

## The State and Economic Globalization: Any Implications for International Law?

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States today confront a new geography of power.<sup>1</sup> The associated changes in the condition of the state are often described as an overall decline in the state's significance, especially the decline in its regulatory capacities. Economic globalization, for one, has brought with it strong pressures for the deregulation of a broad range of markets, economic sectors and national borders, and for the privatization of public sector firms and operations.

But in my reading of the evidence, this new geography of power confronting states entails a far more differentiated process than notions of an overall decline in the significance of the state suggest. And it entails a more transformative process of the state than is indicated by the notion of a simple loss of power. These transformations inside the state and in the state's positioning are partial and incipient but strategic.

As a political economist rather than a legal scholar, I would think that these new conditions carry consequences for the role and content of international law. The effort in this brief essay is to map some of the elements for a new conceptual landscape through which we can detect these conditions and consequences. I will focus primarily on conditions that are likely to affect the scope, exclusivity, and normative power of international law and the organizational architecture for its implementation. But I will not focus on the question of international law per se; I leave that to the experts on the subject. Some of the scholarship on international law has begun to address these issues on its own terms and in its own language. The work of legal scholars as diverse as Aman,<sup>2</sup> Cassel,<sup>3</sup> or Perritt<sup>4</sup> comes to mind here, and this is just focusing on legal

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1. Many scholars coming at the subject from a variety of angles would agree, even as they might use other vocabularies. See, for example, just to cite English language literature: Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991* (Pantheon 1994); Charles Tilly, *Globalization Threatens Labor's Rights*, 47 *Intl Labor & Working-Class Hist* 1 (1995); Bob Jessop, *Reflections on Globalisation and Its (Il)logic(s)*, in Kris Olds, et al, eds, *Globalisation and the Asia-Pacific: Contested Territories* 19 (Routledge 1999). See also various chapters in each of the following collections to get a cross-section of perspectives: James Mittelman, ed, *Globalization: Critical Reflections*, 9 *International Political Economy Yearbook* (Lynne Rienner 1996); Kris Olds, et al, eds, *Globalisation and the Asia-Pacific* (Routledge 1999); David A. Smith, Dorothy J. Solinger, and Steven C. Topik, eds, *States and Sovereignty in the Global Economy* (Routledge 1999); Diana Davis, ed, *13 Political Power and Social Theory* (JAI 1999); Andrew Calabrese and Jean-Claude Burgelman, eds, *Communication, Citizenship, and Social Policy: Rethinking the Limits of the Welfare State* (Rowman & Littlefield 1999).
2. Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 *Vand J Transnatl L* 769 (1998).

scholarship concerned specifically with economic globalization and international law, as distinct from legal scholarship concerned exclusively with international law,<sup>5</sup> or with globalization in domains such as the environment and human rights.

## I. THE CHANGING WORK OF STATES

The structural foundations for my argument lie in the current forms of economic globalization. Economic globalization, in my conception, has emerged as a key dynamic in the formation of a transnational system of power which lies in good part outside the formal interstate system; one instance of this is the relocation of national public governance functions to transnational private arenas. But I argue that the system also lies, to a far higher degree than is usually recognized, inside particular components of national states. This second feature can be recognized in the work done by legislatures, courts, and various agencies in the executive, to produce the mechanisms necessary to accommodate the rights of global capital in what are still national territories under the exclusive control of their states.<sup>6</sup> For me then, economic globalization does not have to do only with crossing geographic borders, as is captured in measures of international investment and trade.

We are seeing a repositioning of the state in a broader field of power and a reconfiguring of the work of states. This broader field of power is partly constituted through the formation of a new private institutional order linked to the global economy, but also through the growing importance of a variety of other institutional orders, from the new roles of the international network of Nongovernmental Organizations ("NGOs") to the international human rights regime.<sup>7</sup> As for the work

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3. Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution*, 19 *Fordham Intl L J* 1963 (1996).
  4. Henry H. Perritt, Jr., *International Administrative Law for the Internet: Mechanisms for Accountability*, 51 *Admin L Rev* 871 (1999).
  5. David Kennedy, *Some Reflections on 'The Role of Sovereignty in the New International Order'*, in *State Sovereignty: The Challenge of a Changing World: New Approaches and Thinking on International Law* 237 (Proceedings of the Twenty-First Annual Conference of the Canadian Council on International Law, Ottawa, Oct 1992).
  6. In my current research on the U.S., I am tracing a whole series of legislative items and executive orders that can be read as accommodations on the part of the national state and as its active participation in producing the conditions for economic globalization. This is a history of micro-interventions, often minute transformations in our regulatory or legal frameworks that facilitated the extension of cross-border operations of US firms. While this is clearly not a new history, either for the US or for other Western former imperial powers, we can identify a new phase which has very specific instances of this broader feature. See Saskia Sassen, *Embedding the Global in the National* in Smith, Solinger, and Topik, eds, *States and Sovereignty in the Global Economy* (cited in note 1); Sassen, *De-Nationalized State Agendas* (cited in note 1).
  7. See, for example, Thomas J. Biersteker, Rodney Bruce Hall and Craig N. Murphy, eds, *Private Authority and Global Governance* (forthcoming); Rodney Bruce Hall, *National Collective Identity* (Columbia 1999); Special issue on *The Internet and Sovereignty*, 7 *Ind J Global Legal Stud* 423 (1999); Christian Joppke, ed, *Challenge to the Nation-State: Immigration in Western Europe and the United States*

of states, *raison d'état*—the substantive rationality of the state—has experienced many incarnations over the centuries. Each of these transformations has led to significant consequences. We cannot take *raison d'état* for granted: we need to specify its characteristics in the current phase and at least consider the possibility that it might be constituted differently from what it was in an earlier period, for instance the period up to the 1980s when the global economic system had not yet been implemented on its current scale. Today many state leaders assert that state budgets cannot afford the costs for social well-being that states had assumed by law in that earlier period, at least in some of the highly developed countries. Today, also, more and more people are asking, “why do we need states?”

The emergence of a mostly private international institutional order wherein the strategic agents are not the national governments of leading countries, but a variety of private actors, may well have the effect of reducing the scope and exclusivity of international law. Further, this new institutional order also has normative authority—a new normativity that is not embedded in what has been (and to some extent remains) the master normativity of modern times, *raison d'état*. Here my question to international law experts is whether these new conditions can reduce the normative power of international law. This new normativity comes from the world of private power yet installs itself in the public realm and in so doing contributes to de-nationalizing what had historically been geared towards national state projects and goals. One of the marking features of this new institutional order is its capacity to privatize what was heretofore public and to de-nationalize what were once national resources and policy agendas. This capacity to privatize and de-nationalize is both a cause and a result of specific transformations of the national state, or more precisely, of some of its components.<sup>8</sup>

My argument here is not that we are seeing the end of states but, rather, that states are not the only or the most important strategic agents in the new configuration. Second, states, including dominant states, have undergone profound transformations as they become the institutional home for the operation of some of the dynamics that are central to globalization. This raises a question about what is actually “national” in some of the institutional components of states linked to the implementation and regulation of economic globalization. The hypothesis here would be that some components of national institutions, even though formally national, are not national in the sense in which we have constructed the meaning of that term over the last hundred years. Here my question to international law experts is whether such a change will weaken or alter the organizational architecture for the implementation of

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(Oxford 1998).

8. I develop these various aspects of the argument at greater length in Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia 1996); Sassen, *Embedding the Global in the National* in Smith, Solinger, and Topik, eds, *States and Sovereignty in the Global Economy* (cited in note 1); Sassen, *De-Nationalized State Agendas* (cited in note 1).

international law insofar as the latter depends on the institutional apparatus of national states.

## II. THE STATE AND GLOBALIZATION

One of the roles of the state vis-à-vis today's global economy, unlike earlier phases of the world economy, has been to negotiate the intersection of national law and foreign actors—whether firms, markets, or supranational organizations. This condition makes the current phase distinctive in a number of ways. We have, on the one hand, the existence of an enormously elaborate body of law developed in good measure over the last hundred years which secures the exclusive territorial authority of national states to an extent not seen in earlier centuries, and on the other, the considerable institutionalizing, especially in the 1990s, of the "rights" of non-national firms, cross-border transactions, and supranational organizations. This sets up the conditions for a necessary engagement by national states in the process of globalization.

The emergent, often imposed, consensus in the community of states to further globalization has created a set of specific obligations on participating states. The state remains as the ultimate guarantor of the "rights" of global capital, in other words, the protection of contracts and property rights. Thus the state has incorporated the global project of its own shrinking role in regulating economic transactions.<sup>9</sup> Firms operating transnationally want to ensure the functions traditionally exercised by the state in the national realm of the economy, notably guaranteeing property rights and contracts. The state here can be conceived of as representing a technical administrative capacity which cannot be replicated at this time by any other institutional arrangement; furthermore, this is a capacity backed by military power, with global power in the case of some states.

This guarantee of the rights of capital is embedded in a certain type of state, a certain conception of the rights of capital, and a certain type of international legal regime. It is largely embedded in the states of the most developed and most powerful countries in the world, in Western notions of contract and property rights, and in a new legal regime aimed at furthering economic globalization.<sup>10</sup> The U.S. as the

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9. Robert W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (Columbia 1987); Leo Panitch, *Rethinking the Role of the State in an Era of Globalization* in Mittelman, ed, *Globalization* at 83-113 (cited in note 1); Stephen Gill, *The Emerging World Order and European Change* in Ralph Miliband and Leo Panitch, eds, *New World Order? The Socialist Register 1992*, 157 (Merlin 1992); Sassen, *Losing Control?* (cited in note 8).

10. This dominance assumes many forms and does not only affect poorer and weaker countries. France, for instance, ranks among the top providers of information services and industrial engineering services in Europe and has a strong though not outstanding position in financial and insurance services. But it has found itself at an increasing disadvantage in legal and accounting services because Anglo-Saxon law dominates in international transactions. Foreign firms with offices in Paris dominate the servicing of the legal needs of firms, whether French or foreign, operating out of France. For a thorough study of contemporary practices and changes in the legal profession in France, see Joël Bonamy and Nicole May, *Services et Mutations Urbaines: Questionnements et Perspectives*

hegemonic power of this period has led/forced other states to adopt these obligations towards global capital. And, in so doing, it has strengthened the economic forces and private actors that can challenge its power. The state continues to play a crucial, though no longer exclusive, role in the production of legality around new forms of economic activity, but increasingly this role has fed the power of a new emerging structure.<sup>11</sup>

### III. DE-NATIONALIZED STATE AGENDAS

We generally use terms such as deregulation, financial and trade liberalization, and privatization, to describe the outcome of the negotiation between the state and the global economy. The problem with such terms is that they only capture the withdrawal of the state from regulating its economy. They do not register all the ways in which the state participates in setting up the new frameworks that further globalization; nor do they capture the associated transformations inside the state.

Let me illustrate.

Central banks are national institutions, concerned with national matters. Yet over the last decade they have become the institutional home within the national state for monetary policies that are necessary to further the development of a global capital market and, indeed, more generally, a global economic system. The new conditionality of the global economic system—e.g. the conditions that need to be met in order for a country to become integrated into the global capital market—contains as one key element the autonomy of central banks so that they may institute a certain kind of monetary policy. In most countries of the world the central bank has tended to be under the influence of the executive or of local oligarchies. Securing central bank autonomy certainly cleaned up a lot of corruption. But it has also been the vehicle for one set of accommodations on the part of national states to the requirements of the global capital market. From the perspective of research this entails the need to decode what is national about that particular set of activities of central banks.

At the level of theorization, it means capturing/conceptualizing a specific set of operations that take place within national institutional settings but are geared to non-national or transnational agendas where once they were geared to national agendas. I conceptualize this as de-nationalization—de-nationalization of specific, typically highly specialized, state institutional orders and of state agendas.

There is a set of strategic dynamics and institutional transformations at work here. They may incorporate a small number of state agencies and units within

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(Anthropos 1996). Similarly, Anglo-Saxon law is increasingly dominant in international commercial arbitration, an institution grounded in continental traditions of jurisprudence, particularly French and Swiss. See Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago 1996).

11. See, for example, Davis, ed, *13 Political Power and Social Theory* (cited in note 1).

departments, a small number of legislative initiatives and of executive orders, and yet have the power to institute a new normativity at the heart of the state; this is especially so because these strategic sectors are operating in complex interactions with private transnational, often powerful actors. Much of the institutional apparatus of the state remains basically unchanged. The inertia of bureaucratic organizations, which creates its own version of path-dependence, makes an enormous contribution to continuity. But increasingly this is emerging as a realm of highly specialized activity among states that falls outside the scope of international law.

The new types of cross-border collaboration among specialized government agencies concerned with a growing range of issues illustrate this well. For instance, the growing interactions among antitrust regulators of a large number of countries in the last three or four years, a period of reinvigorated antitrust activities in the context of economic globalization, have contributed to a growing convergence in antitrust regulations in countries with very diverse competition laws generally.<sup>12</sup> This convergence around specific antitrust issues frequently exists in an ocean of enormous differences among these countries in all kinds of laws and regulations about the economy. It is then a very partial and specialized type of convergence among regulators of different countries who often begin to share more than they may with colleagues back home in the larger bureaucracies within which they work. Yet another instance is the growing transactions among central bankers, necessary in the context of the global capital market. While central bankers have long interacted with each other across borders, we can clearly identify a new phase in the last ten years; the convergence results from implementations within each state, and at the same time, represents the formation of an international system not quite ensconced in international law.<sup>13</sup> These conditions may well alter the scope and exclusivity of international law.

#### IV. A NEW CROSS-BORDER FIELD FOR PUBLIC AND PRIVATE ACTORS

One outcome of these various trends is the emergence of a strategic field of operations that represents a partial disembedding of specific state operations from the broader institutional world of the state geared exclusively to national agendas. It is a fairly rarified field of cross-border transactions among government agencies and business sectors aimed at addressing the new conditions produced and demanded by

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12. Brian Portnoy, *Constructing Competition: The Political Foundations of Alliance Capitalism*, (1999) (unpublished Ph D dissertation, Department of Political Science, University of Chicago).
  13. In contrast, the legislation necessary for instituting off-shore manufacturing agreements required international agreements. Another example would be the institutional and legal framework necessary for the operation of the cross-border commodity-chains identified by Gereffi. See Gary Gereffi, *Global Production Systems and Third World Development* in Barbara Stallings, ed, *Global Change, Regional Response: The New International Context of Development* 100 (Cambridge 1995). See also, Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 *Am U J Intl L & Poly* 717 (1995); Max J. Castro, *Free Markets, Open Societies, Closed Borders? Trends in International Migration and Immigration Policy in the Americas* (North-South Center 1999).

economic globalization.

In positing this, I reject the prevalent notion in much of the literature on globalization that the realm of the national and the realm of the global are mutually exclusive.<sup>14</sup> Globalization is partly endogenous to the national and is in this regard produced through the de-nationalizing of what had been constructed as the national. And it is partly embedded in the national, e.g., global cities, and in this regard requires that the state re-regulate specific aspects of its role in the national.

This is a field of transactions that are strategic, cut across borders, and entail specific interactions with private actors. They do not involve the state as such, as in international treaties, but rather consist of the operations and policies of specific subcomponents of the state—whether legislative initiatives or some of the agendas pursued by central banks, for instance. They cut across borders in that they concern the operations of firms and markets operating globally and hence produce a certain convergence at the level of national regulations and law in the creation of the requisite conditions for globalization.

By saying that they entail specific interactions with private actors I mean that it is not simply about interstate transactions, or a subfield of the interstate system. On the contrary, it is a field of transactions partly embedded in the interstate system and partly in a new, increasingly institutionalized cross-border space of private agents/actors.

It is in this fairly rarefied field of transactions, partly disembedded from the broader institutional world of the state, that what I call de-nationalized state agendas get defined and enacted. This field of transactions represents then an unbundling of whatever the condition of state bundling preceding the current period, the current period being one that was fully in swing in the case of the U.S. by the mid-1980s. This unbundling is also one element in the broader dynamic of a changed relation between sovereignty and national territory—a subject I began to work on in my book *Losing Control?*<sup>15</sup>

## V. PRIVATIZED NORM-MAKING

But for all of this to happen, it took a broader normative transformation in matters concerning the substantive rationality of the state, matters concerning *raison d'état*. In good part this normative transformation is enacted outside the state and originates outside the interstate system. Further, there is a multiplicity of private agents, some minor, some not so minor, that ensure and execute this new normative order.

This transformation has to do with the normative weight gained by the logic of

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14. Sassen, *Embedding the Global in the National* in Smith, Solinger, and Murphy, eds, *States and Sovereignty in the Global Economy* (cited in note 1).

15. Sassen, *Losing Control?* (cited in note 8).

the global capital market in setting criteria for key national economic policies.<sup>16</sup> In the multiple negotiations between national states and global economic actors, we can see a new normativity that attaches to the logic of the capital market and that is succeeding in imposing itself on important aspects of national economic policy making, though, as has been said often, some states are more sovereign than others in these matters. Some of the more familiar elements are the new importance attached to the autonomy of central banks, anti-inflation policies, exchange rate parity and the variety of items usually referred to as "IMF conditionality." In this new normative order, certain claims emerge as legitimate, while others lose a legitimacy they had under Keynesian policies—the latter tend to include issues of citizen's welfare.

I try to capture this normative transformation in the notion of a privatizing of certain capacities for making norms that we have associated with the state, at least in our recent history. This can reduce the normative power of states and hence of international law. It brings with it strengthened possibilities of norm-making in the interests of the few rather than the majority—which in itself is not novel, except in its further and sharper restricting of who might benefit.

## VI. CONCLUSION

From the angle of my research, we can list at least the following possible consequences for international law. First, the fact of a growth in cross-border activities and global actors operating outside the formal interstate system affects the competence and scope of international law. Second, the fact that this domain is increasingly being institutionalized and subjected to the development of private governance mechanisms affects the exclusivity of international law. Third, the fact of growing normative powers in this private domain affects the normative power of international law. Fourth, the state's participation in the re-regulation of its role in the economy and the incipient de-nationalization of particular institutional components of the state necessary to accommodate some of the new policies linked to globalization transform key aspects of the state and in so doing alter the organizational architecture for international law.

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16. See, for example, Sylvia Maxfield, *Gatekeepers of Growth: The International Political Economy of Central Banking in Developing Countries* (Princeton 1997); Jeswald W. Salacuse, *Making Global Deals: Negotiating in the International Marketplace* (Houghton Mifflin 1991); Dezalay and Garth, *Dealing in Virtue* (cited in note 10); Timothy J. Sinclair, *Passing Judgement: Credit Rating Processes as Regulatory Mechanisms of Governance in the Emerging World Order*, 1 Rev Intl Pol Econ 133 (1994); Sassen, *Losing Control?* at ch 2 (cited in note 8).