) with a French one (Euronotation).€

<sup>21</sup>Sinclair (1994), picking up on Rosenau (1992). The growing demand for ratings has given the notion of ratings a growing authoritativeness, which for Sinclair is not well founded given the processes of judgments which are central to it. These processes are tied to certain assumptions, in turn tied to dominant interests, notably narrow assumptions about market efficiency. The aim is undistorted price signals and little if any government intervention. Sinclair (1994: 143) notes that transition costs such as unemployment are usually not factored into evaluations and considered to be outweighed by the new environment created.

significant force in the operation and expansion of the global economy.<sup>22</sup> And as with business law, the U.S. agencies have expanded their influence overseas; to some extent, their growing influence can be seen as both a function of and a promoter of US financial orthodoxy, particularly its short term perspective.

These and other such transnational institutions and regimes do raise questions about the relation between state sovereignty and the governance of global economic processes. International commercial arbitration is basically a private justice system and credit rating agencies are private gate-keeping systems. Along with other such institutions they have emerged as important governance mechanisms whose authority is not centered in the state. Yet they contribute to maintain order at the top, one could say. Does the ascendance of such institutions and regimes entail a decline in state sovereignty? We are seeing a relocation of authority that has transformed the capacities of governments and can be thought of as an instance of what Rosenau has described as governance without government.<sup>23</sup>

We are also seeing the formation of transnational legal regimes and their penetration into national fields hitherto closed. Further, national legal fields are becoming more internationalized in some of the major developed economies. Some of the old divisions between the national and the

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<sup>22</sup>Their power has grown in good part because of disintermediation and the globalization of the capital market. The functions fulfilled by banks in the capital markets (i.e. intermediation) have lost considerable weight in the running of these markets; insofar as banks are subject to considerable government regulation and what has replaced banks is not, the lesser role of banks inevitably brings with it a decline in government regulation over the capital markets. Rating agencies, which are private entities, have taken over some of the functions of banks in organizing information for suppliers and borrowers of capital. An important question here is whether these agencies and the larger complex of entities, represented by "Wall Street" has indeed formed a new intermediary sector (cf. Thrift, 1987) only one largely not regulated the way the banking sector is.

<sup>23</sup> Rosenau and Czempiel (1992)

global are becoming weaker and, to some extent, neutralized. These transnational regimes could, in principle, have assumed various forms and contents. But they are, in fact, assuming a specific form, one wherein the states of the highly developed countries play a strategic geopolitical role. The hegemony of neo-liberal concepts of economic relations with its strong emphasis on markets, deregulation, and free international trade has influenced policy in the 1980s in USA and UK and now increasingly also in continental Europe. This has contributed to the formation of transnational legal regimes that are centered in Western economic concepts.<sup>24</sup>

Dezalay and Garth (1995) note that the "international" is itself constituted largely from a competition among national approaches. There is no global law.<sup>25</sup> Thus the international emerges as a site for regulatory competition among essentially national approaches, whatever the issue-- environmental protection, constitutionalism, human rights.<sup>26</sup> From this perspective "international"

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<sup>24</sup>This hegemony has not passed un-noticed and is engendering considerable debate. For instance, a well-known issue that is emerging as significant in view of the spread of western legal concepts is the critical examination of the philosophical premises about authorship and property that define the legal arena in the West (e.g. Coombe, 1993.)

<sup>25</sup>Shapiro (1993) notes that there is not much of a regime of international law, either through the establishment of a single global law giver and enforcer or through a nation-state consensus. He also posits that if there was, we would be dealing with an international rather than global law. Nor is it certain that law has become universal--i.e. that human relations anywhere in the world will be governed by some law, even if not by a law that is the same everywhere. Globalization of law refers to a very limited, specialized set of legal phenomena, and Shapiro argues that it will almost always refer to North America and Europe; only sometimes to Japan and to some other Asian countries. There have been a few particular common developments and many particular parallel developments in law across the world. Thus, as a concomitant of the globalization of markets and the organization of transnational corporations, there has been a move towards a relatively uniform global contract and commercial law. This can be seen as a private lawmaking system where the 2 or more parties create a set of rules to govern their future relations. Such a system of private lawmaking can exist transnationally even when there is no transnational court or transitional sovereign to resolve disputes and secure enforcement. The case of international commercial arbitration discussed earlier illustrates this well. (See also Shapiro 1979).

<sup>26</sup>Charny 1991; Trachtman 1993. There are two other categories that may partly overlap with internationalization as Americanization, but are important to distinguish, at least analytically. One is multilateralism and the other is what Ruggie has called multiperspectival institutions. (See Sassen, In Progress).

or "transnational" has become in the most recent period, a form of "Americanization."<sup>27</sup> The most widely recognized instance of this is of course the notion of a global culture that is profoundly influenced by U.S. popular culture.<sup>28</sup> But, though less widely recognized and more difficult to specify, this has also become very clear in the legal forms that are ascendant in international business transactions.<sup>29</sup> Through the IMF and IBRD as well as GATT this vision has spread to, some would say been imposed on, the developing world.<sup>30</sup>

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<sup>27</sup>All of this is not a smooth linear progression. There is contestation everywhere, some of it highly visible and formalized, some of it not. In some countries, especially in Europe, we see resistance to what is perceived as the Americanization of the global capital market's standards for the regulation of their financial systems and standards for reporting financial information. Sinclair (1994) notes that the internationalization of ratings by the two leading US agencies could be seen as another step towards global financial integration or as an American agenda. There is clearly growing resentment against US agencies in Europe, as became evident on the occasion of the 1991 downgrading of Credit Suisse and, in early 1992, the downgrading of Swiss Bank Corporation. It is also evident in the difficulty that foreign agencies have had in getting SEC recognition in the USA as Nationally Recognized Statistical Rating Organizations. There have been reports in the media, for example in the Financial Times, about private discussions in London, Paris and Frankfurt about the possibility of setting up a Europe-wide agency to compete with the major US based agencies.

<sup>28</sup>For a discussion of the concept of globalization see King (1991); Robertson 1990. Cf. Robertson's notion of the world as a single place, or the "global human condition." I would say that globalization is also a process that produces differentiation, only the alignment of differences is of a very different kind from that associated with such differentiating notions as national character, national culture, national society. For example, the corporate world today has a global geography, but it isn't everywhere in the world: in fact it has highly defined and structured spaces; secondly, it also is increasingly sharply differentiated from non-corporate segments in the economies of the particular locations (a city such as New York) or countries where it operates.

<sup>29</sup>Shapiro (1993) finds that law and the political structures that produce and sustain it are far more national and far less international than are trade and politics as such.(p.63). He argues that the U.S. domestic legal regime may have to respond to global changes in markets and in politics far more often than to global changes in law; for the most part, national regimes of law and lawyering will remain self-generating. Though, he adds that they will do so in response to globally perceived needs. In my reading it is this last point that may well be emerging as a growing factor in shaping legal form and legal practice.

<sup>30</sup>The best known instance of this is probably the austerity policy imposed on many developing countries. This process also illustrates the participation of states in furthering the goals of globalization, since these austerity policies have to be run through national governments and reprocessed as national policies. In this case it is clearer than in others that the global is not simply the non-national, that global processes materialize in national territories and institutions. There is a distinction here to be made, and to be specified theoretically and empirically, between international law (whether public or private law) which always is implemented through national governments, and these policies which are part of the aim to further globalization.

The competition among national legal systems or approaches is particularly evident in business law where the Anglo American model of the business enterprise and competition is beginning to replace the continental model of legal artisans and corporatist control over the profession.<sup>31</sup> This holds even for international commercial arbitration. Notwithstanding its deep roots in the continental tradition, especially the French and Swiss traditions, this system of private justice is becoming increasingly "Americanized."<sup>32</sup>

### The virtualization of economic activity

The third component in the new geography of power is the growing importance of electronic space. I will address this only briefly, though there is much to be said. I want to isolate one particular issue: the distinctive challenge that the virtualization of a growing number of

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<sup>31</sup>(Dezalay 1992; see also Carrez 1991; Sinclair 1994). More generally, US dominance in the global economy over the last few decades has meant that the globalization of law through private corporate lawmaking assumes the form of the Americanization of commercial law (Shapiro 1993). Certain US legal practices are being diffused throughout the world, e.g. the legal device of franchising. Shapiro notes that it may not only be US dominance, but also a receptivity of common law to contract and other commercial law innovations. Thus it is widely believed in Europe that EC legal businesses goes to London because its lawyers are better at legal innovations to facilitate new and evolving transnational business relations than the civil law of the continent. "For whatever reasons, it is now possible to argue that American business law has become a kind of global jus commune incorporated explicitly or implicitly into transnational contracts and beginning to be incorporated into the case law and even the statutes of many other nations" (Shapiro, 1993: 39). (cite n. 4 Wiegand, 1991).

<sup>32</sup>There are several reasons for this, all somewhat interrelated: the rationalization of arbitration know-how, the ascendance of large Anglo-American transnational legal services firms, and the emergence of a new specialty in conflict resolution (Dezalay 1992). The large Anglo-American law firms which dominate the international market of business law include arbitration as one of the array of services they offer --a kind of litigation that uses a different forum rather than the courts. Specialists in conflict are practitioners formed from the two great groups that have dominated legal practice in the US: corporate lawyers, known for their competence as negotiators in the creation of contracts; and trial lawyers whose talent lies in jury trials. The growing importance in the 1980s of such transactions as mergers and acquisitions, antitrust and other litigation, contributed to a new specialization: knowing how to combine judicial attacks and behind the scenes negotiations to reach the optimum outcome for the client. Dezalay and Garth note that under these conditions judicial recourse becomes a weapon to be used in a situation which will almost certainly end before trial.

economic activities presents not only to the existing state regulatory apparatus but also to private sector institutions increasingly dependent on the new technologies. Taken to its extreme this may signal a control crisis in the making; this would be a type of control crisis for which we lack an analytic vocabulary.

These are questions of control that have to do with the orders of magnitude that can be achieved in the financial markets thanks to the speed in transactions made possible by the new technologies. The best example is probably the foreign currency markets which operate largely in electronic space and have achieved volumes --a trillion dollars a day-- that have left the central banks incapable of exercising the influence on exchange rates they are expected to have (though may in fact not always have had). These are questions of control that arise out of the properties of the new information technologies, notably the immense speed-up of transactions they make possible, rather than out of the extension of the economy beyond the state.

The growing virtualization of economic activities raises questions of control in the global economy that not only go beyond the state but also beyond the notions of non-state centered systems of coordination prevalent in the literature on governance. And they go beyond analyses on the impact of digitization on sovereignty which remain framed by the Liberal vs. Realist theories of the state; this is so even in conceptions that factor in the historicity and variability of sovereignty and acknowledge different logics for its representation (See for example the debate on this subject in The Indiana Journal of Global Legal Studies, Summer 1998).

### The State Reconfigured

In many ways the state is involved in this emerging transnational governance system. But

it is a state that has itself undergone transformation and participated in legitimating a new doctrine about the role of the state in the economy. Central to this new doctrine is a growing consensus among states to further the growth and strength of the global economy.<sup>33</sup> Many governments now see their responsibilities going beyond foreign policy as traditionally conceptualized, and extending onto world trade, the global environment and global economic stability.<sup>34</sup> An important question running through these different interpretations is whether the new transnational regimes and institutions are creating systems that strengthen the claims of certain actors (corporations, the large multinational legal firms) and correspondingly weaken the position of smaller players and of states. Ruggie has pointed out that the issue is not whether such new institutions and major economic actors will substitute national states but rather the possibility of major changes in the system of states: "global markets and transnationalized corporate structures...are not in the business of replacing states" yet they can have the potential for producing fundamental change in the system of states.<sup>35</sup>

What matters here is that global capital has made claims on national states and these have responded through the production of new forms of legality. The new geography of global economic processes, the strategic territories for economic globalization, had to be produced, both in terms of the practices of corporate actors and the requisite infrastructure, and in terms of the

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<sup>33</sup>There is a growing consensus among states to further the goals of economic globalization, to the point that some see in this a constitutionalizing of this new role of states (See Panitch 1996, Cox 1996, Mittelman 1996).

<sup>34</sup>(Aman, Jr. 1995: 437)

<sup>35</sup>(1993: 143)

work of the state in producing or legitimating new legal regimes.<sup>36</sup> Representations that characterize the national state as simply losing significance fail to capture this very important dimension, and reduce what is happening to a function of the global-national duality--what one wins, the other loses. I view deregulation not simply as a loss of control by the state but as a crucial mechanism to negotiate the juxtaposition of the inter-state consensus to pursue globalization and the fact that national legal systems remain as the major, or crucial instantiation through which guarantees of contract and property rights are enforced.<sup>37</sup>

There is a larger theoretic/politico question underlying some of these issues which has to do with what actors gain the legitimacy for governance of the global economy and the legitimacy to take over rules and authorities hitherto encased in the national state.

### Implications

The theoretical and methodological challenge presented by the current phase of globalization is that the latter entails a transcending of exclusive national territoriality and of the interstate system yet is implanted in national territories and institutions. Hence globalization

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<sup>36</sup> There are two distinct issues here. One is the formation of new legal regimes that negotiate between national sovereignty and the transnational practices of corporate economic actors. The second issue is the particular content of this new regime, one which contributes to strengthen the advantages of certain types of economic actors and to weaken those of others. Regarding governance these two aspects translate into two different agendas. One is centered on the effort to create viable systems of coordination/order among the powerful economic actors now operating globally (to ensure, one could say, that the big boys at the top don't kill each other). International commercial arbitration and credit rating agencies, as I discussed them earlier, can be seen as mechanisms for creating this type of order. The second is not so much focused on how to create order at the top but on equity and distributive questions in the context of a globally integrated economic system with immense inequalities in the profit-making capacities of firms and in the earnings capacities of households.

<sup>37</sup> Develop national-global duality; and state as instantiation through which classical international public and private law is implemented and much of the new legal forms.



directly engages two marking features of much social science: the nation-state as the unit of analysis and the implied correspondence of national territory and national exclusive territoriality.

As has been frequently noted, much social science rests on the explicit or implicit assumption of the nation-state as the container of social processes. There is, it seems to me, a second common assumption underlying much social science: that exclusive territoriality is the same as national territory. Both these assumptions describe conditions that have held for a long time, i.e. the history of the modern state, but are now being partly unbundled. One of the features of the current phase of globalization is that the fact of a process happening within the territory of a sovereign state does not necessarily mean it is a national process. This localization of the global, or of the non-national, does violence to many of the methods and conceptual frameworks prevalent in social science. Developing the theoretical and empirical specifications that allow us to accommodate this is difficult and will be time consuming. But it has started (see for instance the effort in this direction by the new critical literature on sovereignty, e.g. Walker 1993 and Weber 1996; Mazlich and Buultjens, 1993; Knox and Taylor 1995; The Gulbenkian Foundation Report on the Status of the Social Sciences, 1996; Sassen 1996).

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