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INTRODUCTION: GLOBALIZATION AND LAW

Globalization is reshaping the fixed and firm boundary between domestic and international spheres and changing our conceptions of the proper domain of domestic and international politics and law. In reformulating the entrenched disciplinary assumptions underlying these conceptual definitions of the national and the international, we necessarily move the concept of sovereignty to the foreground when analyzing the relationship between globalization and law. There is no doubt that the process of globalization is transforming traditional conceptions and constructions of sovereignty; the conventional image of a sovereignty associated with exclusive territorial jurisdiction—given the shorthand term "Westphalian" to denote the importance of the Treaty of Westphalia in giving recognition to these kinds of sovereignty—is no longer theoretically or empirically serviceable in the face of the internationalization of economic and social activity.[1] Similarly, the fragmentation of the State increasingly challenges the notion that within a State, there is a form of internal sovereignty or unity around a monistic legal order.[2]

International law, like international relations, relies on a political theory of sovereignty to buttress its conceptual framework. In a sense, the concept of sovereignty stands in much the same relation to the disciplines of international law and international relations as does the concept of markets to

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1. John Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 174 (1993).

2. *See* Kanishka Jayasuriya, *Political Economy of Democratisation in East Asia*, 18 ASIAN PERSP., Fall-Winter 1994, at 141; Sol Picciotto, *The Regulatory Criss-Cross: Interaction Between Jurisdictions and the Construction of Global Regulatory Networks*, *in* INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVE ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 89, 92-98 (William Bratton et al. eds., 1996); Anne Marie Slaughter, *The Real New World Order*, *in* FOREIGN AFFAIRS 184, 184 (1997).

the discipline of economics. But, as with the concept of the market, the notion of sovereignty has, until recently, not been subject to critical scrutiny in the mainstream literature. Given the rapid globalization of the economy, the growth of regional institutions like the European Union (EU), and the emergence of international regulatory regimes, the conventional notion of a sovereign State has limited efficacy. The concept of the sovereign State as an entity that has exclusive jurisdiction over its territory (with the concomitant limitation on external encroachment on its power), as well as the notion of an internal sovereignty reflected in the internal unity of the State and its "monistic" legal order, needs rethinking. The notion of a single unified system of internal sovereignty has become increasingly problematic in a global political economy surrounded by islands of sovereignty, rather than by a single, central decisionmaking authority. As MacCormick remarks, in relation to sovereignty and the EU, among other things, this means that in order to:

> [E]scape from the idea that all law must originate in a single power source, like a sovereign, is thus to discover the possibility of taking a broader, more diffuse, view of law. The alternative approach is system-oriented in the sense that it stresses the kind of normative system law is, rather than some particular or exclusive set of power relations as fundamental to the nature of law.[3]

The thrust of this Article is to explore the ramifications of this fragmentation of sovereignty for our understanding of international law and international relations. As will be argued later, the development of this "complex sovereignty" reflects the transformation and reconstitution of the notion of State and sovereignty in the face of the globalization of economic relations. In other words, the central argument of this Article is that the emergent system of global governance depends on a fundamental reconstitution of our conventional Westphalian-inspired ideas of sovereignty and Statehood. This Article is divided into three parts. First, it endeavors to

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3. Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1, 8 (1993). *See also* Neil MacCormick, *Liberalism, Nationalism and the Post-Sovereign State*, *in* CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 141 (Richard Bellamy & Dario Castiglione eds., 1996).

establish the efficacy of a structuralist perspective in the analysis of the transformation of sovereignty under the pressure of the globalization of economic relations. Second, it subjects to critical scrutiny the "unitary State" assumption of international relations theory by identifying the key actors in regulatory regimes as independent State agencies who are increasingly seen as playing an "international role" within the domestic State apparatus. Finally, it seeks to challenge some of the presumptions of international lawyers about the nature of international law. This challenge arises mainly because the legal forms of regulatory regimes are governed by networks of regulatory agencies that depend on decentralized enforcement by the national agencies—rather than on supranational international regimes—often reflecting a preference for compliance rather than for enforcement.

I. GLOBALIZATION, GLOBAL GOVERNANCE, AND THE RECONSTITUTION OF SOVEREIGNTY

Periods of crisis and transformation result in critical scrutiny of the background assumptions of many fields of study. This is markedly evident in the discipline of international politics and law where a number of recent studies have subjected the notion of sovereignty to sustained analysis. One approach that may be termed "formalist," takes a rather abstract approach to sovereignty and attempts to match abstract features of sovereignty with State practice. Jackson,[4] for example, suggests the term "quasi-states" to account for those cases where there is a gap between juridical sovereignty and actual State practice, such as Africa. These formalist approaches are ahistorical and fail to grasp the fact that forms of sovereignty are not immutable but change over time. For these theorists, sovereignty is a zero-sum game—you either have it or you do not. Another perspective, labeled "constructionist,"[5] has been strongly shaped by post-modernist thinking and broadly suggests that emergent forms of political communities cannot be encompassed within traditional notions of sovereignty. While the latter perspective is more historically sensitive than the formalist approach in that sovereignty is viewed as a social construction, it nevertheless remains trapped within a zero-sum

4. *See generally* ROBERT JACKSON, QUASI STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990). Also see ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS FOR INTERNATIONAL SOCIETY (1986), for another example of a formalist analysis.

5. See generally STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas Biersteker & Cynthia Weber eds., Cambridge Univ. Press 1996), for a flavor of some of these constructionist arguments.

framework because proponents of this perspective subscribe to the implicit assumption that the global political community will move beyond sovereignty.

In contrast to these approaches, this Article adopts a "structuralist" approach where the focus is more decidedly on the way the form of sovereignty changes in relation to a fundamental transformation in the structure of economic and social relations. This represents not an erosion (as a formalist perspective might imply) or a dissolution (within a constructionist perspective), but a fundamental transformation of the form of sovereignty. As MacCormick points out, the real significance of the EU is the fact that it suggests that sovereignty is being reconstituted in a way which challenges the conventional models that underpin our understanding of the domestic legal and political order.[6]

MacCormick rightly draws our attention to the importance of the EU for the emergence of complex sovereignty, but equally important in this regard is the emergence of new structures of global governance and regulation. Practitioners and scholars of international relations and law, therefore, need to forge new conceptual tools to explore the mechanisms and structures of international regulatory regimes; these tools promise to be an important property of the emergent complex[7] global order. In part, this Article has been prompted by the observation that international regulation is now becoming an important feature of global governance. The extensive international effort to regulate environmental, health, weapons, and even human rights standards bears witness to this trend toward international regulation. But nowhere is this demand for regulation more apparent than in the international financial sphere, especially as a response to the recent Asian currency crisis. The understanding of this emerging architecture of international regulation, implicit in the global regulation of international financial markets, will be greatly enhanced by the logic of the argument developed in this Article.

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6. *See generally* MacCormick, *Liberalism, Nationalism and the Post-Sovereign State*, *supra* note 3.

7. I use "complexity" in the sense that Robert Jervis uses the term to indicate the nature of interconnectedness where "the fates of the units and their relations with others are strongly influenced by interactions at other places and at earlier periods of time." ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 17 (1997).

The interdisciplinary work between international relations and international law of the last decade[8] is well suited for handling the topic of global regulation because of the increasing trend towards cooperation between domestic regulatory agencies to secure compliance with internationally agreed standards. Domestic regulatory agencies often act independently of their governments and in concert with private actors in a range of areas extending from financial and securities regulation to environment and health. Although this form of regulatory cooperation has become an important mode of governance in the global economy, it is important to recognize that the nature and form of this regulatory cooperation differs significantly from the standard or classical model of international organization and law that informs much of contemporary international relations and law.

For scholars of international relations, international regulatory regimes reflect the emergence of new modes of global governance; for international legal scholars they reflect the emergence of new forms of international law. In fact, what these regulatory regimes essentially achieve is to expose the limitations of the Westphalian assumption of mainstream international relations and law, namely that territory is the central component of State sovereignty, thereby conjuring up a legal world composed of interacting unitary States. From an international law perspective,[9] many regulatory regimes fail to pass muster because international organizations are considered to be "organizations composed of states and constituted by formal treaty."[10] Similarly, from an international relations perspective, regulatory regimes strike at the heart of the Westphalian assumption of a political world of unitary State actors because these regimes are composed of relatively autonomous (often self-regulatory) State agencies and private or non-governmental actors, thereby confusing the disciplinary boundary markers between the international and domestic domains.

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8. For an early and influential attempt to incorporate international relations to international law, see generally Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989). For an excellent survey of the interdisciplinary literature see also, Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L. L. 205 (1993); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L. L. 367 (1998).

9. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT].

10. David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 285 (1998).

Slaughter et al. perceptively point to the need to rethink the relationship between international relations and law on the grounds that:

> [I]t is time to move beyond the canonical narratives of how the disciplines evolved, both separately and in conjunction with each other. These narratives are valuable both as intellectual history, providing necessary context for current debates, and as bulwarks against the ad hoc, borrowing of terms and concepts. But it is time to move on.[11]

In this sprit of Slaughter et al., we need to work toward an alternative framework to move beyond the increasingly irrelevant Westphalian paradigm to understand the development of new modes of governance in the global economy.[12] These forms of governance—be they the emergence of the EU or the emergence of new forms of international regulation—challenge the Westphalian framework of sovereignty that has underpinned dominant models of international relations and law.

II. BEYOND CONVENTIONAL MODELS OF INTERNATIONAL LAW AND POLITICS: A STRUCTURALIST UNDERSTANDING OF SOVEREIGNTY

In this regard, an especially influential mode of theorizing the interaction between international law and politics in the global systems is the notion of an international regime.[13] According to Krasner, an "international regime" refers to a set of implicit or explicit principles, norms, rules, and decisionmaking procedures around a particular set of issues in a range of international policy areas.[14] Stone, who has used this framework[15] to explore

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11. Slaughter et al., *supra* note 8, at 368.

12. *See generally* SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY (1996) (analyzing the circumstances and conditions that have contributed to the decline of the Westphalian model).

13. *See generally* Abbott, *supra* note 8 (illustrating an early use of the notion of international regimes in the context of international law). In international relations, the seminal analysis is by Krasner and Ruggie. *See generally* INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983) [hereinafter Krasner].

14. *See* Krasner, *supra* note 13, at 2.

15. Stone's framework takes seriously the role of liberalism in shaping the constitutionality of international regimes. The structure of the EU is in part determined by the liberal political rationality of Western European States. *See generally* Alec Stone, *What is a Supranational Constitution? An Essay in International Relations Theory*, 56 REV. POL. 441 (1994). *See also* Mark Beeson & Kanishka Jayasuriya, *The Political Rationalities of Regionalism: APEC and the EU in Comparative Perspective*, 11 PAC. REV.

the "constitutionality" of international regimes, maintains that international regimes differ to the degree to which they codify norms and institutionalize decisionmaking procedures.[16] For example, the EU represents the evolution of a highly developed constitutional order, whereas the institution of the balance of power or deterrence represents the manifestation of the most rudimentary norms within the international system.

The analysis of international regimes clearly has much to offer for a comprehensive understanding of the institutions of the contemporary global economy. For instance, its emphasis on the development of institutions and norms within the international system does not necessarily require the existence of formal international organizations. Additionally, it has the capacity to incorporate within its framework the plurality and fragmentation of the international response to "global" problems on a range of issues. However, the regime framework is ill-suited for the analysis of emergent forms of global governance. Thus, for example, in the area of regulatory cooperation this analysis is still trapped within the basic confines of the Westphalian paradigm of sovereignty, and as such is not able to encompass within its framework some of the fundamental changes in the architecture of international law.

Perhaps the best reflection of the "Westphalian bias" of the regime theory is the fact that regimes are seen to be composed of States (often through treaty) and involve some degree of "government" at the international level. In many international regimes the treaty is the central component through which States cooperate with one another; it is implicitly or explicitly based on a contractual model of State relationships.[17] This contractual model of regime formation is underpinned by the Westphalian model in which sovereignty is linked with exclusive territorial jurisdiction.[18] It is precisely this model of sovereignty which is transforming under the pressure of the globalization of economic relations. The critical point to note is that the very notion of

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311, 331 (1998).

16. *See* Stone, *supra* note 15, at 470.

17. Abram Chayes & Anotonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 175 n.2 (1993).

18. Ruggie rightly sees this territoriality as an important component of modernity. *See generally* Ruggie, *supra* note 1.

sovereignty needs to be unbundled from its link with territory;[19] models of sovereignty are embedded in specific social and economic structures and as these structures change, so does the form of sovereignty.

Therefore, central to this new thinking is the view that sovereignty should be seen and understood as a historical concept that changes over time. Rosenberg, for example, has shown that the notion of sovereignty is a distinctive political form that enabled not only a set of external economic relations within formally equal States, but perhaps more importantly, allowed the constitution of separate public and private spheres so central to the emergence of capitalist economy.[20] Arguing along these lines, Rosenberg maintains that:

> [T]he historical rise of the sovereign state is thus one aspect of a comprehensive reorganization of the forms of social power. The change that it works in the form and content of the international society is no less startling. For under this new arrangement, while relations of citizenship and jurisdiction define state borders, any aspects of social life which are mediated by relations of exchange in principle no longer receive a political definition (though they are still overseen by the state in various ways) and hence may extend across these borders.[21]

In a nutshell, sovereignty can be considered a specific political form which is distinctive of capitalism and consequentially has enabled the constitution of a distinct sphere of international economic activity.

However, this model of sovereignty, inextricably linked with the notion of territory, is consistent with the growth and emergence of national economies; in contrast, the development of a global economy—rather than an

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19. For an historical analysis of changing notions of sovereignty, see generally JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY (1995).

20. Ellen Meiksins Wood, for example, has argued that "the differentiation of the economic and the political in capitalism is, more precisely, a differentiation of political functions themselves and their separate allocation to the private economic sphere and the public sphere of the state." Ellen Meiksins Wood, *The Separation of the Economic and the Political in Capitalism*, 127 NEW LEFT REV. 66, 82 (1981). It should be noted that the notion of sovereignty that we term "Westphalian" is a broad term that includes the emergence of liberal state forms, which is the object of Rosenberg's analysis.

21. JUSTIN ROSENBERG, THE EMPIRE OF CIVIL SOCIETY: A CRITIQUE OF THE REALIST THEORY OF INTERNATIONAL RELATIONS 129 (1994).

international economy—and the associated reorganization of social power, has transformed this essentially territorial model of sovereignty. It is important to recognize that this argument points to the transformation of the notion of sovereignty—not merely an erosion or a replacement by a global leviathan. Cognizant of the fact that models of sovereignty are not fixed and immutable but contingent upon changing frameworks of economic and political power, we are able to move beyond the simplistic debates about erosion of the State to consider the ramification of changing forms of sovereignty[22] by reformulating basic concepts such as "national" and "international" in the study of international law and politics.

Conceptualizing sovereignty in these dynamic terms removes it from the formalist straightjacket in which it has been generally understood by scholars of both international relations and international law. The reformulation proposed here would suggest that the formal legal category of sovereignty is constantly adjusted to respond to the changing social forms of capitalism. The works of legal theorist Karl Renner exemplify this approach. Renner points out that the notion of property as a legal category played a vastly different role in simple commodity production, where producers of goods are independent artisans who own the means of production, from the situation that prevails in a modern complex capitalist economy.[23] Renner's argument demonstrates the need to analyze the evolution of the legal institution in terms of the distinction between legal categories that may remain static, and the social functions of these categories, which are more dynamic.[24] Therefore, the critical analytical task is to understand the role played by legal categories under different economic structures. As Renner puts it, "this constant divergence between legal norm and social efficacy provides the only explanation for the evolution of the law."[25] In short, the adoption of Renner's methodology allows us to move beyond static and formalistic understandings of sovereignty and have a better appreciation of a contingent model of sovereignty.

Central to the new global economy is the disjunction between the territorial nature of sovereignty and the increasing global nature of economic

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22. See generally BARTELSON, *supra* note 19, for a somewhat similar thesis about how the contingent nature of sovereignty fails to locate changing models of sovereignty in the shifting structural frameworks of capitalism.

23. KARL RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS 105-22 (O. Kahn-Freund ed. & Agnes Schwarzschild trans., 1949).

24. *See id.* at 56.

25. *Id.* at 52.

flows. In short, the territorial jurisdiction of the modern State over economic life is increasingly constrained by the globalization of economic and social relations. Susan Strange, in a sophisticated analysis of these changes in the global political economy,[26] provides a two-fold argument: one, that all States—small and weak—have had their authority and functions greatly diminished because of the integration of States into the global economy; and, two, that "some of the fundamental responsibilities of the State in a market economy—responsibilities first recognized, described, and discussed at considerable length by Adam Smith over 200 years ago—are not now being adequately discharged by anyone."[27] By identifying the significant increase in the power of non-State actors in the global system, Strange makes an important contribution to the study of States and the global political economy. In particular, she draws attention to the role and power of financial markets in constraining the ability of the State to effectively intervene in large areas of economic life. She also observes that: "the authority over society state and economy is undergoing another period of diffusion after two or three centuries in which authority became increasingly centralized in the institutions of the state."[28]

Interestingly, Cohen advances a related thesis in an account of recent changes in the international monetary order in which he distinguishes between "spaces of places" and "spaces of flows."[29] He suggests that our conventional imagery of currency is inherently territorial and is becoming increasingly redundant. A classic instance of this is the growth of "dollarization" in many Latin American economies where private agents use U.S. dollars instead of their own local currency; yet another dramatic example can be found in the movement toward European monetary integration. This emergent monetary order, Cohen contends, subverts our territorial understanding of monetary space with an imagery that is more in tune with the transnational networks of capital.[30] In other words, the greater integration of capital and money markets requires that we move from a notion of "spaces of place" to "spaces of networks." As Cohen puts it, network images run counter to territorial conceptions of place mainly because the "authoritative domain" of the

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26. *See generally* STRANGE, *supra* note 12.
27. *Id.* at 14.
28. *Id.* at 86.
29. *See* BENJAMIN COHEN, THE GEOGRAPHY OF MONEY 8-26 (1998).
30. *See id.* at 8.

currency—its sphere of influence, if you like—may not be congruent with territorial boundaries.[31] Echoing Strange, this leads Cohen to the view that:

> Governments today are less and less capable of preserving even a modicum of monetary autarky; in a world of extensive cross-border competition among currencies, authority is not exercised solely by the state. On the contrary, private actors too play a key role, through their choices among vehicles to use for various monetary purposes.[32]

Both Cohen and Strange provide a valuable analysis of the growing disjunction between the functional domain of economic activity and territorial reach of the sovereign; but, from this persuasive premise, they reach the flawed conclusion that sovereignty is subject to a process of gradual erosion, or to use Strange's evocative phrase, the "diffusion of authority from state to market."[33] As previously argued, a conclusion of this nature can be reached only by construing the legal category of sovereignty in static and formalistic terms. As against this, my argument is that the notion of sovereignty is being transformed, not eroded, by the process of globalization.

In this connection, Picciotto too points out that the notions of jurisdiction or the domain over which State power can be exercised has always been flexible. For example, he points out that historically, the identification of sovereignty with the nation "transforms the basis of the exercise of the State sovereignty into the more flexible and elusive notion of national jurisdiction."[34] According to him, there is a flexibility in notions of jurisdiction with regard to commercial activities, and this often provides a wider jurisdictional reach of the State than that assumed by the territorial model of sovereignty. Hence:

> Jurisdiction over a corporation can be based on the fictions either of its nationality or residence, and can vary for different purposes, using as criteria either the law under which it is formed, the location of its "seat" or head office, or

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31. *See id.* at 13.
32. *Id.* at 25.
33. *See* STRANGE, *supra* note 12, at 197.
34. Picciotto, *supra* note 2, at 99.

> the place from which central management or control are exercised. A "control" test may be used to justify a claim to jurisdiction over the worldwide activities of transnational corporate groups or Transnational Corporations (TNCs), on the grounds that foreign subsidiaries are subject to ultimate control by their dominant shareholders or parent company, and states have increasingly asserted such jurisdiction over "foreign" companies especially to defeat or prevent regulatory avoidance by the use of "foreign" subsidiaries incorporated in jurisdictions of convenience.[35]

A good exemplar of the elasticity of the notion of sovereignty in the face of its disjunction by globalization is provided by the U.S. Supreme Court decision in the case of *Hartford Insurance Co. v. California*.[36] This case involved a conspiracy by London-based coinsurance companies to limit the kind of insurance provided in the United States, particularly in relation to the limitation on pollution claims. As Andreas Lowenfeld points out, the significant jurisdictional issue here was the fact that defendants had conspired in another jurisdiction to "offer reinsurance to American companies except on terms to which the London defendants had jointly agreed, thus harming parties for whom the state attorneys general acted as parentes patriae."[37] The English defendants, while not disputing the effects on the United States, contended that their conduct was fully legal in England and, by the normal standards of international comity, U.S. jurisdiction should not apply in this case. In other words, this is a line of defense fully compatible with the traditional model of sovereignty described above. However, the important point in this case was the fact that the Court established the relative importance of the effect (in this case, the United States) over conduct (in this case, England) and clearly placed much more importance on the former rather than on the latter and established and reinforced precedents for the extraterritorial reach of the U.S. judicial system.

The technical issues raised by the case need not detain us. Its importance lies in the fact that the territorial model of sovereignty is giving way to more

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35. *Id.* at 99-100.

36. *See generally* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

37. Andreas Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 43-44 (1995).

flexible notions of jurisdiction based on effects rather than place of conduct. The debate over the consistency of the decision with the notions of jurisdiction in international law is relevant in that it points to the elasticity of the notion of sovereignty in the face of the changing structure of global economic relations.[38] However, important as these attempts are to establish a basis for an extra-territorial notion of sovereignty, a potentially greater far-reaching development has been the disruption of the internal "unity" or sovereignty of the modern territorial State.

III. FRAGMENTATION AND THE INTERNAL SOVEREIGNTY OF THE STATE

Emerging forms of "complex sovereignty" break down the internal structural coherence of the State, replacing it with often autonomous regulatory agencies whose purpose is to meditate between the international and the local or national. The emergence of the polycentric centers of power within the State,[39] therefore, internationalizes certain agencies (e.g., central banks) within the State while at the same time serving to break down the boundaries between domestic and international politics and law. Again, these emergent properties of sovereignty pose important, even revolutionary, implications for the study of international law and politics. But—contrary to those who seek to describe this as a new "medievalism"—the argument advanced here reinforces the thesis that this is a transformation, not an erosion, of sovereignty.

One of the cardinal features of the modern State—is the development of "internal sovereignty" or internal coherence within the State.[40] A central feature of the early State was the conflict between autonomous centers—be they corporate or ecclesiastical—as they sought to defend their prerogatives and immunities. However, one of the major achievements of the nineteenth-

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38. *See, e.g.*, Phillip Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 57 (1995). Trimble's formalist analysis fails to uncover the fact that legal categories constantly adjust to changes in the underlying distribution of social power.

39. For a discussion of the notion of the fragmented or regulatory State, see generally Jayasuriya, *supra* note 2. *See also* Kanishka Jayasuriya, Globalization, Authoritarian Liberalism and the Developmental State, Keynote Paper, International Workshop on Globalization and Social Welfare in East Asia. Research Centre on Development and International Relations, Aalborg University (Denmark 1998) (on file with author). It is important to note that these agencies have relationships with specialized domestic and international constituencies.

40. I follow Poggi in using the term "internal sovereignty" to describe the development of this internal coherence within the State. GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION 92 (1978).

century State was the emergence of the State as the exclusive center of all authoritative decisionmaking; the State institutionalized the principle of internal sovereignty and thereby established a unitary "monistic" legal order. As Poggi observes, "[m]ature modern states are intrinsically 'monistic' and represent in this a return to the Roman tradition, whereby the *princeps's* power was derived from the will of the *populous*. The Continental juristic construction of the state as person is a characteristically sophisticated way of expressing this principle."[41]

Indeed, from this perspective, legal positivism, particularly as exemplified by the work of Kelsen,[42] provides a jurisprudential foundation for this internal sovereignty. Of course, this juridical unification of the State went hand in hand with the development of a notion of a civil society. This is an important point: the development of internal sovereignty allows the State to clearly distinguish itself from both civil society and the market. Hence, the autonomy of both civil society and the market order is conditioned on the emergence of certain forms of sovereignty. To give one example, the notion of a universal citizenship is only comprehensible in a context where there is—to use Poggi's terminology—a monistic legal order. But perhaps more importantly, in terms of the thesis in this Article, the coherence of the State is of the first importance in establishing a juristic foundation for a domestic market order. From this structuralist perspective, this particular form of internal sovereignty within the State is determined by a particular configuration of economic and social relationships.

However—and this is the nub of the thesis developed here—with the globalization of economic relations, there is a growing incongruity between a territorial notion of sovereignty and the flow of economic activity which disrupts the internal unity or coherence of the State. Increasingly, various agencies and institutions within the State develop a high degree of autonomy and independence;[43] this fragmentation of the domestic order of the State is central to the development of international forms of regulatory governance. In short, the global governance of the economy requires the internationalization of State agencies and institutions; but this can only occur

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41. *Id.* at 93.

42. See for example, HANS KELSEN, THE PURE THEORY OF LAW (Max Knight trans., 2d ed. 1967), for an outline of these views.

43. Another way of looking at this is to see the State as an entity that is increasingly functionally differentiated. Much of the dominant literature in international relations and law perceives the State as an undifferentiated entity.

if these institutions possess a degree of autonomy from other institutions within the State. In other words, the fragmentation of the State is the form that sovereignty takes in an increasingly global economy.

It is important to remember, of course, that even within the parameters of the nineteenth century State, internal sovereignty was never completely dominant. According to Poggi, "[t]he army, the police, the diplomatic service, and sometimes top judicial bodies maintain substantially autonomous lines and traditions of political action, with the result that each operates in some cases as a 'state within the state' as a de facto holder of autonomous political prerogatives."[44]

Nevertheless, the fact remains that globalization has accelerated the development of autonomous agencies, the development of "a state within a state." Slaughter underlines these observations by noting that more and more transgovernmental networks of regulatory agencies, such as central banks, rather than supranational institutions, will be increasingly preferred as a form of governance of the global political economy. She argues that: "[d]isaggregating the state permits the disaggregation of sovereignty as well, ensuring that specific state institutions derive strength and status from participation in transgovernmental order."[45] In a nutshell, the globalization of economic relations increasingly fractures the internal cohesiveness within the State, but this fracturing means the creation of islands of sovereignty within the State.

A good example of this fragmentation or disaggregation of the State is the development of independent central banks. Central bank independence[46] provides a means of purchasing—albeit not always successfully—domestic stability through the credible commitment to pursue "market friendly" monetary policy; but this is at the cost of the fragmentation of the State and the increasing procedural nature of monetary policy. A major reason for the enhanced power of central banks is the growing importance of monetary policy in an era dominated by the demand for more global financial integration. It is important to recognize that these changes reflect not just a

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44. POGGI, *supra* note 40, at 94.

45. Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 196 (Sept.-Oct. 1997).

46. For a discussion of central bank independence, which places it in the context of changes in the global political economy see generally Kanishka Jayasuriya, *Political Economy of the Central Banks*, 29 AUSTL. J. POL. SCI. 115 (Mar. 1994); *see also* Sylvia Maxfield, *Financial Incentives and Central Bank Authority in Industrializing Nations*, 46 WORLD POL. 556 (1994); SYLVIA MAXFIELD, GATEKEEPERS OF GROWTH: THE INTERNATIONAL POLITICAL ECONOMY OF CENTRAL BANKING IN DEVELOPING COUNTRIES (1997).

shift of policy instruments from fiscal to monetary policy, but also a shift of power within the State toward agencies such as central banks. This was not just a technical change to a new set of policy instruments, but a significant change in the mode of coordination within the State. In turn, this trend toward more independent central banks[47] reflects profound structural changes in the international political economy, particularly the increasing importance of global transnational financial structures. Therefore, the emergence of independent central banks and the reconfiguration of the State that this implies are a manifestation of the deeper structural changes taking place in the global political economy, especially in the nature of international markets.

Clearly, independent central banks have become a major focus in the internal restructuring of the State because of the inherent complexities of a global political economy, such as those resulting from highly mobile capital requiring a high level of creditability and the commitment to the pursuit of "hard money" policies. The economic argument for monetary credibility is that monetary signals are important for domestic and international economic actors. However, to be effective, this signaling process needs to be credible. In turn, this credibility is gained by a perceived commitment on the part of monetary authorities to achieve specific monetary objectives which are best achieved through enhanced institutional independence from monetary authorities.[48]

It needs to be recognized that independent central banks are actively engaged in the regulation of international financial markets (e.g., through the Basle Capital Accord to be discussed below or through their critical role in implementing structural adjustment programs of the IMF), but they participate in these regulatory systems as independent, autonomous actors. In turn, these agencies are often required to implement international regulations or agreements at the national level. Slaughter aptly terms this the "nationalization of international law."[49] However, the important point to observe is the way in which structural changes in the global political economy lead to changes in the form of State sovereignty; these changes serve to radically reconstitute our understanding of the traditional boundaries between the international and the domestic spheres because agencies such as

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47. For a comprehensive overview of the arguments for central bank independence, see generally, Jayasuriya, *supra* note 46.

48. *See* ALEX CUKIERMAN, CENTRAL BANK STRATEGY, CREDIBILITY, AND INDEPENDENCE: THEORY AND EVIDENCE 255-57 (1992).

49. Slaughter, *supra* note 45, at 192.

independent central banks are simultaneously part of the domestic order and a range of global governance mechanisms.

IV. FRAGMENTATION OF SOVEREIGNTY AND THE POLYCENTRIC LEGAL ORDER

One of the ramifications of State fragmentation and the greater permeability of the boundary between domestic and international domains is the emergence of a polycentric legal order that directly contradicts the "monistic" legal order implied by an internally unified State. Perhaps the best exemplar of this polycentric legal order and its disruption of the internal sovereignty of the State is the EU. It is useful to examine the experience of the EU not only to illustrate the emergence of new forms of sovereignty but also because the EU serves as a fulcrum for institutional innovation in the area of governance regimes that might point to developments in other areas of the global political system.

However, the application of a Westphalian notion of sovereignty to the EU requires the adoption of two problematic approaches to the question of sovereignty in the emergent European legal order—one pertains to a supranationalism, and the other to a statist model of the EU as a product of intergovernmentalism. The supranationalism approach sees in the EU the strengthening roots of a new federal constitutional order—an order that will result in a layer of supranational governance. It envisages the EU as a form of "co-operative federalism" which relies on formal and informal mechanisms of cooperation between Member States and the new center. As Bellamy and Castiglione point out, proponents of this approach do not necessarily advocate the centralization of political decisionmaking but suggest that sovereignty should move beyond the confines of the nation-state.[50] This perspective places a great emphasis on the constitutionalization of governmental functions,[51] and as such has much in common with the broad liberal approaches to international regimes.[52] From this viewpoint, the function of international law is to uncover the increasing constitutionalization of multilateral regimes. To be sure, the EU represents a form of constitutionalism unmatched by other

50. *See* Richard Bellamy & Dario Castiglione, *Building the Union: The Nature of Sovereignty in the Political Architecture of Europe*, 16 L. & PHIL. 421, 427 (1997).

51. Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413-31 (1991).

52. See Stone, *supra* note 15, at 463, for an outline of such an argument.

multilateral regimes; but as Stone argues, this is essentially a difference in the relative constitutionalization of international regimes.[53]

In contrast, the intergovernmentalism approach statist model insists that the national State in Europe remains strong. This is argued on the grounds that State interests remain the driving force of the EU, as well as the fact that the State still has a high degree of internal sovereignty. Thus, the EU is seen as an association of States that pool sovereignty in order to pursue common interests. This pooling of sovereignty is largely driven by the Council of Ministers influenced by geopolitical considerations and interests. As Mann points out:

> The major encroachments on national sovereignty are not really constitutional—the replacement of one sovereignty by another. Instead, they are the practical, surreptitious, and delayed implementations of decisions taken by the Council of Ministers, whose decision-making processes reflect partly consensus and partly the geopolitical influence of the various member Powers.[54]

Milward, in his account of the evolution of the EU suggests that the European integration, far from leading to the demise of the nation-state, is a way of ensuring its survival.[55] In short, from this perspective, the emergence of the EU does little to disrupt the monistic legal order of the sovereign State.

This second approach is deeply flawed. The EU as an entity is surely more than a pooling of sovereignty. The increasing incorporation of the European Court of Justice (ECJ) judgments into national law and the many references by national courts to the ECJ is in itself a telling factor against those like Milward and Mann who argue for primacy of the national State in the EU.[56] But at a deeper level, the problem with this argument is that it sees the European integration process as a move away from sovereignty rather than a reconstitution of sovereignty. The "federalist" perspective, while empirically richer as an account of the integration, suffers from a similarly fixed understanding of sovereignty; but here, the image of monistic legal order

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53. *See id.* at 473.

54. Michael Mann, *Nation-States in Europe and Other Countries: Diversifying, Developing, Not Dying*, 122 DAEDALUS 115, 127 (1993).

55. ALAN MILWARD, THE EUROPEAN RESCUE OF THE NATION STATE 44 (1992).

56. *See* Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1, 8 (1993).

is simply transferred to the level of the EU. Both perspectives, while reaching antagonistic conclusions, proceed from similar premises about the nature of sovereignty; sovereignty is a zero-sum game in which the emphasis is on the distribution of a fixed quantum of sovereign power rather than on how and where it is produced.

A distinguishing feature of the EU is the emergence of a polity that cannot be understood within traditional confines of territorial-based sovereignty. The difference between a traditional model of sovereignty and the emergent complex sovereignty of the European political order can be seen clearly in the differing emphases placed by the former on government and by the latter on governance; the emerging European polity is composed of multiple layers of governance requiring the participation of State agencies, non-State actors, and European institutions to create a form of "interlocking politics." Interlocking politics in the EU system refers to the highly ambiguous and overlapping division of labor between the national and EU levels that characterize policymaking in the European polity. In fact, much of this governance takes place through the operation of networks of public and private actors located at differing levels of government. Several studies of the EU demonstrate that governance through policy networks is increasingly the preferred form of regulation. Indeed, as Risse-Kappen notes, governance through policy networks is particularly evident in policy domains subject to the heavy influence of EU policies. He goes on to state that "the more a particular policy sector has been integrated and the more decisions in the area are governed by majority rule, the more likely it is that the policy-making process is characterized by transnational and transgovernmental coalitions among private, subnational, and supranational actors rather that intergovernmental bargaining."[57] Of particular importance is the so-called "comitology web" which brings together various groups of national experts and officials in various sectors, such as for example, foodstuffs, drugs, health, and safety which are central to the regulation of the single market.[58]

It is beyond the scope of this Article to examine these developments in detail, but the critical point that needs to be underscored is that these developments point strongly to the emergence of a polycentric legal order that

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57. Thomas Risse-Kappen, *Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union*, 34 J. COMMON MARKET STUD. 53, 66 (1996).

58. For a survey of these committees, see generally Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology*, 3 EUR. L.J. 273 (1997).

is at odds with the monistic order implied by the assumption of internal sovereignty of the Westphalian model. MacCormick aptly describes the nature of this sovereignty when he observes that:

> In the traditional legal sense of "sovereignty," member states of the European Union no longer constitute legally sovereign entities. Nor does the Union, nor its internal pillar the Community, constitute a sovereign entity. The distribution of sovereign rights at various levels of course leaves a compendious "external sovereignty" of all the member states intact and even in a sense strengthened.[59]

Sovereignty is reconfigured in the sense that it is no longer exercised within a monistic legal and decisionmaking structure;[60] instead, it is parceled and diffused across a range of governmental and nongovernmental authorities. Here, the constitutional principle of subsidiarity[61] is the appropriate constitutional description of this new and reconstituted sovereignty.

Undoubtedly, the EU furnishes the best example of the emergence of a polycentric legal order; but illustrations of other reconfigurations of sovereignty can also be found in other contexts. For instance, the World Bank's governance programs may be cited as good examples of these processes. Governance programs seek to build and make transparent a whole range of regulatory institutions; but, in so doing, it is necessary first to make these institutions more independent from central State apparatus, thereby constituting islands of sovereignty within the State. As a process (though it does have a different normative basis), this has some affinity with the multilevel governance of the European polity.[62]

In recent years, multilateral agencies have placed a great deal of emphasis on building effective systems of governance in the developing world,

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59. Neil MacCormick, *Democracy, Subsidiarity and Citizenship in the "European Commonwealth,"* 16 L. & PHIL. 31 (1997).

60. For an exploration of these issues, see Christian Joerges, *Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration*, 2 EUR. L.J. 105, 106-35 (1996).

61. For a discussion of the concept of subsidiarity, see MacCormick, *supra* note 56. Hugh Emy further explains subsidiarity as "delegating responsibility for action or policy to the level deemed most appropriate in society." HUGH V. EMY, REMAKING AUSTRALIA: THE STATE, THE MARKET AND AUSTRALIA'S FUTURE 212 (1993).

62. For a consideration of some of these normative differences in the construction of regional groupings, see Beeson & Jayasuriya, *supra* note 15, at 314-15.

especially in the transitional economies. Not only is most lending tied to the effective implementation of governance programs, but multilateral agencies have followed up on these concerns with extensive aid programs for institutional strengthening or capacity building. The tenor of recent economic reforms in transitional economies and in Southeast Asian countries has been on establishing credible and independent regulatory institutions. A key element in the evolution of a framework of regulatory governance is the establishment of independent regulatory frameworks with a capacity to commit itself to credible policies.[63]

Governance programs emerged out of the experience of structural adjustment programs of the 1980s. International policymakers, puzzled by the apparent failure of structural adjustment programs, began to examine more closely the capacity of economic and bureaucratic institutions to implement economic reform packages. As a World Bank discussion paper on governance noted:

> For some of the bank's borrowers the effectiveness of both adjustment and investment operations is impeded by factors which contribute to poor development management. These include weak institutions, lack of an adequate legal framework, weak financial accounting and auditing systems, damaging discretionary interventions, uncertain and variable policy frameworks and a closed decision-making which increases risks of corruption and waste.[64]

In fact, governance programs provide a complementary set of institution building programs to support economic adjustment programs.

The emphasis placed on the role of the State as a regulator—which multilateral agencies seem to have recognized—requires not a reduction in the role of the State, but rather a restructuring of its governmental functions, shifting the "boundary between the public and private sectors, thereby enlarging the latter, with the government's role changing from direct provision

63. ASIAN DEVELOPMENT BANK, GOVERNANCE: SOUND DEVELOPMENT MANAGEMENT (1995).
64. WORLD BANK, MANAGING DEVELOPMENT: THE GOVERNANCE DIMENSION 2 (1991).

to regulation."[65] One of the concerns of the governance program has been to ensure that the process of economic deregulation and privatization does not lead to the capturing of key markets by politically connected groups and individuals, and these concerns have taken on added importance in the light of the economic crisis in Asia.

For this reason, one of the major concerns of governance is the development of the "rule of law," and to this end there has been a concerted effort to promote legal reform programs in a number of developing States. For example, there are a number of projects in China that seek to establish credible and functional legal institutions. The widespread adoption of foreign commercial law in China is influenced by a highly instrumentalist approach to law and institution building; law is seen as bits of technology, dislocated from its broader normative assumptions, to be employed where useful. This is strikingly apparent in the rapid growth of foreign trade arbitration in China as well as in a number of other emerging economies. But the important point is that the globalization of the Chinese economy leads to the constitution of distinct arenas of law for different groups and interests, a fragmentation of the legal order that stands in sharp contrast to the monistic legal order implied by the conventional notions of sovereignty. Rule of law and governance programs are clear manifestations of a polycentric legal order.

These examples are sufficient to illustrate the thesis that globalization leads to the rupturing of the internal sovereignty of the State—a sovereignty so central to the conventional Westphalian understandings of sovereignty. However, this results not in the dissolution of sovereignty but its reconstitution in a different, more polycentric, form. It is this fragmentation that leads to the emergence of a polycentric legal order more attuned to the governance rather than the "government" of the global economic and political system. It is best reflected in the increasing emphasis on international regulation through networks of regulatory agencies.

V. INTERNATIONAL REGULATORY STATE AND NETWORK GOVERNANCE

One of the important features of governance mechanisms in the global economy is the emergence of a system of regulatory networks. As the State becomes fragmented, regulatory agencies increasingly develop international connections with other regulatory agencies, thereby taking on an

65. WORLD BANK, GOVERNANCE: THE WORLD BANK WASHINGTON D.C. (1994).

"international" function. This reconstitution of sovereignty in a world of rapid globalization takes the "internal" form of fragmentation and polycentricity and the "external" form of "network governance." In fact, regulatory systems have become increasingly important in the management of the global economy and pose important challenges to our conception of the way international law is formulated and enforced; these regulatory webs do not depend on formal international treaties or rely on international organizations for their enforcement. In short, the emergence of an international regulatory State depends on and requires the active participation of agencies within the State. Again, the importance of the reconstitution of sovereignty in these new systems of global regulation should be recognized. We can term this a form of "network governance."[66] As Picciotto observes:

> [T]hese contacts can aptly be described as taking place through networks, in a number of senses. Firstly, they are informal or semi-formal in nature: even when they are publicly visible, they are often not founded on conventional legal instruments such as treaties, but on "gentlemen's agreements" which may be semi-secret.[67]

Often these regulatory networks[68] rely on the application of informal standards rather than a set of formal rules; but more importantly, the operation of these regulatory systems depend on the national application of internationally formulated standards. In this regard, it bears out Slaughter's contention that the reconstitution of sovereignty represents the nationalization of international law.[69] What this signifies is that the operation of the global economy requires extensive regulatory changes at the national level.

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66. *See* Picciotto, *supra* note 2, at 111.

67. *Id.* at 112.

68. Picciotto's analysis of the legal governance of regulatory cooperation is a pioneering attempt to grapple with some of the major theoretical and empirical issues raised by regulatory cooperation. *See* Picciotto, *supra* note 2. In addition, David Zaring's recent work on international financial organization also is an excellent overview of the implications for international law of regulatory cooperation. *See generally* Zaring, *supra* note 10, at 281-301. Of course, there is extensive international political economy literature on these issues. See for example, Geoffrey Underhill, *Keeping Governments Out of Politics: Transnational Securities Markets, Regulatory Cooperation, and Political Legitimacy*, 21 REV. INT'L STUD. 251, 251-78 (1995), who underlines the importance of network governance.

69. *See* Slaughter, *supra* note 45, at 192.

Therefore, if network governance is the preferred form of management, regulatory harmonization is the conceptual framework for international regulatory networks. Again, the EU provides a good illustration; the construction of the European Single Market has made it imperative that there be a complementary process of regulatory harmonization or a system of mutual recognition.[70] An analogous argument can be made at the global level that the constitution of the global economy requires similar mechanisms of regulatory harmonization at the national level. But this depends on the creation of "islands of sovereignty"—strong regulatory capabilities—within the State. For a global economy to operate, there has to be a high degree of cooperation in areas that fall within the traditional domain of the nation-state in order to facilitate a system of global governance. Hence, this global governance requires the nationalization of international law, which can only be achieved through the reconstitution of sovereignty. In other words, how sovereignty is exercised is determined by the changing structure of the capitalist economy.

In this context, the Basle Accord on capital adequacy standards—a set of standards agreed to by central banks to maintain adequate capital levels—provides a useful example of this type of regulatory mechanism. Capital adequacy has become important because of the increasing integration of the financial services industry. As a result, there has been a demand for greater regulation or management of this increasingly mobile banking sector. As Peter Cook, the second chairman of the Basle Committee, points out:

> There was, in effect, a supervisory vacuum in this new global market which needed to be filled. Neither the supervisors, nor indeed the banks themselves, had fully appreciated the degree to which the banking environment was changing in character and the new and increasing risks involved in international business. Supervisors were still very much domestically oriented within the framework of different national banking systems.[71]

There are two significant features which stand out. First, regulatory cooperation was driven by the desire to protect sovereignty. Second, this

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70. *See generally* Beeson & Jayasuriya, *supra* note 15.

71. WOLFGANG H. REINICKE, GLOBAL PUBLIC POLICY 104 (1998).

cooperation could only be achieved by internationalizing regulatory agencies, thereby rupturing the internal sovereignty of the State.

The Basle Committee's chief objective then was to strengthen the supervision of the banking system by establishing a close relationship and mutual cooperation between national supervisory bodies. In short, any regulation had to be within its objective working through consensual supervisory standards and practices; this meant that it had to operate through a dense regulatory web of national agencies. This in turn poses a significant challenge for international lawyers mainly because the Basle Committee does not attempt to enforce detailed harmonization but depends on national supervisory agencies pursuing broadly accepted guidelines.[72] In this respect, the mode of regulation exemplified by the Basle Accord crucially depends on the operation of the notion of subsidiarity. According to Reinicke, the Basle Accord has two conceptions of subsidiarity. The first is a kind of functional subsidiarity that enables the Committee to distinguish between two definitions of capital: a core concept "which had to constitute at least fifty percent of bank's total capital, was the same in all countries;"[73] and a lesser concept that allowed for national variations in the definition of capital. The second conception of subsidiarity is that of a structural subsidiarity which ensures the implementation of the general consensual standards by national supervisory or regulatory agencies. Indeed, the key point about the Basle Accord and the reason it presents such an important challenge to international legal scholars is that its implementation required the national implementation of an internationally agreed set of standards. In this sense, structural subsidiarity can function within a framework of economic governance at multiple levels, and this is increasingly the norm in many international regulatory systems.

The Basle Accord is not the only regulatory framework to be sustained through the mechanism of network governance. Another interesting example from the international financial area, is the International Organisation of Securities Commissions (IOSCO). The IOSCO is the body that deals with the transnationalization of securities markets and attempts to provide a regulatory framework for these markets. This body is comprised of State and non-State agencies engaged in the operation of the securities market; it serves as a regulatory response to the mobility of capital or to the increasing disjuncture between the physical and economic geography. Again, the point to note is that

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72. Zaring, *supra* note 10, at 289.

73. REINICKE, *supra* note 71, at 115-16.

the constitution of a global financial market necessitates a high degree of cooperation between regulatory agencies in areas normally considered to be within the prerogative of the nation-state. In this regard, one of the main objectives of IOSCO is the harmonization of regulatory standards, which is facilitated by a system operating through another system of network governance. Underhill remarks that:

> [T]he IOSCO policy community consists in the main of autonomous government agencies, self regulatory organizations (SROs) and market actors, interacting as non-governmental institutions in the international domain. In this case, the guardians of the rules of the market, and indeed those who make the very rules and create market structure, are somewhat removed from traditional legislative accountability.[74]

In short, network governance (the external dimension of complex sovereignty) depends on the functioning of independent (effective) internal self-regulatory agencies (the internal dimension of complex sovereignty).

But it is important to acknowledge that the principle of subsidiarity—so important to the emergence of governance mechanism in a number of different areas—could operate only because regulatory agencies had a high degree of autonomy and independence from core political institutions. Moreover, this autonomy and independence enabled the constitution of a system of network governance where these agencies actively participated in the formulation and management of the regulatory institutions.

Network governance is not unique to international relations and is a concept that has generated a large amount of literature in the field of public policy.[75] It is worth enumerating the following characteristics of networks. First, networks are interdependent organizations that depend on the mutual exchange of resources to achieve their goals. Second, networks depend on reaching procedures and decisions through broad-based consensus. And finally, networks place a great deal of emphasis on reciprocity, for example,

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74. Underhill, *supra* note 68, at 273.

75. R.A.W. Rhodes, *Different Roads to Unfamiliar Places: UK Experience in Comparative Perspective*, 57 AUSTL. J. PUB. ADMIN. 19, 27 (1998).

the development of a normative standard of obligation.[76] This only scratches the surface of the system of network governance, but nevertheless it is sufficient to establish its distinctiveness as a form of international governance. It is a system of governance that does not fit into the conventional understandings of sovereignty or international law. Zaring, in fact, points out that many of the international regulatory networks fail to meet the formal requirements of international organizations as set out in the Restatement (Third) of the Foreign Relations Law of the United States[77] because these networks are composed of State agencies with their own specific interests.[78] He goes on sensibly to suggest that developments in international law "should make a place for these important organizations in its analytical framework."[79] But of course, this would require the adoption of a different model of sovereignty.

Another distinctive character of international regulatory governance is its reliance on standards rather than specific rules, and this too fails to fit in with the conventional notions of international law. Clearly, both examples—the Basle Capital Accord and IOSCO—mentioned above rely heavily on standard setting. Similar examples abound in the domain of environmental regulation where standard setting, rather than rule formulation is the name of the game. Franz Neumann suggested that the more complex and cartel forms of capitalism herald a shift from formal abstract norms—characteristic of competitive capitalism—to deformalized and particularized standards.[80] Much the same argument can be made about the shift toward standards rather than rules in the global economy.

The importance of standards also points to the fact that international regulatory governance is often characterized by a system of decentralized enforcement by State agencies and authorities. The Basle Committee, after it finalized the Accord on capital adequacy standards, left its enforcement largely to member countries. Remarkably, some of the Basle Committee standards have been adopted by a number of other countries which were originally not a part of the accord. But what needs to be understood here is that the enforcement of specific standards is left to individual regulatory

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76. *Id.*

77. *See generally* RESTATEMENT, *supra* note 9.

78. *See* Zaring, *supra* note 10, at 306.

79. *Id.* at 327.

80. *See* FRANZ NEUMANN, THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY 268 (1986).

agencies and is not the task of a supranational authority. The Basle Committee sees its task as broadly laying down supervisory standards and practices. The IOSCO functions in much the same way—it leaves the task of enforcement to the member countries and sees its role as one of broadly monitoring compliance. It is clear this system of decentralized enforcement is the emerging regulatory model in a range of environmental areas. For example, the Kyoto Protocol on climate change relies on member countries to conform to, and enforce, environmental standards. The task of the international regulatory agency in these areas then becomes one of monitoring the member compliance[81] through audits and other mechanisms rather than through direct enforcement of standards.

In this regard, this emergent international regulatory State has much in common with Teubner's concept of "reflexive regulation."[82] Teubner's central contribution was to identify two distinct regulatory systems: one, through the use of law to directly regulate behavior, and, two, through regulation of decentralized mechanisms whereby State regulatory attempts to shape the general institutional conditions under which individual enterprises or institutions attempt self-regulation. In short, Teubner would suggest that increasingly, regulatory law functions at a secondary level to regulate self-regulation. For Teubner, the increasing complexity of the social order demands that reflexive capacity be built in to the very structure of social subsystems.

Teubner's concept of the "regulation of self-regulation" has much to offer our analysis of international regulatory structures. The way decentralized enforcement operates in a range of financial areas that we have examined is analogous to recent developments in domestic regulatory regimes where there had been an emphasis on laying down the ground rules for self-regulation, not regulation per se. Unlike the self-regulation of enterprises in the domestic legal system, the self-regulation in the global arena means that it operates at the level of relevant State agencies and actors. One of the major consequences of this kind of global regulation is the increasing importance of procedure in international governance. Again, the emergence of these forms of procedural

81. See Chayes & Handler Chayes, *supra* note 17, for an excellent discussion of the notion of compliance. This is an area on which international law needs to focus.

82. *See* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y 239, 239-81 (1983).

regulatory systems cannot be adequately accommodated under conventional understandings of international law.

It is apparent that the increasing complexity of globalization brings with it a global system of governance and regulation. These regulatory forms have three main features. First, they are governed by networks of State agencies acting not on behalf of the State but as independent actors. Second, the emergent international regulatory order is primarily concerned with laying down standards and general regulatory principles rather than strict rules. Finally, recent developments in international regulation in the area of finance, securities, and the environment suggest the emergence of a system of decentralized enforcement or the regulation of self-regulation. In other words, the emergent regulatory system is characterized by a system of network governance providing broad standards and depending on compliance of State agencies in preference to direct enforcement. But a system of indirect regulation depends on a dramatic transformation of the Westphalian notions of sovereignty, which sit uneasily with the conventional understanding of international law.

CONCLUSION

From the foregoing, it is clear that the process of globalization has transformed the traditional understandings of sovereignty and its embranglement with specific and exclusive jurisdiction over a given territorial area. The main contention of this Article is that globalization transforms, not dissolves or erodes, the way in which sovereignty is produced. As such, this argument can be distinguished from a formalist analysis as well as from cosmopolitan accounts of sovereignty. The former seeks to understand the increasing gap between formal sovereignty and its practical effect through the proliferation of conceptual terms such as "quasi-sovereignty,"[83] whereas the latter moves beyond sovereignty through the construction of different kinds of political communities. Both perspectives are, however, trapped within a fixed notion of sovereignty as territory. The alternative offered in this Article proposes a structural understanding of the sovereign form by suggesting that sovereignty in the Westphalian phase, stimulated by the expansion of capitalism on a national scale, was governed by underlying changes in the

83. *See generally* ROBERT JACKSON, QUASI STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990).

distribution of social power. Hence, it is the shift toward a global rather than international economy that has set in motion significant changes in the form of sovereignty. In a nutshell, the assertion is that form of sovereignty is not fixed or immutable, but contingent on the underlying structures of economic and social relations.

The erosion of the internal sovereignty of the State is perhaps the first noticeable manifestation of the transformation of sovereignty. This is particularly the case because a key feature of the Westphalian model (and critical to the separation of the public and private in capitalism) is the internal unity of the State, which in turn implies a monistic legal order. Increasingly, globalization fragments this model of internal sovereignty by creating multiple centers of governance around autonomous national and supranational agencies. The emergent multilevel governance of the EU is a good exemplar of this fragmentation of the internal sovereignty of the State. An important ramification of this change in the form of internal sovereignty within the State has been the emergence of a polycentric legal order, which has substantially broken down the boundaries between international and domestic law. In fact, it is these changes in the internal architecture of the State that have enabled the nationalization of international law that are so critical to the constitution of global systems of governance.

Externally these changes in the form of sovereignty have been evident in the emergence of regulatory regimes such as the Basle Committee on capital adequacy standards, all of which are governed by a network of regulatory agencies. These networks consist of State or regulatory agencies that represent their own specific institutional interests—which may be distinct from other actors within the State—as well as those of their particular constituencies. In short, these agencies or organizations, like independent central banks, function at the boundary between the domestic and the global economy. It is clear that the emergence of network governance following the transformation of sovereignty has allowed States to regulate or govern economic processes that are increasingly transnational. This, in turn, has permitted the State through forms of network governance to close the gap between economic and physical geography, so central to the new global economy. In short, a major consequence of these forms of regulatory governance is that they have enabled unbundling of territoriality and sovereignty, which is essential for the constitution of the global economy.

These developments in international regulation, however, pose important challenges for students of international relations and international law. The

emergent new international regulatory order increasingly relies on the formulation and implementation of broad-based regulatory standards rather than on international rules. Moreover, there is a shift in emphasis from enforcement to securing compliance through national regulatory agencies by determining the general institutional or procedural framework under which regulation occurs. But this proceduralism of the international regulatory State cannot easily be accommodated within theories of international regimes because these emergent regulatory mechanisms rearticulate[84] the international sphere within the national domain. In other words, it breaks down the boundary between the domestic and the international so central to our entrenched understanding of international relations and law.

Much work remains to be done in clarifying the nature of the relationship between the interdisciplinary boundaries of international relations and law. However, this requires a fundamental rethinking of the basic assumptions about sovereignty, which are constitutive of some of the most fundamental distinctions and concepts of both disciplines. Understanding the fact that the form of sovereignty is transformed by underlying changes in globalization of economic relations is a first and important step in inaugurating a new and innovative research agenda for the relationship between globalization and law.

84. See Ruggie, *supra* note 1, at 139-74, for an elaboration of this argument.