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## Bordering Capabilities Versus Borders: Implications for National Borders

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## KEYNOTE ADDRESS

# BORDERING CAPABILITIES VERSUS BORDERS: IMPLICATIONS FOR NATIONAL BORDERS†

*Saskia Sassen\**

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State sovereignty is usually understood as the State's monopoly of authority over a particular territory, demarcated by reasonably established geographic borders. Today, it is becoming evident that even as national territories remain bounded by traditional geographic borderlines, globalization is causing novel types of "borderings" to multiply; these borderings range from regimes protecting firms' trading rights (even when incompatible with domestic law in signatory countries) to emerging forms of protections for threatened species whose habitats comprise more than one country. These novel borderings cut across traditional borders and become evident both globally and inside national territory. Sovereignty remains a systemic property; that is to say, the interstate and supra-national systems remain dependent on the presence and recognition of the mutually exclusive authority of national States over their territories, even when International Monetary Fund (IMF) conditionality, World Trade Organization (WTO) law, or the jurisdiction of the International Criminal Court (ICC) have chipped away at that exclusivity. The institutional space for sovereignty now includes specific functions and authorities of these

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† This Essay is based on an article that first appeared in *NEW POLITICAL ECONOMY*. See Saskia Sassen, *When National Territory Is Home to the Global: Old Borders to Novel Borderings*, 10 *NEW POL. ECON.* 523 (2005). I would like to thank all the editors at the *Michigan Journal of International Law*, and most especially Louisa Marion, Kate Wagner, and Raj Bandla for their enormous help on finalizing this Essay. Finally, a special thank you to the organizers of the "Territory Without Boundaries" Symposium, most especially Serena Liu, Jordan Long, and Matthew Becker.

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global institutions. This, in turn, chips away at the State's capacity to legitimate—through the legislature, the courts, and executive decree, or by signing on to international treaties. Although weak, these diverse emergent regimes cut into the foundational proposition of the exclusive authority of the State over its territory.<sup>1</sup> The politics of sovereignty now include claims for sovereignty on the part of indigenous people, today recognized by at least some States (notably Canada), as well as claims by global regulators seeking to override particular aspects of state sovereignty, notably through WTO law and IMF conditionality in the 1980s and 1990s. The outcomes are more complex than notions of mutually exclusive territorial authority can capture.

These shifts in the condition of state sovereignty raise a question regarding the status of State-centered border regimes, as several of the Essays in this Symposium Issue demonstrate. To this, I add that traditional borders now coexist with a variety of other bordering dynamics and capabilities. Elsewhere I have hypothesized that the increased deregulation of particular components of traditional borders (such as border components governing the flow of capital, information, services, trade) has induced the development of such new types of borderings.<sup>2</sup> Among such borderings, I include the specialized cross-border regimes developed to protect the rights and guarantees of contracts of firms across countries; particular protections of certain types of commodities in global trading regimes—for example, strengthening national subsidies for specific commodities as a larger number of producing countries become capable of trading globally; manufacturing standards for outsourced products and international accounting and financial reporting, both of which exclude older national standards of most countries; portable rights granted to transnational professionals and managers under the WTO; and formation of multiple highly specialized financial and other markets that are now closed to the public—that is, not stock markets.

I do not see the rise of these novel borderings as necessarily indicating that States are losing a putative battle against global forces. Insofar as the State historically has had the capability to encase its territory through administrative and legal instruments, it also has had the capability to change that encasement, for instance, by deregulating and opening its borders to

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1. I would add here the new constitutions developed and implemented in the 1990s in Latin America after the military dictatorships, in post-Apartheid South Africa, and in post-Communist Eastern and Central Europe. I am thinking particularly about a clause that they contain providing that the sovereign cannot presume to be the exclusive representative of its people in international fora. Behind this lie, above all, indigenous peoples and their claims to an alternative sovereignty and the Apartheid-era struggle by the African National Congress and its claim that the South African State was not its representative.

2. SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* 222–76 (2d ed. 2008) [hereinafter SASSEN, *TERRITORY*].

foreign firms and investment, committing to laws governing the WTO and the international human rights regime, participating in international banking and finance systems, and so on. But, I will argue, this capability of the State to *make* critical components of its traditional borders needs to be historicized: today this capability is being developed and used for micro yet strategic shifts in the conception of national territory and national state authority that marked much of the formation of the modern State. That older conception has ruled for so long that it has become akin to a state of nature—a *sine qua non* of the existence itself of the nation-state. One aspect of the current foundational, though not totalizing, change is the emergence of this variety of borderings insofar as they have the effect of denationalizing that which was once constructed as national. Critical to my argument is that the State plays an active role in this denationalizing, but this only becomes evident when we disaggregate “the” State and examine the work of particular parts of the State: particular agencies, particular court decisions, particular executive orders. It also means that this denationalizing can coexist with traditional borders and with the ongoing role of the State in new global regimes.

A critical implication of this conceptualization is that we need to problematize the proposition that national borders encase the “national” and that, hence, deregulating traditional borders entails a substantive shift to a “borderless world.” The new specialized borderings that I describe are the borders of our current age: they cut across traditional borders but do not necessarily reduce the incidence of borders, even though they change the character and logics of bordering. This also extends to a range of conditions that have been introduced in the sphere of law as a result of our greater recognition of ecological vulnerabilities: for instance, when we recognize the natural habitat of a threatened species, we are also recognizing types of borderings that cut across traditional borders. It also points to the fact that the “global” can no longer be confined to that which is explicitly global in scale. Rather, global now includes practices and institutions that scale at subnational levels, that is, function in realms that have traditionally been confined to local levels in hierarchical national systems. Globally scaled processes often comprise multi-scalar practices and organizational forms. For instance, global capital markets are constituted both through globally-spanning electronic networks and through locally embedded conditions, such as financial centers and all they entail, from infrastructure to informal systems of (partial and specialized) “trust,” an aspect I develop in *TERRITORY, AUTHORITY, RIGHTS*.<sup>3</sup> Finally, this type of conceptualization points to the possible formation of novel types of

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3. *Id.* at 350–64.

borderings through the encounter of the global and the national *inside* national territory.

Through my research and writings, I develop and apply a novel construction of the notion of “assemblages” to describe those types of emergent formations that involve the mixing of subnational and global domains to address matters usually confined to the global.<sup>4</sup> It is one way of detecting the shifting meaning of what we might think of as national institutional space; allowing for the possibility that the global and/or the denationalized are now endogenous to the national carries implications for the meaning of the traditional border. As a category, the concept of assemblage allows me to bring together, into a larger organizing logic, components of what have historically been formalized as mutually exclusive domains. I have been especially interested in instances marked by contingency rather than lineal and determinative causalities. That is the conceptual advantage of the category of assemblages as compared to systems, a concept denoting formalization and closure. A second feature that I have explored in my research is the changing valence of a capability when it switches organizing logics in periods of foundational, if partial, transformation. For instance, where the rule of law historically was used to apply protectionism deemed critical to the formation of nation States, today that same capability is critical to the formation of a global corporate economy predicated on opening traditional borders.

A core argument of this Essay is that the capability to *make* borderings has itself switched organizing logics: from institutionalizing the perimeter of a territory to multiplying transversal borderings cutting across that perimeter. This switch is partly linked to the types of scalar shifts in the operational space of a growing number of systems. To the more economic systems already mentioned above, let me add such diverse instances as the policing of the illegal drug trade, the war on terror, the judicial and political struggle to protect human rights, and the environmental effort to reorganize transnational economic sectors, including the fisheries examined in this Symposium. Each of these systems functions today as a globally scaled assemblage that includes subnational, national, and supranational components, ranging from varied laws to operational geographies.

A central concern of this Essay is the recognition that these globally scaled assemblages include subnational processes and dynamics. This is partly a tactical concern, since much of the globalization literature has explicitly or implicitly posited the relationship between the national and the global as binary and often marked by zero-sum logic. I argue that this

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4. For a discussion of this concept of assemblages and my particular use of it, see *id.* at 1–23.

is a flawed representation and instead present that relationship as a spectrum, with zero-sum logic at one end and a subnational constitution of the global at the other.

This reading of the current period has political, theoretical, and methodological consequences. Inclusion of subnational conditions in this conception destabilizes older hierarchies of scale and conceptions of nested scalings. One intriguing question is what this destabilization means for law, including both the scholarly study of the law and the actual use of subnational laws in matters that are global. Symposium panelist Hari Osofsky's law-and-geography approach touched upon this idea, particularly when she discussed the approach that local actors take to address expressly global problems. In Symposium discussions, the *Michigan Journal of International Law's* Matthew Becker also pointed out that, in a network theory approach, this also resonates with a legal focus on collective good problems—a point raised by Eric Bilsky's presentation of the challenges of fisheries management.<sup>5</sup> In yet a third example, the implementation of WTO law and human rights law in a country can also be seen as constituting an assemblage of very particular local, national, and supranational/international elements.

In each of these illustrations, the proposition about a bordered exclusive territory as a parameter for authority and rights has entered a new phase. While the exclusive territorial authority of the State remains prevalent, the constitutive regimes of this authority are today less absolute than once intended to be. But it might be too hasty to assume that the critical site for making and registering that change is the traditional border. In Part I of this Essay, I will examine the main lines of the debate about the State and the question of borders and exclusive territorial authority. Next, in Part II, I will examine the subnational constitution of global processes to get at the question that concerns me here, namely, the partial unbundling of traditional national territorial borders and the formation of new bordering capabilities, both subnational and transnational. Finally, in Part III, I will discuss borders and new bordering capabilities and the kinds of theoretical and research issues that they bring to the scholarly agenda.

## I. NATIONAL TERRITORIES AND GLOBAL PROCESSES

Through the consideration of borders, we can gain interesting insights into the changing scope of national territory during an era of globalization

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5. Email from Matthew Becker, Executive Articles Editor, Michigan Journal of International Law, to Saskia Sassen, Robert S. Lynd Professor of Sociology and Member, The Committee on Global Thought, Columbia University (Mar. 5, 2009, 10:17:44 PM EST) (on file with author).

and digitization. Traditional geographic borders are among the critical national institutions that global and digital capabilities can unsettle and even neutralize.<sup>6</sup> There is much disagreement among scholars about the impact of the rise of these global and digital capabilities on state territorial jurisdictions, with some seeing much and others little real change.<sup>7</sup> But both sides of the debate share one often implicit assumption: that of the territorial exclusivity of the nation State, an assumption that makes the border a line dividing the national and the global into two mutually exclusive domains.

Nevertheless, changes underway are shifting the meaning of borders, even while actual geographic lines demarcating territories remain mostly unaltered. Perhaps more importantly, these changes expose the multiple ways in which the geographic border (and its outposts, notably international airports and consular offices) can be articulated by enormously diverse institutions and norms, ranging from institutions that neutralize the border (for example, free-trade treaties) to those that weaponize it (for example, deployment of more than the customary armed guards and armaments). The heightened legibility of the diverse meanings of the geographic border (and its outposts) feeds into its unstable meaning. And, while this unstable meaning has long been evident sociologically, it is now also legible legally. At its most extreme, it shows bordering to be a practice and capability that can be uncoupled from traditional border geographies.<sup>8</sup> Finally, current changes also illuminate the extent to which state capture has shaped the historiography and geography describing and

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6. For example, digitized information transfers do not go through the channels of geographic borders, as do trucks. They can be inter- or intra-firm transfers, inter-agency transfers, crossborder scientific networks, and so on. In a very different way, electronic payments systems similarly cross borders, and their rapid growth created a bit of a problem early on for central banks trying to measure national money supplies.

7. For a discussion of the broad consequences on law and regulation caused by the digitization of a growing range of domains, see CHRISANTHI AVGEROU ET AL., *OXFORD HANDBOOK ON INFORMATION AND COMMUNICATION TECHNOLOGIES* (2007); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); DOROTHY E. DENNING, *INFORMATION WARFARE AND SECURITY* (1999); JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* (2006); TERHI RANTANEN, *THE MEDIA AND GLOBALIZATION* (2005); Robert Latham & Saskia Sassen, *Digital Formations: Constructing an Object of Study*, in *DIGITAL FORMATIONS: IT AND NEW ARCHITECTURES IN THE GLOBAL REALM I* (Robert Latham & Saskia Sassen eds., 2005).

8. Before advancing further, I should emphasize that I focus particularly on the national borders of States, and their demarcation of a State's exclusive territorial authority. This particular type of demarcation must be distinguished from many other historic, institutionalized divisions of diverse domains, such as the separation of organized religion and the State in liberal democracies, or, at a more specialized level, the separation of banking from insurance.

interpreting the geopolitics of the last two centuries, an issue that has received considerable attention in the last few years.<sup>9</sup>

The central argument of this Essay is that we are now seeing the incipient formation of new bordering capabilities and of new state practices regarding territory. These entail the partial denationalizing of what historically has been constructed as national, a process that unsettles the meaning of geographic borders. Critical to this argument is the proposition that global processes also take place at subnational levels, thereby disrupting the notion of mutual exclusivity between the national and the global. Much academic attention has been paid to the loss of state functions to supranational, global, and private entities.<sup>10</sup> Much less attention has been paid to the thesis that state territorial authority is being affected by the proliferation of subnational scalings of global processes and institutions. When we conceive of globalization as enacted at subnational scales and institutional domains, we can posit the proliferation of borderings within national territories. Thus, my thesis is that economic globalization is a politico-economic system partly located inside national States, and that, as a result, we see: (a) the partial, often highly specialized (and hence obscure) denationalizing of specific components of state work, the economy, society, and the polity, and (b) that the specialized transnational regimes implemented to govern global processes enter national institutional space and geographic territory. These dynamics combined produce a variety of novel borderings inside national territory that often function independently of geographic state borders.<sup>11</sup> Focusing on these bordering capabilities allows us to see something about territory and space that is easily obscured

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9. This becomes evident in cases that rupture this dominant geopolitical version. For an elaboration of this type of case, see SASSEN, *TERRITORY*, *supra* note 2, at 277–321. For instance, legal scholars as diverse as Karen Knop, Susan B. Coutin, and Peter J. Spiro have remarked on the ambiguities in certain aspects of international law that become visible when the law is applied to cases involving a non-typical subject, such as women in international claims or immigrants in citizenship-related cases. See, e.g., KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW* (2002); PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008); Susan B. Coutin, *Denationalization, Inclusion, and Exclusion: Negotiating the Boundaries of Belonging*, 7 *IND. J. GLOBAL LEGAL STUD.* 585 (2000); Karen Knop, *Here and There: International Law in Domestic Courts*, 32 *N.Y.U. J. INT'L L. & POL.* 501 (2000). For a discussion of such ambiguities in the social science literature, see ULRICH BECK, *WHAT IS GLOBALIZATION?* (Patrick Camiller trans., Polity Press 2000) (1997); Bob Jessop, *Reflections on Globalization and its (Il)logic(s)*, in *GLOBALISATION AND THE ASIA-PACIFIC: CONTESTED TERRITORIES* 19 (Kris Olds et al. eds., 1999); Peter J. Taylor, *World Cities and Territorial States Under Conditions of Contemporary Globalization*, 19 *POL. GEOGRAPHY* 5 (2000).

10. For some of the wealth of globalization and privatization literature, see sources cited *infra* notes 13, 18.

11. See SASKIA SASSEN, *LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 1–58 (1996) [hereinafter SASSEN, *LOSING CONTROL?*]; SASSEN, *TERRITORY*, *supra* note 2.



in the more prevalent analyses, which assume the mutual exclusivity of the national and the global.

The rise of overlapping systems of rule, however, is not new; on the contrary, there have been many cases in epochs preceding the formation of the modern State in which a given territory was subject to multiple systems of rule. In this regard, current conditions are probably more aligned with those pre-modern state epochs, whereas the strengthening of exclusive national state authority might be the exceptional case. In most developed countries, the gradual institutional tightening of the national State's exclusive authority over its territory accelerated after World War I, when the State had the administrative and technical competences to control its borders. At the same time, so did the elaboration in the social sciences of categories for analysis, research techniques, and data sets centered in a national state perspective. After a century of this type of elaboration, we now need new theoretical and empirical tools to accommodate the possibility of multiple relations between territory and institutional encasement, rather than the singular one of national territory and sovereign rule. This collective task is well under way.<sup>12</sup>

The multiple regimes that constitute the border as an institution can be grouped into a formalized apparatus that is part of the interstate system. One of these regimes has at its core the body of regulations covering international flows, including flows of commodities, capital, people, services, and information. Other regimes include extraterritorial jurisdiction; regimes for granting citizenship, asylum, and extradition; deployment of militaries; and so on. No matter their nature, these multiple regimes cohere around (a) the State's unilateral authority to define and enforce regulations in its territory and (b) the State's obligation to respect and enforce regulations stemming from bilateral agreements and international treaties. For diverse reasons, ranging from differences in power among States to practical constraints, these regimes were never fully effective. Today, this formalized apparatus is being partially unbundled by new types of interstate agreements, such as WTO treaties or the needs of the global capital market. And, it confronts an emerging, far less formalized array of borderings operating largely outside of the formal interstate system. Further, this emergent array of borderings does not necessarily entail a self-evident crossing of borders, and, hence, may not be immediately legible as having to do with borders, albeit borders other than interstate borders.

Thus, part of my argument is that the dominance of the national State/territorial model has oversimplified the border concept. Borders have been largely reduced to geographic events and the immediate institutional

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12. For a conceptual and bibliographic elaboration, see SASSEN, *TERRITORY*, *supra* note 2, at 1-73.

apparatus through which they are controlled, protected, and generally governed. Globalization then helps actually and heuristically to disaggregate "the" border and, through this disaggregation, clearly articulates its multiple components. The globalization of a broad range of processes shows us that borders can extend deep into national territory, they are constituted through many more institutions than simply the nation State, and they have many more locations than is suggested by standard geographic representations. Globalization also helps make legible the features and the conditionalities of what has been the dominant border regime associated with the nation State. Therefore, while still the prevalent border regime of our times, the nation-state border is less dominant now than it was fifteen years ago.

Globalization thus engages the territory of the State, and thereby inevitably the question of state borders. Although a broad array of scholarship has engaged globalization, territory, and the State, it has not directly addressed the distinction between national borders and bordering capabilities that I seek to make here.<sup>13</sup> This distinction is addressed indirectly or obliquely because the framing in the literature focuses on another issue: the tug-of-war between the global and the national, entities presumed to be mutually exclusive. For the purposes of this Essay, it is worth examining the assumptions that are made on each side of the debate.

This state and globalization scholarship is prolific, growing, and, by now, increasingly familiar. Very briefly, we can identify two major strands. In the first, States remain as the key actors, so not much has changed: the interstate system is comprised of a community of States with mutually recognized territorial borders.<sup>14</sup> In the second, although States remain important, other key actors also are accumulating rights and powers to cross those borders.<sup>15</sup> Some scholars see these as new

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13. For two of the best sources on the variety of issues involved, see A. Claire Cutler et al., *Private Authority and International Affairs*, in *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* 3 (A. Claire Cutler et al. eds., 1999); Steven L. Schwarcz, *Private Ordering*, 97 *NW U. L. REV.* 319 (2002).

14. These are issues that had emerged forcefully by the 1990s. See, e.g., *CHALLENGE TO THE NATION-STATE* (Christian Joppke ed., 1998); PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE* (1996); Eric Helleiner, *Sovereignty, Territoriality and the Globalization of Finance*, in *STATES AND SOVEREIGNTY IN THE GLOBAL ECONOMY* 138 (David A. Smith et al. eds., 1999); Louis W. Pauly, *Global Finance, Political Authority, and the Problem of Legitimation*, in *THE EMERGENCE OF PRIVATE AUTHORITY AND GLOBAL GOVERNANCE* 76 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002) [hereinafter *PRIVATE AUTHORITY*].

15. For what is probably still the most comprehensive mapping of the main strands in the scholarship on globalization and the State, see DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999) (categorizing the two major emerging strands as "hyperglobalist," positing that national States are becoming weak and are on their

actors; others do not, and rather emphasize that they are old, but, at the same time, their powers have weakened and their roles shrunk with the strengthening of national States over the last one hundred years.<sup>16</sup> Even if we assume for the sake of argument that the present era is, at a general level, a continuation of a long history of changes that have not altered fundamental state primacy, there still warrants detailed analysis of the specificities of the current changes.

Focusing on the formation of novel bordering capabilities brings to the fore particular aspects of territory and space that are easily overlooked.<sup>17</sup> Unlike analyses of private authority, which emphasize the important shift of authority from the public to the private domain,<sup>18</sup> here I seek to isolate private agendas and authority *inside* the

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way out, and “transformationist,” contending that globalization has brought about significant changes in state authority and the work of States); *see also* GLOBALIZATION THEORY: APPROACHES AND CONTROVERSIES (David Held & Anthony McGrew eds., 2007) [hereinafter GLOBALIZATION THEORY].

16. The debate regarding globalization and state participation extends far beyond issues pertaining to the global economy. For example, there is an older scholarship on world-order systems and cosmopolitanism. *See, e.g.*, DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE 219–86 (1995); RICHARD FALK, EXPLORATIONS AT THE EDGE OF TIME: THE PROSPECTS FOR WORLD ORDER (1992); Richard Falk, *The Making of Global Citizenship*, in GLOBAL VISIONS: BEYOND THE NEW WORLD ORDER 39 (Jeremy Brecher et al. eds., 1993). Additionally, a new literature examines the interaction between national States and a variety of transnational movements and effects. *See generally* GLOBALIZATION THEORY, *supra* note 15; Evalyn W. Tennant, *Locating Transnational Activists: The United States Anti-Apartheid Movement and the Confines of the National*, in DECIPHERING THE GLOBAL: ITS SCALES, SPACES, AND SUBJECTS 119 (Saskia Sassen ed., 2007) [hereinafter DECIPHERING THE GLOBAL] (discussing globalization and transnationalism); Anne Bartlett, *The City and the Self: The Emergence of New Political Subjects in London*, in DECIPHERING THE GLOBAL, *supra*, at 221 (addressing globalization and cosmopolitanism); DISPLACEMENT, ASYLUM, MIGRATION: THE OXFORD AMNESTY LECTURES 2004 15, 15–136 (Kate E. Tunstall ed., 2006) (discussing human rights); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW (2003) (discussing human rights); Josh Kaplan, *The Transnational Human Rights Movement and States of Emergency in Israel/Palestine*, in DECIPHERING THE GLOBAL, *supra*, at 283 (human rights); ADAPTING CITIES TO CLIMATE CHANGE: UNDERSTANDING AND ADDRESSING THE DEVELOPMENT CHALLENGES (Jane Bicknell et al. eds., 2009) (addressing international environmental efforts). Importantly, a number of scholars have discussed the possibility of a global civil society. *See* JEFFREY C. ALEXANDER, THE CIVIL SPHERE (2006); GLOBAL CIVIL SOCIETY 2002 (Marlies Glasius et al. eds., 2002); GLOBAL CIVIL SOCIETY 2007/8: COMMUNICATIVE POWER AND DEMOCRACY (Martin Albrow et al. eds., 2008). One effort in this new literature is to examine and theorize potential advantages of transcending nationally oriented state authority and instituting world-level institutional orders. *See infra* note 28 and accompanying text.

17. For a more extensive examination and bibliographic material, *see* SASSEN, TERRITORY, *supra* note 2.

18. A growing literature that emerged in the 1990s—and often overlapped with particular parts of the above-cited strands—emphasizes the relocation of national public government functions to private actors, both within national and transnational domains. *See* Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT’L L. 769 (1998); Cutler et al., *supra* note 13. On the rise of private authority, *see generally* PRIVATE AUTHORITY, *supra* note

public domain of the State.<sup>19</sup> This can go further to an emphasis on the privatization of norm-making capacities: these capacities were once in the public domain, but today they have become private and use the public domain to enact private norms. I have developed this argument using the case of globalized finance and its capacity to insert its needs into public policy as if it were the desirable norm for all economic sectors.<sup>20</sup> My perspective also differs from literature arguing the decline and obsolescence of the State.<sup>21</sup> Instead, it comes closest to scholarship emphasizing state transformation,<sup>22</sup> although

14; Schwarcz, *supra* note 13. For a discussion of current research on a range of issues relating to the emergence of cross-border governance mechanisms, see generally POLITICAL SPACE: FRONTIERS OF CHANGE AND GOVERNANCE IN A GLOBALIZING WORLD (Yale H. Ferguson & R.J. Barry Jones eds., 2002) [hereinafter POLITICAL SPACE]. For a parallel view focused on resistance to globalization, see, for example, Christopher Chase-Dunn & Barry Gills, *Waves of Globalization and Resistance in the Capitalist World System*, in CRITICAL GLOBALIZATION STUDIES 45 (Richard P. Appelbaum & William I. Robinson eds., 2005).

19. For a good examination of these issues as they arise in specific institutional settings, see generally Aman, *supra* note 18. For an excellent collection of essays discussing these dynamics further, see TRANSNATIONAL LEGAL PROCESSES: GLOBALIZATION AND POWER DISPARITIES (Michael Likosky ed., 2002).

20. See SASSEN, TERRITORY, *supra* note 2, at 148–276.

21. For a broadly read, though perhaps imprecise, early treatment of the topic, see KEN-ICHI OHMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES (1995); WALTER B. WRISTON, THE TWILIGHT OF SOVEREIGNTY: HOW THE INFORMATION REVOLUTION IS TRANSFORMING OUR WORLD (1992). Both works posit that the combination of globalization and digitization would override older types of borders that are a function of nation-states and protectionist governments. My own work contests these notions. THE GLOBAL CITY argues that even financial globalization is lumpy and needs a network of territorial financial centers that function as bridges between increasingly standardized global markets and the thick environments of national financial cultures. See generally SASKIA SASSEN, THE GLOBAL CITY: NEW YORK, LONDON, TOKYO (2d ed. 2001) [hereinafter SASSEN, THE GLOBAL CITY]. TERRITORY, AUTHORITY, RIGHTS argues that certain components of national states become even more important because they have to develop a range of legal and policy instruments to accommodate the development of global capital markets and a global trading system. SASSEN, TERRITORY, *supra* note 2. Furthermore, I argue that both globalization and digitization lead to new kinds of bordered spaces, the subject developed in this Essay. Yet another early piece is one written by Stephen J. Kobrin, which finds that digitization enables more than one such seamless globalization; in his example, networks interested in implementing a Multilateral Agreement on Investment at the time competed with civil society networks interested in contesting such an agreement. Stephen J. Kobrin, *The MAI and the Clash of Globalizations*, 112 FOREIGN POL'Y 97 (1998).

22. The vast literature on globalization that emerges in the 1990s contains, among others, a type of analysis that interprets deregulation and privatization as the incorporation by the State of its own shrinking role. In its most formalized version, that position argues that States “constitutionalize” their own diminished role. See generally JAMES H. MITTELMAN, THE GLOBALIZATION SYNDROME: TRANSFORMATION AND RESISTANCE (2000); SPACES OF GLOBALIZATION: REASSERTING THE POWER OF THE LOCAL (Kevin R. Cox ed., 1997); Stephen Gill, *Globalization, Democratization, and the Politics of Indifference*, in GLOBALIZATION: CRITICAL REFLECTIONS 205 (James H. Mittelman ed., 1996); Leo Panitch, *Rethinking the Role of the State in an Era of Globalization*, in GLOBALIZATION: CRITICAL REFLECTIONS, *supra*, at 83. This is akin to the argument that I develop in this Essay, to wit, that the State participates

this literature does not address current phases of globalization with equal specificity.<sup>23</sup>

One of my efforts here is, then, to blur some longstanding dualities in state scholarship, notably, those concerning the distinctive spheres of influence of, respectively, the national and the global, of state and non-state actors, and of the private and the public.<sup>24</sup> While it may indeed be that two sides of the duality are mostly separate and mutually exclusive, I argue that it is critically important to recognize and decipher conditions or components that do not fit into this dual structure. Borders and novel bordering capacities then function as a heuristic to detect deeper transformations.<sup>25</sup> An important methodological assumption here is that focusing on economic globalization can help disentangle some of these issues precisely because when the State strengthens the legitimacy of claims by foreign investors and firms and the legitimate authority of international regimes inside the country, it renders visible the process of accommodating these claims and authorities, locating them in what remain basically national economies and national polities.<sup>26</sup>

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in implementing the changes that weaken its role by regulating the economy and regulating traditional borders, but with a difference: I argue that a more detailed analysis of which components of the State do this work shows us that these components gain power even as the rest of the State loses power.

23. Perhaps the best example of this concept is raised by Eric Helleiner, who examines the regulatory changes brought on by the emergence of global financial systems and shows how States remain key actors, at least in the banking sector. Helleiner, *supra* note 14; *see also* Benjamin J. Cohen, *Electronic Money: New Day or False Dawn?*, 8 REV. INT'L POL. ECON. 197 (2001); Rachel Harvey, *The Subnational Constitution of Global Financial Markets*, in DECIPHERING THE GLOBAL, *supra* note 16, at 201–18.

24. *See* THE EVOLUTION OF POLITICAL KNOWLEDGE (Edward D. Mansfield & Richard Sisson eds., 2004) (containing papers by prominent international relations scholars addressing key issues regarding the State and the current features of the interstate system, and responses by scholars from fields other than international relations noting the shortcomings of the international relations scholarship in capturing the changes of the current period and their implications for our understanding of the role of the State).

25. *See* SASSEN, TERRITORY, *supra* note 2, at 148–221. I find interesting parallels in this context to debates surrounding types of legal jurisdiction, which are predicated on binaries, in situations in which these binaries become problematic. For instance, we now recognize and prioritize the natural habitats of fisheries in laws; and some modern laws recognize environmental priorities, even where fisheries cross national borders, a fact that in the past may have been given priority over those environmental issues. This example also can point to novel types of interactions between, and the shortcomings of, different jurisdictional approaches. *See, e.g.*, George A. Bermann, *International Regulatory Cooperation and US Federalism*, in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 373–84 (George A. Bermann et al. eds., 2000) (discussing tensions between U.S. federalism and participation in international regulatory markets); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) (articulating the limitations of “categorical federalism,” or a legal assumption binding laws to shifting local, national, and transnational jurisdictional boundaries).

26. Although in much of the world, privatization and deregulation have been constituted through the entry of *foreign* investors and firms, these dynamics can also be present

When the global gets constituted subnationally, however, it alters the national in ways that may be minor or major. At the least, national institutional encasements must be partially lifted. Even the process of state withdrawal from regulating the economy requires some participation by the State. Entry of private, often foreign, interests into this specific work of the State then raises a critical question: whether this entry constitutes a *new* form of state authority working alongside private authority or whether that private authority rather replaces established forms of state authority?<sup>27</sup> My argument is that the mix of processes we describe as globalization is indeed producing an incomplete yet significant form of authority deep within the national State, that is, a hybrid authority that is neither fully private nor fully public, neither fully national nor fully global.<sup>28</sup>

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when privatization and deregulation concern *native* firms and investors. See SASSEN, TERRITORY, *supra* note 2, at 222–76.

27. Several scholars began to focus on the nature of these interactions in the 1990s. See generally PAUL N. DOREMUS ET AL., *THE MYTH OF THE GLOBAL CORPORATION* (1998); *GLOBAL CAPITALISM VERSUS DEMOCRACY* (Leo Panitch & Colin Leys eds., 1999); Philip C. Cerny, *Structuring the Political Arena: Public Goods, States and Governance in a Globalizing World*, in *GLOBAL POLITICAL ECONOMY: CONTEMPORARY THEORIES* 21 (Ronan Palan ed., 2000); Ken Dark, *The Informational Reconfiguring of Global Geopolitics*, in *POLITICAL SPACE*, *supra* note 18, at 61; Boris Kagarlitsky, *The Challenge for the Left: Reclaiming the State*, in *GLOBAL CAPITALISM VERSUS DEMOCRACY*, *supra*, at 294–313; SUSAN STRANGE, *THE RETREAT OF THE STATE* (1996); Jan Aart Scholte, *Global Capitalism and the State*, 73 *INT'L AFF.* 427 (1997). One way in which to organize these major issues is to ask whether the role of the State is to *reduce* its own authority—for example, as suggested through deregulation, privatization, or, more generally, “less government”—or whether this role also requires the *production* of new types of regulations, legislative items, court decisions, or, in brief, a whole series of new “legalities.” I use this term to distinguish this production from “law” or “jurisprudence.” SASSEN, *LOSING CONTROL?*, *supra* note 11, at 1–30; see also Giselle Datz, *Global-National Interactions as Sovereign Debt Restructuring Outcomes*, in *DECIPHERING THE GLOBAL*, *supra* note 16, at 323.

28. Complicating this analysis is the fact that a wide variety of actors, including non-state actors, now share increased autonomy and influence over traditionally state functions. The literature on non-governmental organizations (NGOs), transnational NGOs (TNGOs), and associated forms of activism has generated interesting insights into the changed position of States in the context of multiple globalizations. Increasingly, activist groups can constitute themselves as part of global horizontal networks. Such networks are fed by the recurrence of critical conditions and struggles in multiple countries around the world. Environmental and human rights activists tend to be more oriented toward other such groups across the globe than toward their neighbors. The same happens in highly specialized professional and scientific fields in a context in which their home institutions, whether national governments or universities, are increasingly having to respond to the globalization of more and more of their work. Finally, another instance might be the increasingly global circuits for art *biennales*, international exhibits, and festivals. These are far less formalized entities than global firms, but they are also producing such transversal borderings. The work of developing and globalizing competition policy, accounting and financial reporting standards, environmental and human rights rules, and many others strengthen both global standardization and the formation of cross-border networks of the particular experts and activists involved. See, e.g., P.N. HOWARD, *NEW MEDIA CAMPAIGNS AND THE MANAGED CITIZEN* (2006); MARGARET E. KECK & KATHRYN

In the next Section, I examine how States that implement cross-border regimes must undergo significant transformations. Entry into the global economy requires the domestic development—through legislative acts, court rulings, or executive orders—of those mechanisms necessary to develop and protect the new rights/entitlements of the “foreign capital”<sup>29</sup> now present in national territories, in principle under the exclusive authority of their States.<sup>30</sup>

## II. NATIONAL BORDERS AND SUBNATIONAL SCALINGS OF THE GLOBAL

As components of national States become the institutional home for the operation of dynamics central to globalization, they undergo changes that are difficult to register or name. This is one instantiation of a process

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SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); VALENTINE M. MOGHADAM, *GLOBALIZING WOMEN: TRANSNATIONAL FEMINIST NETWORKS* (2005); ROBERT O'BRIEN ET AL., *CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS* (2000); Tennant, *supra* note 16, at 117–136. *But cf.* ANDRÉ C. DRAINVILLE, *CONTESTING GLOBALIZATION: SPACE AND PLACE IN THE WORLD ECONOMY* (2005) (rejecting, in part, the notion that these non-state actors actually represent a politics that undermines existing forms of authority, including that of the State). Globalization is also producing a variety of global networks to combat emergent global agents such as trafficking gangs. *See, e.g.*, Global Survival Network, <http://www.witness.org/> (last visited June 21, 2009); Coalition to Abolish Slavery and Trafficking (CAST), <http://www.castla.org/news/resources.htm> (last visited June 21, 2009). A new instance of global networking has come under recent scrutiny in academic literature in the wake of the September 11, 2001 attacks on the World Trade Center, that is, the use of the global financial system and the international immigration regime by international organized terrorist groups. *See, e.g.*, UNDERSTANDING SEPTEMBER 11 (Craig Calhoun et al. eds., 2002).

29. Seen from the perspective of firms and investors operating transnationally, the objective of this transformation is to enjoy the protections traditionally exercised by the State in the national realm of the economy for national firms, notably guaranteeing property rights and contracts. How this transformation is accomplished may depend on the differences between market-based economies. *See* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001) [hereinafter *VARIETIES OF CAPITALISM*]. It may also depend on the particular issue in question. *See, e.g.*, Cutler et al., *supra* note 13; PRIVATE AUTHORITY, *supra* note 14; Schwarcz, *supra* note 13.

30. Two very different bodies of scholarship, which develop lines of analysis that can help in capturing some of these conditions, build on the earlier work of James Rousenau, and particularly his examination of the domestic “frontier” inside the national State. *See* JAMES N. ROSENEAU, *ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD* (1997); R.B.J. WALKER, *INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY* (1993) (problematizing the inside/outside distinction in international relations theory). For an interesting variant on this subject that examines the proliferation of global non-state-centered networks in the case of Africa, see *INTERVENTION AND TRANSNATIONALISM IN AFRICA: GLOBAL-LOCAL NETWORKS OF POWER* (Thomas Callaghy et al. eds., 2001).

that I call “incipient denationalization,”<sup>31</sup> a process I always intend to be conditioned on what was historically *constructed* as national.

This partial, often highly specialized or at least particularized, denationalization can take place in any number of domains. For example, recent developments in the human rights regime increasingly make it possible for a plaintiff in a given country to sue a firm<sup>32</sup> (or even a dictator) in that country’s courts. Similarly, the human rights regime can be used to grant undocumented immigrants certain rights. Denationalization is, thus, multivalent: it endogenizes global agendas of many different types of actors, not only those of corporate firms and financial actors, but also those pursuing human rights objectives.

The process of denationalization, therefore, raises interesting questions for research: how has our conception of “national” changed as a result of globalization? And, relatedly, what about those institutional components of States responsible for the implementation and regulation of economic globalization remains “national,” as opposed to “local,” “transnational,” or “global”?

The hypothesis here would be that some components of national institutions, although formally national, are not national in the sense in which we have constructed the meaning of that term over the last one hundred years. One of the roles of the State vis-à-vis today’s global economy is to negotiate the intersection of national law and foreign actors—whether firms, markets, or supranational organizations. This raises a question as to whether there are particular conditions today that make execution of this role distinctive and unlike execution in earlier phases of the world economy. It also raises a question about the appropriateness of the primacy given (theoretically and politically) to the opening of borders as an indicator of globalization.<sup>33</sup> But the most significant question is to what extent particular components of the national State have endogenized the global. A critical example of this second dynamic includes the implementation in most countries of policies that privilege the control of monetary inflation over employment growth, one requirement for the development of global capital markets. Another instance is the partly non-formalized “transnational process” by which human rights enter a national legal system and eventually become part of national law.<sup>34</sup>

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31. See generally SASSEN, *TERRITORY*, *supra* note 2.

32. See Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 *HASTINGS INT’L & COMP. L. REV.* 401 (2002).

33. In my reading, this opening, though visible, is but one indicator of globalization.

34. See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *HOUS. L. REV.* 623 (1998).



A deeper analysis of deregulation provides a helpful prism through which to view the changing nature of the State in the process of globalization. It is becoming clear that the role of the State in the process of deregulation involves the production of a series of instruments that grant foreign actors and international regimes rights to the territory of the State in a way that represents at least a partial rupture from historic notions of sovereignty. These entrees have given rise to a proliferation of specialized, semi-autonomous regulatory agencies and the specialized cross-border networks they create, which are taking over functions once enclosed within national legal frameworks.<sup>35</sup> One way of conceptualizing the effect of these instruments, then, is to posit that they produce new types of borders deep inside the territory of the national State. They do not shift the geographic line that demarcates the "border" recognized in international treaties; rather, they produce new borders and they change the institutional apparatus that gives content to the geographic border.

This analysis provides a critical insight: that processes that do not necessarily scale at the global level as such yet still can be part of globalization. These processes take place deep within territories and institutional domains that have largely been constructed in national terms. What makes these processes part of globalization even though located in national, indeed subnational, settings is that they involve transborder networks and formations that connect and articulate local or "national" actors and processes. Among these processes, I include particular aspects of the work of States, such as the above-mentioned monetary and fiscal policies, which are critical to the constitution of global markets and are thus being implemented in a growing number of countries entering global markets. Another example can be found in cross-border activist networks that are engaged in specific, localized

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35. This grant of entry into the national territory to foreign and international actors can be seen in specific examples in a variety of domains. See generally VARIETIES OF CAPITALISM, *supra* note 29 (describing the enormous variety of ways in which capitalism is organized in different countries). There are several texts influential in shaping some of the dominant strands of the literature. See, e.g., JOHN H. DUNNING, ALLIANCE CAPITALISM AND GLOBAL BUSINESS (1997) (describing specific aspects of international business collaboration); GLOBAL COMPETITION POLICY (Edward M. Graham & J. David Richardson eds., 1997) (discussing competition policy). For earlier influential works, see LEAH A. HAUS, UNIONS, IMMIGRATION, AND INTERNATIONALIZATION: NEW CHALLENGES AND CHANGING COALITION IN THE UNITED STATES AND FRANCE (2002) (discussing a very different domain, namely the new opening of top leadership positions in a growing number of unions to organizing immigrants); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (treating networks among members of the judiciary); Symposium, *The Internet and the Sovereign State: The Role and Impact of Cyberspace on National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 415 (1998) (discussing the impacts of technology networks on state sovereignty). Finally, for one of the best treatments of the subject of networks and their implications for law, see BENKLER, *supra* note 7.

struggles yet have an explicit or implicit global agenda. For example, many human rights and environmental organizations have non-cosmopolitan, global politics and imaginaries that are deeply attached or focused on localized concerns, yet participate in global lateral networks containing other parallel, localized efforts. A particular challenge of the work of identifying such processes and actors as part of globalization is that doing so requires decoding at least some of what continues to be experienced and represented as national.

Important to the argument in this Essay is the thesis that these types of nation-based practices and dynamics can be conceptualized as constitutive of scalings that are de facto global but not usually recognized nor formalized as such. This brings to the fore internal and novel borderings produced in the encounter between a global process—whether economic, cultural, political, or subjective—and thick national environments. This encounter can assume many different shapes and contents. It can be a highly charged event with multiple individual, institutional, and/or structural contestations, victories and retreats on each side. Or, it can be a highly specialized insertion likely noticeable only within that specialized domain, as might be the case with some of the new standards in finance and accounting.

The research needed to get at these types of issues can vary enormously depending on their content (political, economic, cultural, or subjective), location (institutional, structural, demographic, or subjective), and level of formality. Yet, cutting across this variability is the need to distinguish (a) the various scales constituted through global processes, ranging from supranational and global to subnational and trans-local,<sup>36</sup> and (b) the specific site of a given object of study within this multi-scalar globalization.<sup>37</sup> Geography, more than any other of the social sciences

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36. See generally CITIES IN GLOBALIZATION: PRACTICES, POLICIES, AND THEORIES (Peter J. Taylor et al. eds., 2007) (examining novel ways in which cities are now actors in international or global domains once exclusive to national States); SANJEEV KHAGRAM, DAMS AND DEVELOPMENT: TRANSNATIONAL STRUGGLES FOR WATER AND POWER (2004) (illustrating an example of transborder activist networks engaged in local struggles with a global agenda, and the potential for such struggles when they concern an issue shared by most countries—in this case, water); NATALIA RIBAS-MATEOS, THE MEDITERRANEAN IN THE AGE OF GLOBALIZATION: MIGRATION, WELFARE, AND BORDERS (2005) (discussing the factors and effects of globalization in a defined geographic region); ROBERT C. SMITH, MEXICAN NEW YORK: TRANSNATIONAL LIVES OF NEW IMMIGRANTS (2006) (illustrating transnational life and its domestic connections); TRANSNATIONALISM FROM BELOW (M. Peter Smith & Luis E. Guamizo eds., 1998); Peter J. Taylor, *World Cities and Territorial States: The Rise and Fall of their Mutuality*, in WORLD CITIES IN A WORLD-SYSTEM 48 (Paul L. Knox & Peter J. Taylor eds., 1995) [hereinafter WORLD CITIES].

37. See, e.g., Richard Howitt, "A World in a Grain of Sand": Toward a Reconceptualization of Geographical Scale, 24 *AUSTL. GEOGRAPHER* 33 (1993); Andrew E.G. Jonas, Editorial, *The Scale Politics of Spatiality*, 12 *ENV'T & PLANNING D: SOC'Y & SPACE* 257

today, has contributed to a critical stance toward scale, recognizing the historicity of scales and resisting the reification of the national scale so present in most of social science.<sup>38</sup>

This, in turn, calls for a critical conceptual task: the need to decode particular aspects of what is still represented or experienced as “national,” which may, in fact, have shifted from its historical conception. In many ways, this research and theorization logic is the same as that developed and used in studies of the economics of the “global city.”<sup>39</sup> But, while a growing number of scholars today have come to recognize and code subnational global city functions as part of the global, globalization scholars outside of this literature continue to code other subnational instances of the global as local and national.

Analysis of three examples will help to illustrate some of the conceptual, methodological, and empirical issues raised in studies aimed at detecting the global inside the national, signalling the existence of novel types of borderings. The first concerns the role of “place” in many of the circuits constitutive of economic and political globalization. A focus on place allows us to unbundle the concept of globalization as a function of multiple specialized cross-border circuits on which different types of places are located.<sup>40</sup> For example, to repeat, global cities are conceptualized as subnational places where multiple global circuits intersect; they are, therefore, positioned on several structured cross-border geographies, each of which typically has a distinct scope and is constituted by distinct practices and actors.<sup>41</sup> Analysis of place and circuits produces different

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(1994); Doreen Massey, *Politics and Space/Time*, in PLACE AND THE POLITICS OF IDENTITY 141 (Michael Keith & Steve Pile eds., 1993).

38. There is a large literature in geography on scale. The following examples address a range of issues that can be examined in scalar terms. See generally Paul C. Adams, *Protest and the Scale Politics of Telecommunications*, 15 POL. GEOGRAPHY 419 (1996); John Agnew, *Representing Space: Space, Scale and Culture in Social Science*, in PLACE/CULTURE/REPRESENTATION 251 (James Duncan & David Ley eds., 1993); Neil Brenner, *Global Cities, Glocal States: Global City Formation and State Territorial Restructuring in Contemporary Europe*, 5 REV. INT’L POL. ECON. 1 (1998); Howitt, *supra* note 37; Lynn A. Staeheli, *Globalization and the Scales of Citizenship*, 19 GEOGRAPHY RES. FORUM 60 (1999).

39. See generally SASSEN, THE GLOBAL CITY, *supra* note 21.

40. Elsewhere, I examine the emergence of forms of globality centered on localized struggles and actors who are part of cross-border networks. This is a form of global politics that runs not through global institutions, but through local ones. SASSEN, TERRITORY, *supra* note 2, at 329–77.

41. For instance, at least some of the circuits connecting São Paulo to global dynamics are different from those of Frankfurt, Johannesburg, or Mumbai: São Paulo exports coffee; Frankfurt, financial instruments; Johannesburg, diamonds; Mumbai, gold jewelry. Each of these cities has dozens of such specialized global circuits. Further, distinct sets of overlapping circuits contribute to the constitution of distinctly structured cross-border geographies; for instance, as globalization strengthened in the 1990s, there was an intensifying of older hegemonic geographies, such as the increase in transactions among New York, Miami, Mexico City, and São Paulo. See, e.g., Christof Pamreiter, *Mexico: The Making of a Global City: Mex-*

insights into globalization than do analyses centered on global firms and markets, international trade, or the pertinent supranational institutions. While one focus is not necessarily better than the other, each provides information that the other does not about globalization.

A second example that provides insight into the ways in which we can find the global within the national is the consideration of the effects of digital interactive technology on local actors; specifically, these technologies can assist in repositioning the "local." For instance, aided by new technology, a financial services firm can become a microenvironment with continuous global span. But so too can households and resource-poor organizations, a phenomenon increasingly observed in the case of activist organizations. These microenvironments can be oriented to other such microenvironments located far away, thereby destabilizing both the notion of context, which is often imbricated with that of the local, and the notion that physical proximity is one of the attributes or markers of the local. A critical reconceptualization of the local along these lines entails an at least partial rejection of the notion that local scales are inevitably part of nested hierarchies of scale running from the local to the regional, national, and international.

A third example of locating the global within what historically has been considered the national concerns a specific set of interactions between global dynamics and particular components of national States. The crucial conditionality here is the partial embeddedness of the global in the national, of which the global city is perhaps emblematic. My main argument here is that, insofar as specific structurations of the global now inhabit space that has historically been constructed and institutionalized as national territory, this transformation engenders a variety of negotiations. One set of outcomes evident today is what I describe as an incipient, highly specialized, and partial denationalization of specific components of national States.

In all three examples, the question of scaling takes on very specific contents: each involves practices and dynamics that, I argue, pertain to the constituting of the global yet are taking place at what has been historically constructed as the scale of the national. With few exceptions, the social sciences have not had critical distance, that is, historicized, the scale of the national. The consequence has been a tendency to take it as a

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*ico City*, in GLOBAL NETWORKS, LINKED CITIES 145 (Saskia Sassen ed., 2002); Sueli Ramos Schiffer, *São Paulo: Articulating a Cross-Border Region*, in GLOBAL NETWORKS, LINKED CITIES, *supra*, at 209. A similar effect has been seen in newly constituted geographies, such as the articulation of Shanghai with a rapidly growing number of cross-border circuits. See XIANGMING CHEN, *AS BORDERS BEND: TRANSNATIONAL SPACES ON THE PACIFIC RIM* (2005); Felicity Rose Gu & Zilai Tang, *Shanghai: Reconnecting to the Global Economy*, in GLOBAL NETWORKS, LINKED CITIES, *supra*, at 273.

fixed scale, reifying it, and, more generally, to neutralize the question of scaling, or at best to reduce it to a hierarchy of size. Associated with this tendency is also the often uncritical assumption that these scales are mutually exclusive and, most pertinently for my argument here, that the scale of the national is mutually exclusive with that of the global. A qualifying variant which allows for mutual imbrications, though of a very limited sort, can be seen when scaling is conceived of as a nested hierarchy.<sup>42</sup>

### III. NATIONAL BORDERS AND SUBNATIONAL BORDERINGS

The three cases briefly indicated above resist the types of assumptions and propositions underlying what today is referred to as “methodological nationalism”<sup>43</sup>. But they do so in a distinct way. Crucial to existing criticisms of methodological nationalism is the need for

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42. In my early research on the global city, I began to understand some of these questions of reified scales. Much of the earlier literature on global and world cities provided a critical appraisal of questions of scaling, but with important exceptions. See Brenner, *supra* note 38 (providing an embryonic appraisal of scaling and globalization); Taylor, *supra* note 36, at 48–62 (introducing consideration of the State in understanding the rise of cities in the current era). This early literature is confined to nested scalings. Later scholarship focusing on “glocalization,” on the other hand, recognizes and theorizes questions of scale but often remains attached to a notion of nested scalings. I find that among the literature in geography that comes closest in its conceptualization to that which I develop in this Essay—albeit focused on very different issues—is the literature on claims of rights by indigenous peoples. For early and pioneering work on this topic, see Howitt, *supra* note 37; Claudia Notzke, *A New Perspective in Aboriginal Nature Resource Management: Co-Management*, 26 GEOFORUM 187 (1995); Steven E. Silvern, *Scales of Justice: Law, American Indian Treaty Rights and Political Construction of Scale*, 18 POL. GEOGRAPHY 639 (1999). Clearly, this literature particularly illuminates the positioning of the issues addressed in this Essay because, from the outset, there are (a) two exclusive claims over a single territory, and (b) endogeneity of both types of claims—that of the modern sovereign and that of the indigenous nation. My Essay similarly addresses the coexistence of the claim of the historical sovereign and the claim of the global as endogenized in the reconstituted sovereign. For a full development of this somewhat abstract statement, see SASSEN, TERRITORY, *supra* note 2, at 1–23, 378–423.

43. Methodological nationalism tends to be present in just about all the social sciences. See SASKIA SASSEN, *A SOCIOLOGY OF GLOBALIZATION* ch. 1 (2007). It is the norm in sociology and in political science, two disciplines in which data are collected at the national level and some of the most advanced methods and data sets require closure of the unit of analysis, i.e. the nation-state. The result is a tendency to examine and to interpret issues from the perspective of the nation-state and/or the national State. Indeed the legal scholar Harold J. Berman argues that this national perspective also dominates legal interpretation of early law, and thereby obscures certain connections, notably that so-called new canon law actually fed the development of secular law. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 361–63 (1983). I discuss this in TERRITORY, AUTHORITY, RIGHTS, at 46–48; *id.* ch. 2. I add a twist to the discussion about methodological nationalism through my insistence that the national, as in national territory but also as in national institutions, can undergo processes of denationalization, which needs to be factored into the critique. *Id.* chs. 1, 8–9.

transnationalism: that is, the “nation as container” category is shown to be inadequate given the proliferation of dynamics and formations that expand beyond nation-state borders.<sup>44</sup> My criticism of methodological nationalism, on the other hand, focuses on reasons *other than* transnationalism: the “nation as container” model is undermined by the fact that multiple and specific structurations of the global now exist *inside* what has historically been constructed as national. In many ways, I focus on the other end of the transnationalism dynamic: I look inside the national.<sup>45</sup> Further, I posit that, because the national is thick and highly institutionalized, structurations of the global inside the national have necessarily involved an incremental, partial, and highly specialized denationalization of particular components of the national. Legibility of this transformation is limited by the fact that it can take place through national institutional or legal channels. For instance, central banks began to privilege anti-inflation criteria over job growth as part of national monetary policy in the 1980s. This emphasis meets the needs of only some sectors, notably the finance sector, and particularly the development of global financial markets. Yet these priorities are presented as necessary for the whole economy. Mine is, then, a critique of methodological nationalism with a starting point not exclusively predicated on the fact of transnationalism, but rather on the possibility of internal denationalization.

One analytic pathway to understanding this bundle of empirical and conceptual issues is to disaggregate state-centered border regimes and to locate a given site in a global web of bordered spaces. A key analytic distinction to be made is between the ongoing presence of border regimes centered in the State and the interstate system, on the one hand, and the emergence of the types of novel borderings associated with the multiplication of subnational global scalings discussed above, on the other.

State-centered border regimes have undergone significant changes following the rise of globalization; neoliberal, supranational regimes; and new forms of private authority, even while they have remained part of older formalizations, such as international treaties. We now see a great diversity of institutional locations among state-centered regimes. Considering the cross-border flow of capital from flows of goods can help clarify this idea. Moving capital across borders requires a sequence of interventions that moves deep inside the national institutional apparatus and differs in character from movement of traded goods. While goods transfer requires an actual, geographic border crossing, capital transfer

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44. See BECK, *supra* note 9; Taylor, *supra* note 9.

45. Chen's recent work also conducts a similar analysis. See CHEN, *supra* note 41.

does not (unless actual cash is transported). In each case, however, individual border-control intervention points can be understood as sites in a chain of locations, which are not necessarily located along national borders. For example, traded goods might have to pass through a pre-border inspection or certification site. In the case of capital, the chain of locations likely will involve banks, stock markets, and electronic networks. Thus, while financial and trade bordering functions each contain specific institutional and geographic locations, the geographic borderline is but one point in the chain. And, institutional border-control intervention points increasingly form long chains continuing inside the country.

This notion of multiple locations comes into focus when we consider that "sites" for border regime enforcement may range from banks to objects to bodies. When a bank executes the most elementary money transfer to another country, the bank is a site for border-regime enforcement. By contrast, when a certified good (such as an agricultural product) crosses a border, the object itself is one of the sites for enforcement. Finally, this concept also encompasses the example of a tourist carrying a tourist visa and an immigrant carrying the requisite certification; indeed, in the case of immigration, it is the body of the immigrant herself which is both the carrier of much of the regime and the crucial site for enforcement. Similarly, in the case of an unauthorized immigrant, it is, again, the body of the immigrant that is the carrier of the violation of the law and of the corresponding punishment (such as detention or expulsion).

A direct effect of globalization, especially corporate economic globalization, has been to create increasing divergence among different border regimes. Sometimes these divergences are the effect of enormous specialization and are rather obscure; other times, they are elementary. One familiar example is the lifting of border controls on a growing variety of capital, services, and information flows alongside increased tightening of other border regimes, such as those controlling migration of low-wage workers. We are also seeing the construction of specific border regimes to contain and govern emerging, strategic, and/or specialized flows cutting across traditional national borders. For example, new (and divergent) regimes in the North American Free Trade Agreement (NAFTA) and subject to the General Agreements on Tariffs and Trade (GATT) now govern the cross-border circulation of high-level professionals,<sup>46</sup> where in the past these professionals might have been part of a country's general immigration regime.

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46. SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* 55-76 (1998); SASSEN, *LOSING CONTROL?*, *supra* note 11, at 87-88.

In what follows, I examine briefly some of the key analytic distinctions we might use in researching these emergent questions about national territory, old borders, and novel types of borderings within national territory. First I discuss what it might mean to study a subnational site as part of global processes and hence to recognize the formation of novel types of borderings. Next, and to conclude, I focus on the larger issues of territory and state authority raised at the beginning of this paper by examining two novel types of bordering dynamics as these intersect with the national territorial authority of the State: namely the emergent global law systems and interactive digital domains. In doing so, I focus particularly on the destabilized meaning of conventional borders under the impact of multiple forms of globalization.

#### *A. Positioning a Site in a Global Web of Borders*

If we were to consider what might be involved in locating an economic site in a global web of borders, under my research practice a first step would be to conceive of the global economy as constituted through: (a) a set of specialized/partial circuits; and (b) multiple, often overlapping space economies.<sup>47</sup> Thus, the question we would ask is: how is the given area articulated with various circuits and space economies?

The articulation of a site with global circuits can be direct or indirect, and as part of long or short chains. An instance of a direct articulation would be a site located on a specialized global circuit, such as those created by export forestry, a mine, offshore manufacturing, or offshore banking. An instance of an indirect articulation, on the other hand, might be a site located on national economic circuits, such as a site for the production of processed consumer goods, whose market is major distributors who export through multiple complex national and foreign urban markets. The chains of transactions involved likely would be shorter in the case of extractive industries than in the case of manufacturing, especially consumer goods manufacturing where export/import handlers and multiple distributors would likely be part of the chain.

In considering the second element, it is important to recognize, first, that a given site can be constituted through one or more space economies,<sup>48</sup> and, second, that none, one, or several of these might be global

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47. The use of the notion of space economy allows me to distinguish an operational space for a sector or a firm that cuts across the more institutionalized understanding behind such terms as "national" economy. With the growth of global transactions, and in a setting in which States regulate their borders much less for cross-border economic activities, we need such distinctions.

48. For example, a forestry site or an agricultural site is likely to be constituted through fewer space economies than a financial center or a manufacturing complex. The reason for this



space economies. It seems to me crucial to disaggregate a site along these lines and not to reify an area because space economies can be far more complex than common sense might suggest. For example, a sparsely populated area such as a logging site might be located on only one global circuit (that of an international logging company that has contracted for all the wood produced from the site). However, that multinational's acquisition of the wood might require it to satisfy a number of requirements typically executed via specialized corporate services (notably accounting and law). Further, as the multinational would likely require financing, it would be subject to national securities regulations.

We might then say, therefore, that the forestry site is actually constituted through several space economies, but at least two: logging and specialized corporate services. It is likely also to be part of a third space economy, that of global financial markets. For instance, if the logging company were part of a stock exchange listing, it may have "liquidated" the logs by converting them into derivatives that could then circulate as financial instruments in the global capital market.<sup>49</sup> In doing so, it would have inserted itself into this third space economy.<sup>50</sup>

There is a kind of analytics that emerges out of the particularity of this discussion of state-centered border regimes and the empirical work of locating a site that is part of a global web of state-centered border regimes. These are analytics that aim to disaggregate the border function into its object, locations, and sites for enforcement. The effect is to make legible the multiple territorial, spatial, and institutional dimensions of "the border."

### B. *Disembedding the Border from Its National Encasements*

A critical component changing the field of forces within which modern States operate is the proliferation of private authorities capable of

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is the fact that the forestry site is a single economic space, in contrast to a manufacturing complex, which requires inputs from other economic sectors (metal, plastic, wood) and possibly other manufacturing sectors (if it produces components, for instance).

49. Finally, there is a temptation to say that a spent, used-up, sparsely populated area—for instance, a completely logged forest—constitutes "dead land" on an otherwise dynamic global (logging) circuit. As a key articulation of that site remains that global logging circuit, to keep the dead site on the circuit that caused its death is part of a critical social science. There is no good reason to render it invisible. Making it visible captures a longer trajectory, including an original condition of earth that is alive, and a process that devastated the circuit's original condition.

50. Notably, this insertion into global financial markets is distinct from the financing of the actual logging work. It relates to the ability of global finance today to liquefy even the most immobile material good, such as real estate, so that it may circulate as a profit-making financial instrument in the global capital market, in addition to the profit-making potential of the material good itself.

undertaking functions historically performed by States. These include the expansion of older systems into new economic sectors (for example, the emergence of arbitration in complex commercial disputes), as well as the development of new, highly specialized forms of private authority oriented toward specific economic sectors (such as new rules governing operations of multinational construction and engineering firms).

One outcome of this trend is the emergence of a strategic field of operations that represents a partial disembedding of specific bordering operations from the broader institutional world of the State geared to national agendas. It is a fairly rarefied field of cross-border transactions aimed at addressing the new conditions produced and demanded by economic globalization. The transactions are strategic, cut across borders, and generally entail specific interactions among private actors, and, at times, government agencies or officials. They do not involve the State as such, as would international treaties; rather, these transactions advance the operations and aims of private actors, in this case, mostly firms and markets aiming to globalize their operations. These transactions cut across borders in that they concern standards and regulations imposed on firms and markets operating globally; in so doing, these transactions push toward convergence among state laws that are aimed at creating the requisite conditions for globalization.

There are two distinct features about this field of transactions that lead me to posit that we can conceive of it as a disembedded space that is in the process of being structured. The first is that while operating in familiar settings—the state and interstate system in the case of government officials and agencies, and the supranational system and the private sector in the case of non-state economic actors—the practices of these agents are constituting a distinct field that assembles bits of territory, authority, and rights into new types of specialized and, often, highly particularized structures. The field of practices getting constituted cannot be confined to the institutional world of the interstate system.

The second feature is the proliferation of rules that begin to assemble into new systems of law. Here, we enter a whole new domain of private authorities that are fragmented, specialized, increasingly formalized, but not located in national law *per se*. This proliferation of specialized, mostly private or supranational systems of law is significant in that it signals the destabilizing of conventional understandings of national borders.

Two extreme instances of these dynamics are captured in the examples of emerging global law systems and interactive digital domains, such as electronic financial markets. Global law systems are not centered in state law, that is to say, they are to be distinguished from both national

and international law. And global digital interactive domains are mostly informal, hence outside the existing treaty system; they are often basically ensconced in subnational localities that are part of cross-border networks. The formation of these two distinct systems entails a multiplication of bordered spaces. Yet, the national notion of borders as delimiting two sovereign territorial States is not quite in play. Instead, the bordering operates at either a transnational, supranational, or subnational scale. Further, although these networks may cross national borders, they are not necessarily part of the new open-border regimes that are state-centered, such as those of the global trading system or legal immigration. Insofar as these are global bordered domains, they entail a novel instance of the notion of borders.

### 1. Toward Global Law Systems

One, perhaps extreme, example that illustrates how current processes may disembed national borders from their national encasements is the recent formation of global law systems.<sup>51</sup> Over the last two decades, we have seen a multiplication of cross-border systems of rule that evince variable autonomy from national law. At one end are systems clearly centered in what is emerging as a transnational public domain, and at the other, systems that are completely autonomous and largely private.

Some scholars see in this development an emergent “global law,” which we might conceive of as a type of law disembedded from national law systems. At the heart of this notion of a single global law lies a system, first, that is not centered in national law and, second, that goes beyond the project of harmonizing different national laws into a coherent system. In actuality, there has been rapid growth over the last decades of such autonomous, highly differentiated systems of rules, some connected to the supranational system but not centered in national law, while others privatized and autonomous.<sup>52</sup>

There is disagreement, however, about the existence of a true global law. While some scholars have long argued that there is no such entity,<sup>53</sup>

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51. For a fuller development of this idea, see SASSEN, TERRITORY, *supra* note 2, at 264–68.

52. The work of Gunther Teubner is among the most radical efforts to differentiate among national, international, and global law. *See, e.g.*, Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3 (Christian Joerges et al. eds., 2004). In contrast, Dezalay and Garth have a more pragmatic understanding. *See, e.g.*, YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

53. *See, e.g.*, Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 63 (1993). Shapiro finds that law and the political structures that produce and sus-

their analysis recognizes increasing internationalism in the law, suggesting that they might accommodate its presence if they were writing today.<sup>54</sup> Whatever the approach, these scholars prefer to conceive of global law as a site in which multiple, competing national systems interact. For instance, Yves Dezalay and Bryant Garth note that the “international” is itself constituted largely out of a competition among national approaches.<sup>55</sup> Thus, the international emerges as a site for regulatory competition among essentially national approaches on any number of issues, including environmental protection, constitutionalism, and human

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tain it are far more national and far less international than are trade and politics as such. He argues that it is not certain that law itself is universal—that is, that human relations anywhere in the world are governed by even differing rules of law. *Id.* Further, he notes that there is not a strong international law regime maintained by a single global lawmaker and enforcer or through nation-state consensus. He also posits that if there were, it would create *international* rather than *global* law. Globalization of law, he argues, refers to a very limited, specialized set of legal phenomena, which will almost always refer to North America and Europe, only sometimes to Japan and to some other Asian countries. *Id.* at 37–38; see also Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 314–17, 319 (2002). Berman’s article begins by surveying the myriad ways that increasing globalization of communication, travel, and trade, and in particular the rise of the Internet, have forced judges and legal scholars to “adapt” traditional legal jurisdictional rules to the new economic and social environment. Though these issues arise in a variety of doctrinal areas and may involve a wide range of different legal and policy concerns, they all touch on the idea of legal jurisdiction, that is, the circumstances under which a juridical body can assert authority to adjudicate or apply its legal norms to a dispute. And, in each of these cases, the question is complicated by the fact that jurisdiction may be asserted in one physical location over activities or parties located in a different physical location. Rather, jurisdiction is the locus for debates about community definition, sovereignty, and legitimacy. In addition, the idea of legal jurisdiction both reflects and reinforces social conceptions of space, distance, and identity.

54. See Shapiro, *supra* note 53, at 39 (“For whatever reasons, it is now possible to argue that American business law has become a kind of global *jus commune* incorporated explicitly or implicitly into transnational contracts and beginning to be incorporated into the case law and even the statutes of many other nations.”) Shapiro notes that there have been a few particular common developments and many particular parallel developments in law across the world. For example, as a concomitant of the globalization of markets and the organization of transnational corporations, there has been a move toward a relatively uniform global contract and commercial law. This can be seen as a private lawmaking system through which two or more parties create a set of rules to govern their future relations. Such a system of private lawmaking could exist transnationally even in the absence of a transnational court. For how some of these issues play out in a very different domain, see Lars-Erik Cederman & Peter A. Kraus, *Transnational Communication and the European Demos*, in *Digital Formations* 283–311 (Robert Latham & Saskia Sassen eds., 2005); see also JODI DEAN ET AL., *REFORMATTING POLITICS: INFORMATION TECHNOLOGY AND GLOBAL CIVIL SOCIETY* (2006).

55. For further elaboration, see generally DEZALAY & GARTH, *supra* note 52, who develop the proposition that the “international” is itself constituted largely from a competition among national approaches. Much of the scholarship on global governance comes from this type of perspective. For a detailed examination of technical issues in international arbitration that illuminates some of this harmonizing of differences, see, e.g., Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT’L L. 1183 (2004).

rights.<sup>56</sup> For other scholars, there is indeed an emerging global law, centered in the development of autonomous, partial regimes.<sup>57</sup> The Project on International Courts and Tribunals (PICT)<sup>58</sup> has identified approximately 125 international institutions through which independent authorities reach final legal decisions.<sup>59</sup> These operate through courts, quasi-courts, arbitral bodies, and other dispute resolution fora,<sup>60</sup> as well as in the public and private domains.<sup>61</sup> Further, the number of private systems has grown sharply in the last decade, as the vast literature of globalization has shown.<sup>62</sup>

The formation of these novel global regimes is not necessarily premised on the integration, harmonization, or convergence of national legal orders. Rather, these regimes also produce novel types of borderings, notably through the juridification of the regime; this, then, often entails an insertion of a distinctly bordered space into a national territory marked by its own specific bordering—the conventional border. In this sense, these new regimes are distinct from, for example, the international economic laws arising out of the WTO's Agreement on Trade-Related

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56. These are issues that have been around for a relatively long time. See David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L.J. 423 (1991); Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993). There are two other categories that may partly overlap with internationalization as Americanization, but which are important to distinguish analytically. One is traditional multilateralism and the other is what John Gerald Ruggie has called "multiperspectival state identities," which incorporate whatever the critical range of perspectives present in a given international domain. JOHN GERARD RUGGIE, *CONSTRUCTING THE WORLD POLITY* 26–27 (1998); see also Paul Schiff Berman, *supra* note 53, at 441.

57. See Teubner, *supra*, note 52.

58. The Project on International Courts and Tribunals (PICT) was founded in 1997 by the Center on International Cooperation (CIC), New York University, and the Foundation for International Environmental Law and Development. From 2002 onward, PICT has been a common project of the Centre for International Courts and Tribunals, University College London. See Project on International Courts and Tribunals, <http://www.pict-pecti.org> (last visited June 20, 2009) [hereinafter PICT].

59. *Id.*

60. To name a few, they include the International Criminal Court, the International Maritime Court, regional human rights tribunals, various reparations tribunals, hybrid international-national tribunals, trade and investment judicial bodies, convention- and treaty-derived institutions such as the European Free Trade Association Court, and other regional courts, such as the European Court of Justice and the Benelux Court of Justice. *Id.*; see also DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (1999) (on human rights); Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003) (on hybrid courts).

61. See, e.g., Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69 (2003) (arguing that insofar as international arbitration transcends national borders and has an American influence, its practitioners—inevitably shaped by their own experiences in arbitrating—also increasingly incorporate American notions into the process); Carbonneau, *supra* note 55.

62. See sources cited *supra* notes 13–15.

Aspects of International Property Rights (TRIPS), which require Member States to institute specific regulations within their national legal systems. As Gunther Teubner recognizes, there is a multiplication of sectoral regimes that overlay national legal systems.<sup>63</sup> The outcome is a foundational transformation of the criteria for differentiating law. At issue is not the law of nations, nor the distinction between private and public, but rather the recognition of multiple specialized and segmented processes of juridification, which today are largely private. Teubner explains: "Societal fragmentation impacts upon law in a manner such that the political regulation of differentiated societal spheres requires the parcelling out of issue-specific policy-arenas, which, for their part, juridify themselves."<sup>64</sup> From this perspective, global law is segmented into transnational legal regimes, which define the "external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for themselves."<sup>65</sup>

To take a concrete example, a type of private authority that illustrates some, though by no means all, of these issues can be seen in the so-called *lex constructionis*, or, the combination of rules and standard contracts governing cross-border construction projects.<sup>66</sup> This example combines (a) the notion of an autonomous global system of rules internal to an economic sector with (b) the fact that a few large firms have disproportionate control over a sector, which thereby facilitates the making of such private systems of rules.

The construction sector is dominated by a small number of well-organized private associations, including the International Federation of Consulting Engineers, the International European Construction Federation, the British Institution of Civil Engineers, the Engineering Advancement Association of Japan, and the American Institute of Architects.<sup>67</sup> In addition, the World Bank, the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and certain international law firms also contribute to developing legal norms for how the sector is

63. Teubner, *supra* note 52.

64. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1009 (2004) (translated by Michelle Everson).

65. *Id.* For instance, in the case of the Internet Corporation for Assigned Names and Numbers (ICANN), we can see one of these specialized transnational regimes. See Dirk Lehmkühl, *The Resolution of Domain Names vs. Trademark Conflicts: A Case Study on Regulation Beyond the Nation-State, and Related Problems*, 23 ZEITSCHRIFT FÜR RECHTS-SOZIOLOGIE 61 (2002) (F.R.G.).

66. Oren Perez, *Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts*, 29 J. L. & Soc'y 77, 84-85 (2002).

67. *Id.* at 86.

meant to function.<sup>68</sup> Although the construction associations largely operate within an autonomous system of rules and exercise broad power, they cannot escape all outside constraints. For example, they increasingly need to engage in environmental protection. How these associations handle this issue under *lex constructionis* is emblematic of what other such autonomously governed sectors do: they apply a strategy that primarily aims to externalize responsibility for regulating environmental issues arising out of large-scale construction projects to the host State. This externalization to the “extra-contractual” realm of the law of the host-State, using “compliance” provisions, is today part of a standard construction contract.

These and other such transnational institutions and regimes do signal a shift in authority from the public to the private when it comes to governing the global economy. They also contain a shift in the capacity for norm-making, and, in that regard, raise questions about changes in the relation between state sovereignty and the governance of global economic processes. International commercial arbitration is basically a private justice system, credit-rating agencies are private gate-keeping systems, and the *lex constructionis* is a self-regulatory regime in a major economic sector dominated by a limited number of large firms. Along with other such institutions, these have emerged as important governance mechanisms whose authority is not centered in the State. Each is a bordered system—a key conditionality for its effectiveness and validity. But the bordering capability is not part of national state borders.

## CONCLUSION

In this Essay, I have sought to expand the analytic terrain for understanding and representing what we have come to call globalization, and its effects on national territories and their traditional borders. To do this, I have posited a distinction between traditional national (territorial) borders and the more abstract notion of borderings and bordering capabilities. My thesis is that the opening of traditional national borders may, in fact, strengthen a range of transversal bordering capabilities—transversal in the sense that these capabilities cut across traditional borders and enter and exist deep inside national institutional spaces. Further, I have argued that such transversal borderings can coexist, and indeed be enabled by sector deregulation. At the limit, this thesis posits that the existence of such borderings is a function of the opening of traditional

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68. *Id.* at 86–87.

borders, albeit to variable degrees and depending on the characteristics of the relevant domain.

These transversal borderings demarcate domains that are simultaneously global and national. They are not new to our nation-States and interstate system. Nevertheless, their valence has changed because of their sharp proliferation since the 1980s. These transversal, bordered domains can range from highly formalized to informal, and can encompass enormously diverse fields, from the financial to political, academic, and religious. Finally, their existence can be legal or outside the law, as might be the case in illegal trading in arms and drugs, both of which can be seen as bordered domains in that they need secrecy. I describe these transversally bordered domains as assemblages to illustrate the idea that they incorporate and endogenize elements from a variety of fields that have historically been distinct, and they do so contingently or in phases of a trajectory of development.

The evolution of sectors as diverse as finance and fisheries over the last twenty years captures some of these features of transversal borderings. But, we also see similar trends in the evolution of far less formalized terrains, such as in activist networks comprised of actors pursuing a variety of causes or in global art circuits.

In all of these examples, we can detect global transversal borderings that enter the national in a variety of ways. I see, in this engagement, a range of often specialized processes that begin to denationalize what has historically been constructed as national. In this regard, denationalization often is the subnational constitution of the global, repeated in country after country and each with its own particularities. At this time, denationalization is not only partial and frequently illegible, but also diverse in its level of formalization, its institutional depth, and its global span. It can coexist with traditional geographic borders demarcating a national territory, but it will tend to depend on them being open borders. And; it can coexist with national States, even though not quite as national as before the current phase of globalization. From this, I conclude that a likely future for the State is as a denationalized actor, operating within a world in which its territory will continue to have geographic demarcation but also will be marked by transversal borderings.