Territory • Authority • Rights

From Medieval to Global Assemblages

Saskia Sassen
The Rise of Markets and the Law in Reshaping the "Public Interest"

The shifting location of the public-private divide toward expanding the latter raises questions about the role of older notions of a national public interest, the latter critical to the normativity of the state. When the expansion of the private sphere occurs internationally, that is to say, in a context where national states have always had weaker governance capabilities than in their national politics, we add yet another dimension to the problematic of the national public interest. The void seems to have been filled through the expanded privatization and marketization of public sector functions in a growing number of countries around the world: the result is a global concept of regulation as efficiency. With efficiency as its sole aim, privatization becomes legitimate in domains once exclusive to the state. The neutrality attributed to markets makes them critical to attaining efficiency and hence to the overall public benefit.71 As efficiency becomes the objective, it tends to replace or function as a stand-in for the public interest. The ideal of the regulatory state has given way to that of the competitive state whose new norm is to maximize efficiency.72

But the private sphere has never operated in a neutral and consensual manner as posited by liberalism. There are, to start with, two practical issues. The first is that some processes cannot be reduced to market-based understandings of efficiency. They might entail other types of criteria, such as distributive effects.73 Second, private mechanisms may not produce the greatest efficiency. Beyond these two types of issues, there is the fact that given competition with other countries in the global economy, a race-to-the-bottom effect is likely and thereby the further extension of deregulation, possibly going beyond what is efficient and even including illegal overexten-

71 From a market perspective, regulation carries costs and thereby reduces competitiveness and adds unnecessary costs for consumers. However, this proposition clearly accommodates a variety of qualifiers. Markets require regulations, such as antitrust enforcement (most refer to as competition policy outside the United States), to ensure the existence of free markets. Further, there are highly regulated markets, e.g., those for medicines that ensure the competitive success of products.

72 Schware (2002) finds that few legal scholars mention goals other than efficiency for commercial regulation. The focus is primarily on whether regulation is necessary to correct market failures (monopolies, externalities, bargaining power problems, and information problems) in order to increase efficiency. Schware questions whether efficiency is the only goal of commercial regulation.

73 Further, there are limits to what markets can achieve—though the discourse on the efficiencies of deregulation may not always help us understand what the limits might be in particular domains. Thus markets do not necessarily secure the public goals they are meant to achieve. Further, the actual market moment does not include all the parties affected by the transaction (Haden 1992).
sion.44 Deregulatory dynamics do not necessarily produce a sort of golden mean and can easily produce cumulative causation in one direction, that is, deregulatory excess.45 A fourth feature is what we might describe as the stickiness of existing harmonized multilateral frameworks (for example, for trade), which, once established, will tend to leave little if any room for incentives to see alternatives as preferable to the existing arrangement (Stephens 2002), even if they would increase market efficiency. Thus, if such an agreement contains deregulatory implementations, the tendency will be for these to stick and to continue to set the norm—a sort of built-in bias.

Public aspects of private activities are becoming increasingly unregulated and unaccountable (Hall and Biersteker 2002). The deregulation of the economy and the privatization and marketization of public functions not only expand the private sphere but also remove economic activity from public scrutiny and accountability. This matters because privatized and marketized public functions often retain public aspects. It is further accentuated by the fact, as discussed earlier for the United States, that where there are specialized regulatory commissions these are mostly within the executive branch of government and escape routine public oversight by the legislature. Increasingly the private economic sphere functions outside the scope of most forms of public accountability and scrutiny beyond basic compliance with the law.

Economic globalization and its emphasis on state competitiveness has promoted the advantages of markets over governments also in the provision of a broad range of public services and products once delivered through the public sector. The emphasis on market efficiency easily slides into notions of the advantages of getting the government out as a way of maximizing the public good. Shifting public sector activities to the market can indeed reduce government costs; it can also contribute to a kind of de facto "regulatory harmonization" in that market conditionalities enter the picture when a firm is operating in more than one jurisdiction. Market-driven regulatory harmonization is efficient for the firm, but this does not guarantee efficiencies for the public. Aman (2004: 10–12) observes that it is critical to establish whether the efficiencies realized are those of private providers rather than those of the public, in which case the challenge becomes how to achieve better matches.

44 Public functions such as regulation raise the weight of local factors as local jurisdictions are pulled into the competition for global industries. The possibility of moving from one to another jurisdiction based on lower regulatory demands puts downward pressures regarding regulations across all jurisdictions. This also extends to the international level.

45 Aman (2002) raises the issue of privatizing prisons that save money for a particular government but do so at the expense of the constitutional rights of the prisoners, an overall cost to a society under the rule of law. Another case with a similar implication is that of savings to consumers (an overall gain to a particular society) through imports from countries that use child labor, a violation of law.
The marketizing of public functions can take on different forms depending on whether it involves existing markets or creates a market where there was none before. The deregulation of market-based industries is by far still the most common form of the growth of market dynamics replacing government regulation. The making of a new market to handle public functions, for example, the privatizing of prisons, is in many ways a novel development. A more common version in this second case is the public-private partnership, one that has tended to involve sectors where there is a market. The evidence (see Aman 2004) suggests that the globalization of the economy has pushed states to marketize both types of public functions. It is part of the overall trend in a growing number of countries to shift government-centered ways of handling regulatory problems at all levels of government to markets. An examination of the use of markets for what were once functions of the public sector also illuminates some of the issues discussed earlier on internal state redistribution of power. The shift to markets and market authority is a far more complex dynamic than terms such as deregulation suggest. Privatization, deregulation, and marketization have reduced the role of Congress but added to the role of the executive through the setting up of specialized commissions and the power they have assumed. In addition, this is a shift that is beyond party politics (Kagan 2001: 2344).

This shift of public functions to markets raises several questions, notably about the advantages of market versus government regulation and, more generally, whether all markets are the same and hence equally susceptible to market discipline. We are seeing new mixes of private and public powers in the marketizing of public functions. Today we see public-private partnerships for mixed public-private goals that result in entities that are neither fully public nor fully private, with all the added governance challenges this may entail. These novel mixes cannot be analyzed adequately in terms of traditional categories for such partnerships. Markets and market approaches can vary sharply, with different problems regarding fairness, transparency, and the degree of public participation. There is growing evidence that market discipline, or "regulation," does not necessarily improve public services. There are many examples, including some in highly developed countries with well-functioning market economies that show mixed results at best. For example, the British government has had to resume control over key components of privatized rail travel. It makes clear that not all markets are the same. Some markets are effective at providing some types of public services, but we cannot generalize on either the market or services side.

This shift to markets also raises questions as to the effects on citizens'.

*But public-private partnerships and use of private entities did not result from but rather predated globalization.*
rights. Some public services involve rights; when such services are marketized, citizens’ rights may get lost (Aman 2004: 99–101). Schwarcz (2002), in his work on the privatization of prisons, observes that rights subject to markets are no longer rights. But he goes on to argue that we can use economic ends for non-economic means, for instance, to provide affordable housing for all (see Sandholz 1999). In some ways, when the government creates markets where there are none, we are seeing the formation of markets that are neither wholly public nor wholly private. Three questions that need to be asked (Aman 1992) concerning the privatizing of public services are: 1) what are the political values that the use of markets seeks to achieve; 2) what is the impact of the power exercised by entities involved in these markets on the individuals involved: customers, citizens, consumers; and 3) what procedures can best ensure the kind of public participation and transparency necessary for political legitimacy. Thus markets in public goods where citizens can decide through their legislature what a good is worth in terms of national resource allocation, for instance, are not simply a private domain involving private actors. These types of issues also bring out the constructed character of the private-public division.

Related to the notion of market efficiency and its neutrality is the presumption built into legal systems that the contracting parties have equal bargaining power. While this is an accepted view in much of the liberal Western world, it is not accepted everywhere (Rittich 2001; Rajagopal 2003). The assumption of equal bargaining power holds for some situations, but it rarely does in transactions involving states with asymmetries in economic, technological, and legal capabilities. This is one issue raised by poorer states with little bargaining power and obstacles to market access (Thomas 1999). While there have been efforts to correct this outcome, foundational norms remain untouched (Rittich 2001: 942–43). Legal rules have distributive effects and thus may determine who has access to which markets, goods, and services and on what terms. This has been further exacerbated by the developments of the 1990s onward. We see a blurring of the distinction between the private and public domains today in some global regimes, such as trade, in the form of a multiplication of alliances between public and private agents, and between elites from the government and the corporate private sector. These alliances are grounded in a shared commitment to the expansion of capitalism through the promotion of private regulatory authority (Wendt 1995; Cutler, Hauser, and Porter 1999).

Further, freedom to enter contracts often entails accepting contract

---

77 When privatization through markets is a cost-cutting measure and these markets are seen as private, transparency decreases. This can undercut public participation around the issue involved. More important, the information that would make public participation meaningful ceases to be available when public services are marketized. New procedural approaches are necessary to make some markets accountable to citizens.
specifications that come out of highly developed economies and presume various types of capabilities. There are many cases that illustrate this particular asymmetry, and one need not come at it from a highly critical perspective of the global economy. In his study of IMF standards and their workability, Eichengreen (2003: 9–11) finds that many debtor countries in the global south simply lack the legal, accounting, and technical financial capabilities and resources to handle IMF-imposed programs, even if they wanted to fulfill all the requirements. These contracts are enormously complex and presume resources and technical proficiencies typical of rich global north countries. A different type of example is the process at the Doha Round of the WTO that secured some concessions from large pharmaceuticals on their intellectual property rights in recognition of the desperate health situation, notably AIDS, in many poor countries. But even here, as soon as the meeting was over, the lawyers representing the pharmaceuticals went to work, chipping away at many of the negotiated gains of the poor countries, which lacked the resources and enough legal talent to fight back.

Another trend that increases the power of private actors and works to the disadvantage of poorer countries is the marked shift beginning in the 1990s in the global south toward U.S.-style economics at the highest levels of national governments (Dezalay and Garth 2002a; Babb 2001; Fourcade-Gourinchas and Babb 2002) and the shift toward private corporate law and away from traditional public law as a source of norms. In the case of Latin America this meant a shift away from the dominance of traditional nation-state oriented lawyers (Dezalay and Garth 2002a). With the rise of the economists and the growing role of the IMF came a shift to a Western-style legal discourse in international development institutions which often served to justify what the economists were proposing: to enhance economic corporate globalization, corporate transparency to assure investors, privatization, and marketization of erstwhile public functions. Even as economists displace (traditional) public law lawyers in a growing number of governments in the global south, private corporate law is now increasingly used in the development discourse to justify the turn to the market. Markets now dominate where before the government was the main actor, promoting—often, but never completely, as a rhetorical contribution—the public interest, safety of citizens, provision of basic needs, and so on; the evidence shows that since the 1980s there have been massive cuts in nearly all countries in the global south of basic needs budget items, as well as a general decline in economic development objectives.31 Today in international finance

31 This new project today displaces the concerns that marked the first phase of the post-war development project and endured in the second, the import substitution phase. A move from development-based to adjustment and policy-based lending in the 1980s by the international finance institutions led to a sharp increase in the failure of states, government institutions, and practices, and hence gave an entry point for legal reform. The transition states were the occasion for
and development, law and legal discourse play a particularly important role in the representation and legitimization of reforms. Rather than poverty alleviation and economic growth the emphasis is on contract guarantees, rights of firms, intellectual property rights, and the notion that legal criteria are neutral, technical, and transparent. "Good governance ... is [made] synonymous with sound development management" (Rittel 2001: 932). Law here serves to make this project recognizable and acceptable as a new ideology for development. It places securing entitlements, honoring obligations, and limiting risk for investors at the forefront of the legal reform agenda. For Klare (1982: 1358) this is indicative of the broader role of law as promoting the idea of the rational and the natural: the law as legitimating ideology makes the historically contingent appear necessary. In that sense legal discourse keeps us from considering new modes of democratic self-government (Rittel 2001; Rajagopal 2003).

Reports and policy statements by the major developmental institutions are replete with references to the benefits of the rule of law and the need for "good governance." In its recent (2001) "comprehensive development framework" the World Bank attempts to set out a template for the pursuit of development, emphasizing good and clean government and an effective legal and justice system are identified as the first elements of sustainable growth and poverty alleviation. For the World Bank the successful separation of law and politics, putting law on the side of economics, is crucial. Governance efforts can be justified if they are on the side of economic concerns; if they are linked to politics they are more problematic (see World Bank 2001: n. 20). In contrast, as recently as 1997 (World Development Report 1997) the World Bank reconsidered the role of the state in fostering growth in a globalized economy. Now the World Bank is developing a new major project for a comprehensive framework for legal and judicial reform.

In the case of the global south, law emerges as a solution to a broader set of problems. First, failures of economic development have come to be seen as a function of state interference in the economy, various vested interests which

---

this given their preceding period as centrally planned economies and hence supposedly especially in need of international institutions to help in the transition. The ongoing decline and stagnation in large parts of Africa, on the other hand, was explained in terms of failed states. In both cases the project became one of helping these states adjust to the rules of the global economy.

Law is seen as a remedy to stalled development.

9 The law that matters to neoliberal legalism is a core of private law rules and other laws and regulations that enhance efficiency and support investment. Rittel observes that at the heart of what motivates legal reform is the aim to promote private sector growth. There are foundational laws for market economies to function: laws pertaining to the protection of property and enforcement of contract rights, augmented by corporations and bankruptcy law, banking and securities regulations, intellectual property protection laws, and competition laws.
distort markets, and large social demands on the state. Much of the strong insistence on the rule of law is to eliminate these “distortions”—when in fact both public and private law operate within a mode of production (Wood 2003). Second, law is seen as the counterweight to politics. In fact, law can itself be subject to politics in the narrow sense of the term, both in its practice and original design. The rule of law provides transparency, but transparency is itself a constructed and conditioned outcome that often is in the interests of certain actors, for example, corporate investors, even as other parts of the law can protect individuals against the state and other powerful actors. Third, many laws and regulations about state involvement in economic development—for example, in development or welfare projects—no matter how democratically derived or sanctioned, are represented as undesirable “state interventions” or excessive regulations and thus as bad economic practice. In brief, law is a means to protect boundaries: between the state and the individual, and the private and public where boundaries are seen as weak. Law can protect the markets from the state and political interests, and is thus identified with efficient markets. Finally, law is represented as separate from power, where power may in fact be at work both in the use and in the formulation of law (Duncan Kennedy 1997). One critical outcome is that the law is increasingly divorced from distributional issues and social conflict even as it assumes a growing role in the economy. As the development discourse increasingly is formulated in the vocabularies of the law, many of the institutional and value choices entailed by market reform and development projects disappear behind the supposedly neutral technical language of the law.

At the heart of this process of rendering the vested interests of powerful actors invisible lies a particular view of the nature of law and adjudication. Rittel raises critical questions that allow us to understand the drastic nature of this shift in the role of law. “How does law come to be seen at the side of economics rather than politics? The instrument of efficiency rather than distribution, the guardian of private right rather than the instrument of democratic will? The domain of experts rather than the concern of the public? What is the conception of the practice of adjudication and the figure of the judge behind the new master notion of the benefits of the law?” This type of neoliberal conception of law as promoting neutrality and efficiency obscures the fact that there are political choices “in the very design and implementation of the legal regimes underpinning market centered development” (2001: 931).80

80 Beyond the matter of the character of the law, there is a second aspect critical to this attribution of neutrality to the private sphere: the notion that the application of the law is a neutral process. Mainstream legal thinking posts that lawmakers and law application belong to two
Although there is a role for the state in implementation and enforcement, "these entitlements are conceived as the individual rights of natural or juridical persons, techniques for keeping the state and the collectivity at bay and ways to ensure that investors can calculate risk and avoid interference with returns on their investments. The determination of the good law of the market, then, is not fundamentally a question of politics" (Cutler, Haufler, and Porter 1999: 935). Certain laws are simply necessary to markets because they promote growth and efficiency. The proposition that the market knows best dragged the law into its orbit and legitimated much of this. Often it is bureaucrats or private parties who apply the law because it is seen as merely a matter of getting the application right, when in fact it may well involve interpretation that is likely to be partly shaped by politics or interests.

With economic globalization it has become increasingly common for rules originated by private actors to be eventually enacted by governments. One incentive for this type of regulation is that it can overcome the lack of collaboration among governments. For Schwarzc (2002), this type of privatization of regulation is not particularly handicapped by legitimacy problems: insofar as it is enacted by governments it can be assumed to have been scrutinized and sanctioned by the enacting government. Some of these rules, however, can be and have been criticized for capturing only the interests of particular types of countries, especially highly developed ones. This has been the case with some of the WTO rules, financial and accounting rules, and capital requirement rules, even when each member country processes the incorporation of the rules into its national law and institutional frame, which I interpret as denationalized state work.

The overall effects of these various forms of privatization on democratic accountability and participation in the current global age are problematic. There is a tendency toward decreased transparency when it comes to public accountability even as corporate transparency grows. Perhaps at the heart of the issue is not so much contesting all forms of privatization but ensuring greater transparency and accountability of the private domain, not presenting it as neutral.

different domains. Judges apply the law. But according to some scholars (e.g., Duncan Kennedy 1997), far from being neutral, the process of application of the law—adjudication and interpretation—is a critical site for the elaboration of legal norms. Kerry Ristich (2001) uses Duncan Kennedy's argument (1997) that far from being the neutral technical moment of application of rules, adjudication is charged with politics and ideology because it is ambiguous and open-ended. An essential aspect of the practice of judging is the denial of the very large degree of choice and agency a judge faces in reaching a decision and developing the reasons that support it. Decisions are not simply the result of mechanical applications of the pertinent rules and doctrines to the case.
States today confront new geographies of power. The associated changes in the condition of the state are often described as an overall decline in the significance of the state, especially its regulatory capacities. Economic globalization has brought strong pressures for the deregulation of a broad range of markets, economic sectors, and national borders and, furthermore, for the privatization of public sector firms and operations. Although this is correct, it is far too partial an analysis of the foundational transformations taking place inside the state and in the field of external forces within which it functions.

The work of states or raison d'état—the substantive rationality of the state—has had many incarnations over the centuries. Each transformation has had significant consequences. Today the conditionalities for and the content of specific components of the work of states have changed sharply compared to the immediate post–World War II decades or the longer multi-centuries frame discussed in part I. Some of these changes are typically captured today through notions such as the neoliberal or competitive state, to be distinguished from the welfare state of the postwar era.

In chapter 4 I emphasized the importance of the redistribution of power inside the state, with growing power shifting to the executive and away from the legislature, and the judiciary's assumption of new strategic functions. In this chapter I focus on the larger context within which states function today. I develop three arguments in an attempt to get at the critical and strategic features of that larger context. First, and most generally, I posit that the marking features of the new—mostly but not exclusively—private institu-

1 Many scholars coming at the subject from a variety of angles would agree, even though they might use other vocabularies. See, e.g., Hobshawm (1994); Tilly (1995); Jessop (1999); Hardt and Negri (2000); Robinson (2004). See also various chapters in the following collections to get a cross-section of critical perspectives: Mantelmann (1996); Châ et al. (1999); Smith, D. et al. (1999); and Calabrese and Burgelman (1999), to cite English-language literature.
tional order in formation are its capacity to privatize what was heretofore public and to denationalize what were once national authorities and policy agendas. Scholars have focused mostly on the rise of private authority, including the privatizing of domains once exclusive to the state. The growing range of such forms of private authority constitutes a critical component of the new field of power within which states have to function today. I add capabilities to privatize and denationalize that are internal to the state itself, such as specific policymaking capacities in ministries of finance and central banks that can reorient some parts of the state to global agendas. In brief, the rise of private authority is not simply an external force that constrains the state. It is partly endogenous to the state.

Second, as a new growing scholarship has shown, it is important to recognize such private authority in domains once exclusive to the state, a subject introduced in the preceding chapter. I extend this argument in two ways that develop the issues raised in a more abstract fashion. On the one hand I posit that this type of private authority represents a new normative order, one that exists outside what has been and to some extent remains the master normativity of modern times, raison d'État. On the other hand, I argue that key elements of this new normative order enter the public realm where they get represented as part of public policy or public objectives; this contributes to denationalize what had historically been constructed as national state agendas. Particular components of the national state begin to function as the institutional home for the operation of powerful dynamics constitutive or critical for “global capital.” In so doing, these state institutions reorient their particular policy work or broader state agendas toward the requirements of the global economy even as they continue to be coded as national.

Third, what is the meaning of “national” in institutional components of states linked to the implementation of economic globalization? National territory and state authority assume new meanings under these conditions. I examine these issues through the specifics of the global market for capital. The reconfiguring of this market since the 1980s and the corresponding ascendancy of financial norms as criteria for economic policy instantiate this unsettling of existing meanings. The research to date does not adequately address a central feature of the foundational transformations afoot: it is the fact that the utility logic of the global capital market actually increasingly circulates through the public domain where it eventually emerges as state policy (Sassen 1996: chapter 2). In so doing, an examination of the global-market for capital also allows us to understand particular shifts in the construction of the private and public domains, including the de facto blurring of the distinction even as it is formally strengthened.
CHAPTER FIVE

The chapter concludes with a discussion of the character and emergent formalization of a complex, multisited institutional order that entails a dislodging of various types of norms and authorities, both private and public, from their traditional encasements in national domestic and international law. This signals that such formalizations are possible outside the sphere of law of the national state. At its most developed this is becoming a form of global law (Teubner 2004). At its most elementary it consists of a variety of partial and autonomous systems of rule for governing specialized sectors. In both cases, it amounts to a proliferation of partial, often internetworked assemblages of specific and always partial elements of TAR.

The particular transformations inside the state, the new emergent privatized forms of authority for governing a growing range of specialized domains, and the circulation of private utility logics inside the public domain are all partial and incipient but strategic developments. They have the capacity to alter possibly crucial conditions for the liberal state and for the organizational architecture of international public law, its scope, and its exclusivity. In this sense they have the capacity to alter the scope of the formal authority of states and of the interstate system, the crucial institutional domains through which the "rule of law" is implemented. How do these trends engage the larger questions about the current global age and democracy, as well as the sources for the "legitimacy" of claims and norms?

VARIABLE INTERPRETATIONS OF STATE POWER IN THE GLOBAL ECONOMY

A key issue in the scholarship on the contemporary state and globalization is the power of global capital to constrain and even force national states to adopt particular policies. One line of argumentation on both the left and the right of the political spectrum is that this leads to more fiscally conservative policies, notably the trimming of social programs, and to pressures for greater openness to international trade and investment. These trends are often represented as evidence of the rise of a new global capitalism that renders states powerless to make real policy choices: transnational markets have constrained states to adopt increasingly similar economic, social, and fiscal policy regimes. The result is a convergence on neoliberalism: growing state acceptance of U.S. ideals of low taxes, market-based policies, shrinking welfare states, and elimination of industrial policy (Brenner and Theodore 2002, Fourcade-Gourinchas and Babb 2002). Another line in the scholarship rejects
this (Helleiner 1999; Weiss 1998; Krasner 2004), albeit with variable levels of recognition of the extent of globalization. For some the above thesis is incorrect both empirically, that is, the data show far less support for strong globalization that reduces state powers (Evans 1997; Mann 1997), and theoretically, that is, there is nothing new about this since states have long been interdependent (Krasner 2004). An elaboration of this line posits that even if economic integration were far more advanced than it is presently, the predicted generalized emasculation of state powers would not necessarily come about. The reason is the effects of economic integration on governing capacities would not be uniform since states can adapt and manage international and domestic linkages, particularly the articulation of business and government. Continued divergence can also be expected because in some key instances globalization is being advanced through the nation-state and hence depends on the nation-state for its meaning and existence (Helleiner 1995; Pauly 2003).

Among those who think globalization has been highly exaggerated, some find that the state remains an important locus for accumulation and that along with international actors they will continue to structure economic space (Wade 1990; Mann 1986). Others see state powers as much more circumscribed through the shedding and shifting of traditional responsibilities (Hirst and Thomson 1996; Panitch 1996; Swyngedouw 1992) and the diminishing of the state's traditional role as economic manager and sovereign power. For these, the state maintains its role as a key agent that can legitimate and delegate authority to powers above and below the national level; further, its territorial centrality and constitutional legitimacy assure the state's continuing key role in an international world economy even as conventional sovereignty and economic management powers lessen. Nation-states should no longer be seen as the sole governing powers; they are now one class of several types of powers and political agencies in a complex system of power from the global to the local level (Hirst and Thomson 1996: 190; Brenner 2004; Kelly 1999; Swyngedouw 1992).

For Weiss (1998) states will matter more and this will advance rather than retard development of the world economy, a view that rests partly on her emphasis on state adaptability rather than a view that emphasizes the decline of state functions. In this regard very diverse scholars (e.g., Krasner, Weiss, Mann, Evans) emphasize the tendency to overstate the power of the state in earlier periods—that this type of argument suggests that there was once a time when states were not subject to external forces that required or
imposed accommodations. Postwar high economic growth can easily be interpreted as reflecting a past power of states to set macroeconomic policy stimulating high growth and plenty of revenues for the government to spend. In this light the ensuing economic stagnation of the 1970s that reduced the fiscal resources of states and led to the need to raise taxes can then be attributed to the emerging global economy. But for these scholars (e.g., Weiss) the particular difficulties of national governments with macroeconomic management (for example, balancing budgets or mobilizing sufficient revenue to fund government programs) have more to do with internal fiscal difficulties caused by recession than with globalization. Fiscal crises are phases and so are periods of growth: a return to sustained growth can then again enable governments' macroeconomic policymaking.

Another major bundle of issues in the scholarship concerns the standardizing and homogenizing effects of globalization. An important body of literature has demonstrated that there is enormous variability among nation-states. This literature criticizes the notion that because of globalization all governments follow fiscally restrictive policies and evolve institutionally toward convergence. The deregulations of the 1980s and 1990s affected many advanced industrial countries but they also evinced policy divergence (e.g., Vogel 1995; Sassen 2001).2 Most cases of deregulation reflect governments' combining liberalization (introducing more competition into markets) with re-regulation—the reformulation of old regulatory rules and the creation of new ones. There is much debate about the extent of domestic changes. The subject of welfare decline is one issue here: it illustrates the need to distinguish the internal state reorganization of service provision from the level or extent of such provision. Pierson's study of Britain, Germany, the United States, and Sweden finds little evidence of radical change (1996); despite changes in how delivery is organized, welfare service provision regimes are stable (Clarke 2003; Taylor-Gooby 2004; Esping-Andersen 1990 and 1996). These changes can thus be interpreted as more connected to the evolution of the welfare state since its inception fifty years ago than as the result of global market pressures (e.g., Weiss 1998: chapter 5). Yet more recently, there is evidence of less regime stability (Clarke 2003, Taylor-Gooby 2004).

The empirical evidence showing considerable variability in policy responses and states' broader macro- and microframing is crucial as a counterbalance to easy generalizations about the powerlessness of national states cont-

---

2 Vogel's comparison of regulatory reforms in Britain and Japan shows that governments have responded to similar market pressures in remarkably different ways, reorganizing rather than abandoning control of private sector behavior. See also Sassen 1991.
DE NATIONALIZED STATE AGENDAS

fronted with global markets, global firms, and their homogenizing powers. Such firms and markets are powerful and they can standardize key aspects of the various countries they enter, but this is not the full story. Once global firms and global markets enter national institutional spaces they confront considerable national specificity. Empirically I add the existence of "national" systems whose operational features are de facto global as a result of the denationalizing of particular national policy frames; these systems are then to be distinguished from imperial systems of earlier phases of the world economy, which were de facto national.

I agree that the tendency to expect institutional convergence and the failure to recognize state variety are two sides of the same coin (Weiss 1997: 4). Both are based on a policy instrument theory of state capacity in which the relevant instruments are somehow predetermined and fixed in character. Any decline in a particular policy is read as state loss of power. State specificity is crucial, and not recognizing it can lead to spurious inferences. But this perspective leaves out the fact that global systems insert themselves in national domains where they once were nonexistent. The outcome of this negotiation between standardizing global systems and the thick environments of the national can easily be packaged as national even though its actual content pertains to new global systems. In this regard I find Cox's thesis that strong states act as midwives, not victims of internationalization, compelling (1987: 204). Failure to differentiate state capacities, both across countries and inside a given national state, easily can keep globalization scholars from considering, let alone examining, how states may at times facilitate globalization.

State involvement needs to be differentiated. Some forms of such involvement actually correspond to the national/world economy interaction of preceding periods rather than the denationalization I identify as critical for many features of the current era. In this light, I would interpret the 1997–98 Asian financial crisis and Japan's prolonged economic crisis of the 1990s as global systemic disciplining, even punishment for pursuing their own type of policies aimed at keeping their economies under firm control by national capital owners and to some extent the state. By the late 1990s we see in both of these countries a forced denationalizing of control over their economies. Rather than seeing the imposition of further "liberalization" and deregulation on their economies made possible partly by the "crises" of these economies, as state adaptability to the global era, I would interpret these crises and the ensuing liberalizations as an imposed systemic adjustment to the current global economic regime. The high levels of regulation and of national capitalist control over their economies well into the 1990s is, then, more akin to
contesting a particular model of participation—that represented by the
United States—in the global economy. The crises—financial in South Korea
and economic in Japan—are not failures of these governments but the out-
come of global systemic disciplining. This would then raise a question as to
how long these states can pursue their own distinctive model of economic
growth, still marked by considerable state coordination and powerful na-
tional capitals.

My interpretation raises two specific analytic questions. They con-
cern the distinction between policy vocabularies, which may well still be na-
tional and may still diverge considerably across countries, and what it is that
is in fact taking place. Thus a particular state policy orientation may well be
represented as national but in fact no longer be national in the sense in
which it was historically constructed. In a later section in this chapter I exa-
mine the implications of the policies of the 1980s and 1990s promoting pri-
vatization, deregulation, and marketization—briefly, they are national poli-
cies but they are effecting a foundational change that alters the notion itself
of the national. It raises a question as to the character of such national policy
and criteria, and the possibility that we are actually dealing with a globalizing
dynamic functioning through state policies—that is to say, denational-
ized state work. This in turn brings up a second analytical distinction, that
between a capability (for example, states that can still command enough
taxes to have strong welfare states) and the assemblage within which it is po-
tioned (a different organizing logic may well be at work). For example,
larger public investing into raising school standards in the United States
may now be connected to shaping a “competitive” labor force for a global
world. This would be a different project and purpose from the original con-
cept of educating one’s population as a matter of civic and social rights. The
scholarship on the state tends to conflate what happens inside the national
state with “the national”—in the historically constructed sense of the last
centuries. From here it is easy to fall into the dualisms of the global and na-
tional as mutually exclusive, or a reifying of the global as external and the
national as internal (for a critical analysis of this duality, see, for example,
Walker 1993).

In brief, the interpretation developed in this chapter thus builds on
the current scholarship about economic globalization and the state yet differs
from it in significant ways. When it comes to the debate about the impact of
globalization on the state, I build on the scholarship that has documented the
ongoing significance of state participation, whether willing or enforced. The
state participates in and enables the formation of global markets and a global
space for the operations of firms and markets. I also build on the scholarship
that has documented how the state has evolved in these processes and adapted to new enabling and constraining conditions.

But my work differs from this scholarship in two specific lines of analysis. One is my thesis of a major tipping point that launches a new organizing logic in the assemblage of state capabilities for international action and collaboration. This means that while particular older capabilities may still be there the larger assemblage within which they function has been foundationally transformed. Methodologically this entails distinguishing the particular components from the larger whole. For instance, cross-border financial flows are not enough to have a global financial market, nor are cross-border trade flows enough to establish a global trading system. We have had both types of flows for centuries, but not the systems that they constitute today. The particular assemblage of territory, authority, and rights entailed by the formation of a global financial market or a global trading system differs sharply from earlier international systems for handling cross-border flows. Analytically, a focus on TAR provides three alignments along which to examine capabilities and the possibility of their positioning in two different organizational logics. Further, this type of disaggregation allows me to detect distinct trajectories for each of these three, as well as distinct institutional insertions. For instance, the repositioning of territory in the case of a global financial market is a process we can distinguish from that undergone by authority or rights.

Second, I emphasize the internal transformation of the state and that this transformation is itself constitutive of the new organizing logic, a proposition introduced in the preceding chapter. This contrasts with the more common notion that globalization comes from the outside and forces the state to adapt to a new set of external factors. I find myself far closer to some of the legal scholarship on the state than with the International Political Economy (IPE) scholarship on globalization, which has not really examined the internal transformations of the state in great detail and deals with “the state” as a unitary category. These details are critical to my synthesizing interpretation of a denationalizing dynamic and of an epochal transformation for which the state is a strategic site. Further, in much of the scholarship that does emphasize a role for the state in the context of globalization, often a critical one, the global and the national are still posited as two separate domains. My argument is that while some aspects of state participation are in fact instances of states adapting to and participating in the global, other components of the national state and of the larger nation-state are themselves strategic sites for the structuring of the global and in this process undergo foundational change.

This conceptualization brings up another key issue. As the national becomes a more complex site for the global, the specific and deep histories of a
country become more, rather than less, significant and hence produce distinctive negotiations with the new endogenous and external global forces. This will then exacerbate the differences between weak and strong states, as well as the differences among various institutional domains inside a given state.

DENATIONALIZED STATE AGENDAS

One of the longstanding roles of the state vis-à-vis international economic transactions has been to negotiate the intersection of national law and the activities of foreign actors in its territory as well as the activities of its national actors in foreign countries. These actors can be individuals, firms, markets, or supranational organizations. While this is not a new role, it has been transformed and expanded in the current global age, especially in the case of economic actors. In all countries now incorporated in the global economic system, governments have issued legislative measures, executive orders, and court decisions enabling foreign firms to operate in their territory and their markets to become international.

Are there particular conditions that make executing this role in the current phase distinctive and unlike what it may have been in earlier phases of the world economy? While this is in many ways a question of interpretation, in the preceding chapter I argued that there is indeed something distinctive about the current period compared with the earlier world scale examined in chapter 3 and the immediate post—World War II international system examined in chapter 4. By the 1980s there was an enormously elaborate body of law developed in good measure over the preceding hundred years that secured the exclusive territorial authority of national states to an extent not seen in earlier centuries. But there has been a considerable institutionalizing, especially since the 1990s, of the “rights” of non-national firms, the deregulation of cross-border transactions, and the proliferation of privatized systems of law internal to specialized fields, most notably the reinvented lex mercatoria and the new lex digitalis. These are systems of private rules to govern specialized domains. Except for the most powerful, states today also find their work constrained by the growing influence and power of several supranational organizations, particularly the IMF and the WTO. If securing these rights, options, and powers entailed an even partial relinquishing of components of state authority as constructed over the last century and more, this signals a necessary engagement by national states in the process of globalization.

I examine the case of noneconomic actors in chapters 6 and 7.
even as this same process also enables the formalization of nonstate normative orders where the state once had exclusive authority.

This raises a question as to the nature of this engagement by the state in processes of globalization, and how it might vary for different types of states. Is the role of the state simply one of reducing its authority (for example, as suggested with terms such as deregulation and privatization, and generally "less government"), or does it also require the production of new types of work by states—notably regulations, legislative items, court decisions, and executive orders, all amounting to the production of a whole series of new "legalities"? Some states, that is, the United States and Britain, are producing the design for these new legalities and are hence imposing these on other states given the interdependencies at the heart of the current phase of globalization. Yet even so, participating states need to develop the specific instruments in terms of their own politico-economic arrangements. That is to say, legislative items, executive orders, adherence to new technical standards, and so on will have to be produced through the particular institutional and political structures of each of these states, incorporating the new norms into each state’s specific policy and legal vocabularies. In this regard, the state can be seen as incorporating the global project of its own shrinking role in regulating economic transactions (Cox 1987; Panitch 1996; Gill 1996; Helleiner 1995).

---

4 Even as I confine this discussion to what are described as states effectively functioning under the rule of law, we must allow for considerable differences in the power of these states. As has been said many times, the U.S. government can aim at imposing conditions on the global markets and on participating states that, for instance, the government of Argentina cannot—even as it revealed itself capable of unsetting the IMF when it refused to abide by its demands after the 2001 crisis by deciding to go into sovereign default.

5 I use this term to distinguish this type of production from lawmaking and jurisprudence (Sassen 1996: chapter 1).

6 This dominance assumes many forms and affects more than poor and weak countries. France, for instance, ranks among the top providers of information and industrial engineering services in the world and has a strong though not outstanding position in financial and insurance services. But it has found itself at an increasing disadvantage in legal and accounting services because Anglo-American law and standards dominate international transactions. Anglo-American firms with offices in Paris service the legal needs of firms, whether French or foreign, operating out of France. Similarly, Anglo-American law is increasingly dominant in international commercial arbitration, an institution grounded in continental traditions of jurisprudence, particularly French and Swiss.

7 The guarantee of the rights of capital arises historically out of a particular type of state, a particular conception of the rights of capital, and a particular type of international legal regime (see ch. 3). Thus today it is largely Western notions of contract and property rights developed by some of the most developed and most powerful countries in the world that dominate. To this we now need to add the new legal regimes aimed at furthering economic globalization, e.g., the push to get countries to support copyright law.
Thus the emergent, often imposed consensus in the community of states to further globalization is not merely a political decision of accepting (or rejecting) that consensus. It entails specific types of work by a large number of distinct institutions in each of these countries, and thereby partly shapes the actual work of states. My argument is, then, that the state emerges as one of the key sites for developing and instituting the conditionalities of corporate economic globalization; the working state can be conceived of as a technical and administrative capacity that cannot be fully replicated at this time by any other institutional arrangement. And it is a capacity backed by military power, with global power in the case of some states (Hirst and Thompson 1995). While in this interpretation the state matters, it does not do so on the terms posited by those who argue that globalization has not really altered the centrality of state power. The accommodation of the interests of foreign firms and investors under conditions where most of a country’s institutional domains have been constructed as “national” entails a negotiation. The negotiation in the current phase has tended toward the denationalizing of several highly specialized national institutional components. The hypothesis is then that some components of national institutions, even though formally national, are not national in the sense in which state practice has constructed the meaning of that term in the West since the emergence of the so-called regulatory state in the late 1800s and early 1900s. A good illustration of this is the Keynesian regime, the high point of the regulatory state. Though imperfectly implemented and often excluding national minorities, it aimed at strengthening the “national” economy and “national” consumption capacity, as well as raising the educational level of “national” workforces. There are, clearly, enormous variations among countries in terms of the extent to which a national policy project existed, its features, and the actual period of time of its implementation. Many of the European states were and remain far more developed in this regard than the United States. The policies that emerge in the 1980s and 1990s to accommodate the global projects of some firms and some markets partly unbundle this notion of the national and target particular places, economic sectors, and workforce segments.

But this work of states has an ironic outcome insofar as it has the effect of destabilizing some aspects of state power itself. Thus the U.S. government as the hegemonic power of this period has led and sometimes forced other states to adopt these obligations toward global capital and, in so doing, has contributed to strengthening the forces that can challenge or destabilize what have historically been constructed as state powers, including its own.4

4 See, e.g., the argument by Arrighi (1994); see also the debate in Davis (1999).
DENATIONALIZED STATE AGENDAS

One of the ways in which this becomes evident is that while the state continues to play a crucial, though no longer exclusive role in the production of legality around new forms of economic activity, at least some of this production of legalities is increasingly feeding the power of a new emerging authority structure marked by denationalization in some of its components and by privatization in other components. An important, insufficiently noted mediation in this process is precisely the rise and partial privatizing of the power of the executive branch in government (chapter 4). Among liberal democracies this is sharpest in the United States and the United Kingdom. From the perspective of firms operating transnationally, the objective is to ensure the functions traditionally exercised by the state in the national realm of the economy, notably guaranteeing property rights and contracts. How this gets done may involve a range of agents. To some extent national states are producing the necessary instrumentality that enable new forms of authority. These instrumentalitys may include national legislative acts or measures that are in one way or another extra-national yet need to be enforced inside national economies. This holds also for what is considered to be the first instance of global economic law, the Trade Related Agreements on Intellectual Property Rights (TRIPS) implemented in 1995; this is a specific form of international economic law to be distinguished from the international law of states. Further, to an increasing extent this work of guaranteeing is becoming privatized, as is signaled for instance by the growth of international commercial arbitration and other forms of private authority, yet even so needs to secure accommodations by national states, that is, that a state will not use military power to support one of its national firms that may have lost its case in an international commercial arbitration.

Many of these trends come together in the strategic role played by central banks today. These are national institutions that address national matters. Yet over the last decade they have become the institutional home within the national state for monetary policies that are necessary to further the development of a global capital market and, indeed, more generally, a global economic system. One key element of the new conditionality of the global economic system that needs to be met for a country to become integrated into the global capital market is the autonomy of central banks. This facilitates instituting a certain kind of monetary policy, specifically, one privileging low inflation over job growth even when a president may have preferred it the other

* This autonomy is taken for granted in the United States and in most EU countries (though before the formation of the European Central Bank France’s central bank, for instance, was not considered as quite autonomous from the executive). But in many countries the executive or local oligarchies have long had undue influence on central banks—albeit not always to the disadvantage of the disadvantaged.
way around, particularly at reelection time. While securing central bank autonomy has certainly cleaned up a lot of corruption, it has also been a key vehicle through which national states accommodate the requirements of the global capital market. A parallel analysis can be made of ministries of finance (or the U.S. Treasury) which impose certain kinds of fiscal policies as part of the new conditionalities of economic globalization.

We generally use terms such as deregulation, financial and trade liberalization, and privatization to describe the changed authority of the state when it comes to the economy. The problem with such terms is that they only capture the withdrawal of the state from regulating its economy. They do not register all the ways in which the state participates in setting up the new frameworks through which globalization is furthered, nor do they capture the associated transformations inside the state—a subject introduced in chapter 4 and developed in this chapter. This means capturing and conceptualizing a specific set of operations that take place within national institutional settings but are geared toward non-national or transnational agendas where once they were geared toward national agendas. There is a set of strategic dynamics and institutional transformations at work here. They may incorporate a small number of state agencies and units within departments, a small number of legislative initiatives and executive orders, and yet have the power to institute a new normativity at the heart of the state; this is especially so because these strategic sectors are operating in complex interactions with private, transnational, and powerful actors. Much of the institutional apparatus of the state remains basically unchanged. The inertia of bureaucratic organization suggests continuity and easily obscures the fact of foundational changes in key state sectors.

Submerged in what has been constructed as national legislative history, it is possible to find in many of the national states that participate in the global economy a series of legislative items and executive orders that can be read as accommodations on the part of these states to the demands of global firms and global markets. Even more significant is the accelerating history of executive branch work to deregulate, privatize, and marketize public sector functions. These accommodations had to be produced and in that sense represent the active participation by these states in working out the conditions for economic globalization. This is a history of micro-interventions, often minute transformations in regulatory or legal frameworks. It is clearly not a new history, not for the United States or other Western former imperial powers (for example, the “concessions” to trading companies under British, Dutch, and other colonial regimes). Yet, we can identify a new phase, one that has very specific instantiations of this broader feature.
This is a particularly developed microhistory in the United States where it clearly facilitated the expansion of the cross-border operations of U.S. firms. Among the first in a long sequence of legislative measures, and perhaps among the best known, are the tariffs passed in the mid-1960s to facilitate the internationalization of manufacturing, which exempted firms from import duties on the value added of re-imported components assembled or manufactured in offshore plants. In the case of the United States, I date the beginning of this microhistory of legislative and executive interventions to the mid-1960s, with a full crystallization of various measures facilitating the global operations of U.S. firms and the globalization of markets in the 1980s, and work continuing vigorously in the 1990s. The Foreign Investment Act of 1976, the implementation of International Banking Facilities in 1981, the various deregulations and liberalizations of the financial sector in the 1980s, and so on are but the best known landmarks in this microhistory.

Yet another aspect of this participation by the state in the implementation of a global economic system can be found in the new types of cross-border collaborations among specialized government agencies concerned with a growing range of issues emerging from the globalization of capital markets and the new trade order. These often build on long-standing networks (H. K. Jacobson 1984). Slaughter (2004) identifies three types of such government networks. One functions within international organizations in terms of issue areas. It involves the national ministries or agencies charged with the particular issue area: trade ministers in GATT, finance ministers in the IMF; defense and foreign ministers in NATO; central bankers in the Bank for International Settlements. A second type consists of government networks within the framework of an executive agreement. These are transgovernmental networks that emerge outside a formal international institution, even though members operate within a framework agreed on at least by the heads of their respective governments. Examples are transatlantic governmental interactions specifically authorized and encouraged by executive agreement. A third type consists of spontaneous government networks, a development of the current era. These networks arise outside formal intergovernmental agreements, whether treaties or executive agreements: the Basel Committee of the Bank for International Settlements (BIS) is a leading example. They are networks that lack a foundational treaty and nothing they do purports to be legally binding on the members. Another example is agreements among

\[\text{\textsuperscript{10}}\] Pollack and Chaffee (2001) examine several such executive agreements between U.S. and EU commission presidents to foster increased cooperation, including the Transatlantic Declaration of 1990, the New Transatlantic Agenda of 1995 (with a Joint U.S.-EU Action Plan attached), and the Transatlantic EC Partnership agreement of 1998.
domestic regulatory agencies of two or more countries. The last few decades have seen a vast increase in these, with agreements that can be implemented by the regulators themselves, without further approval by national legislators. These have grown far more than traditional treaty negotiations.

There are multiple instances of this highly specialized type of convergence in regulatory issues concerning telecommunications, finance, the Internet, and so on. In some of these sectors there has long been an often elementary convergence, or at least coordination, of standards. What we see today is a sharp increase in the work of establishing convergence. For instance, we see an intensification of transactions among central bankers, necessary in the context of the global capital market. While central bankers have long interacted with each other across borders, we can clearly identify a new phase in the last ten years. The world of cross-border trade has brought with it a sharpened need for convergence in standards, as is evident in the vast proliferation of ISO items. Another example would be the institutional and legal framework necessary for the operation of cross-border commodity chains and value-adding chains.

In what follows I examine two aspects of these new or reinvented forms of state work. One is the WTO's intellectual property rights law, the first instance of a new type of international economic law. The other is a particular type of intergovernmental network of specialists in competition policy, one of the critical building blocks for the corporate global economy; competition policy, or antitrust policy, is a good example of this work of states aimed at achieving global convergence of standards and rules.

**Antitrust Policy: From Extraterritoriality to a Global System?**

The 1980s launched a period of reinvigorated antitrust activities, with rapid acceleration in the 1990s. Economic globalization put pressure on governments to work toward convergence in antitrust regulations in a situation where countries tended to have diverse competition laws or enforcement practices. The end of the cold war and the reinsertion of the so-called Eastern bloc countries into the market system further added to this new importance of competition policy. This convergence around specific antitrust issues by regulators in a growing number of countries frequently exists in an ocean of enormous differences among these countries in all kinds of laws and

---

11 For a detailed study of these developments, especially the intensification of cross-border interactions among competition policy regulators, see Pertainy (1999).
regulations covering components of the economy which do not intersect with globalization. It is then a very partial and specialized type of convergence among regulators from different countries who often begin to share more with each other than they do with colleagues back home in the larger bureaucracies within which they work.

Competition policy is one key area for the changing relation between the private and the public in the context of globalization and for the competition between different models, notably those of the United States and Europe. While many countries have had some version of competition policy, there has been a sharp increase in those that have adopted such policies or reinvigorated inactive ones. By the late 1990s more than seventy countries had something resembling Western antitrust rules, compared to forty in 1970 (Portnoy 1999). The reactivation of existing antitrust laws is also important. Thus the Netherlands, Great Britain, Denmark, Portugal, and Greece have had to overhaul some of their laws especially in relation to the European Commission (EC) and the development of a European competition regime. The leadership of the EC played a crucial role in this shaping phase, notably under Competition Policy Commissioners Sir Leon Brittan and Karel van Miert.

The enormous change in the international organization of business makes it difficult to apply the old norms of what a desirable competition policy might be. We see new forms of cross-border cooperation among firms, including the growth of business alliances (Dunning 1997) and complex patterns of subcontracting and short-term partnerships (Dieter Ernst 2005). In addition we are seeing the emergence of new industries that do not fit existing patterns and evince an increasingly complex relation to the intellectual property rights regime (S. Weber 2005). The deregulation of markets and industries and the new technologies make designing competition policy a difficult task because it is not even clear what the new competitive structure should be in dynamic industries operating in cross-border markets or functioning through global firms. More theoretically, perhaps, the shifting boundary between private and public authority when it comes to regulatory capacity (for instance, the growth of self-regulatory efforts in some industries) further complicates matters. To these challenges one can add the efforts in the EU to achieve agreement on specific EU company types—legal entities not based on or created through national legislation. This also illustrates the difficulties of

---

12 Much of the growth in the 1990s came from developing countries and transitional economies in central and Eastern Europe, reaching over 100 countries by 2000. Among developed countries there were fewer than 10 in 1950, 20 in 1975, and 29 by 1998 (including the developed countries from central Europe).
convergence efforts: It took over thirty years for an agreement on a European Company (Societas Europaea) to be reached. Among the reasons that agreement was so difficult regarding the creation of entities such as a European firm is the fact that not all member states have the legal forms entailed by the proposals, or if they do, their features may differ significantly. If this is a difficulty within the EU, it is easy to imagine the difficulties present in broader cross-border configurations.

One can see a degree of convergence in regulatory responses to global economic pressures, particularly market liberalization and the growth of cross-border business activity. The relation between competition policy and trade policy, that is, anti-dumping provisions, is a central issue here. According to one line of analysis, this convergence is basically a form of Americanization of competition policy. Countries have adopted different versions of American antitrust, but perhaps an even bigger effort in many countries is toward harmonizing their legal systems with EU policy in a sort of Europeanization of antitrust law (Portnoy 1999: chapter 4). According to Wallerstein (1974), U.S. antitrust law is not very exportable to other countries because it was developed under very specific historical, political, and industrial conditions not found elsewhere. Further, in view of the many different interpretations of the Sherman Act, Wallerstein argues that it is not clear what aspect of the Sherman Act might be exported. At the same time, the current internationalization of antitrust may have reinvigorated U.S. antitrust law. In his research, Portnoy (1999) finds that the better explanation of the spread and convergence of antitrust law lies in the formation of transnational networks of regulators who increasingly interact and collabo-

---

13 Features of the agreement (in force October 2004) include European Company (SE) formation, state/firm relations, and structures (Hannigan 2003). What does not fall under the agreement is subject to the governance of the state. Proposals for the European Mutual Company, European Cooperative Company, and others are now being considered. Despite the passage of this agreement, its reliance on member states company law has raised questions about whether it represents a true unification of company law. The development of further Company Directives (the 3rd and 10th) relating to cross-border movements might undermine this agreement (Hannigan 2003: 58–59).

14 Portnoy (1999) disagrees with this interpretation and notes that it was only with the general acceptance of extraterritoriality and the emergence of international antitrust cooperation that antitrust regimes proliferated in the late 1980s and 1990s. American power was great for many decades before this and yet did not impose antitrust on countries where it had undue influence—except for Japan and Germany in the immediate postwar period where it was not subsequently much enforced. In the 1980s antitrust had become a tame regime in the United States.

15 For instance, the countries of central and Eastern Europe have been more likely to adopt the administrative form of European competition policy. This is understandable since they come from traditions where state bureaucracies are used to dealing with the economy.
rate. He identifies the growing number of organizations and occasions where this interaction and cooperation take place. The International Competition Policy Advisory Committee (ICPAC) is one key site for these processes. Some of these are public sector entities, others are private sector entities, and still others are hybrids.  

In terms of the role of the state, we are seeing a shift from supporting strategic or basic industries to establishing conditions for competitiveness in a global economy, a shift from macro- to microeconomic issues. And it is a shift from Keynesian policies of general national welfare to the promotion of enterprise, innovation, and profitability in both private and public sectors (Cerny 1997: 260). Again, in these shifts we can also detect a change in the boundaries between the private and the public domains (e.g., Cutler 1997).

The issues of convergence and diversity in antitrust rules come to the fore in merger policy. Most countries have not had merger regulations. It is only in recent years that this has changed: over fifty countries now have merger rules; most of this increase is due to developing countries instituting such rules (Shelton 1999). When it comes to substance and procedure, much effort has gone into rationalizing merger control systems in the EU. The EU developed a two-tiered system in 1989: large mergers go to the EU merger control regime, while smaller ones are regulated by the national agencies. The result has been unification of a significant and growing portion of all European merger regulation.  

16 The OECD Competition Law and Policy Committee has operated since 1994, the U.S.-Japan Structural Impediments Initiative Talks (1989–91), and the bi-annual U.S.-EU Dialogue, operating since 1997. Among the private entities are the International Chamber of Commerce (ICC); the International Antitrust Section of the American Bar Association; the Business Industry Advisory Committee of the OECD; various industry associations; transnational law firms such as Skadden Arps and Covington Burke; and the Trans-Atlantic Business Dialogue. Among the hybrid entities are the U.S. International Policy Advisory Committee (1997–99); the U.S. Federal Trade Commission Global Competition hearings, operating since 1995; the EU Group of Experts (1993–95); the Global Forum for Competition and Trade Policy (World Bank/IBA); and private consultants such as antitrust experts (Portnoy 1999: chapter 4).

17 One agreement—one December 12, 1989 the Council of Ministers adopted the European Community Merger Regulation (ECMR), with two significant amendments in March 1998 and May 2004. The ECMR has sought to develop procedures for mergers, resolve jurisdictional matters, and create tools for judging what counts as concentration in an industry. Another related area concerns the development of a BC takeover code. A Takeover Directive was finally passed by the European Parliament in December 2003. It took almost fifteen years for the passage of this Directive to occur. Its eventual passage was made possible by market developments (Hannigan 2003), such as the convergence of the Directive with United Kingdom’s own Takeover Code and the establishment of takeover codes in several countries (i.e. Belgium, Germany, Netherlands) that modeled the United Kingdom’s code (the effectiveness of the Directive, however, is subject to debate, e.g. Novarese 2004).
North Atlantic. Mergers and acquisitions between North America and Europe totaled $256.5 billion in 1998, up from $69.4 billion in 1995. There have long been significant differences between the U.S. and Western European merger control models. The latter is more likely to define relevant markets more narrowly, to find competition threatened at lower market-share thresholds, to take much greater account of the well-being of individual competitors rather than generalized effects, and to adopt a more expansive definition of unlawful dominant firm behavior (Kovacic 1998: 1086). These differences are beginning to weaken and there is growing convergence between the EU and the United States, especially in the area of single-firm and oligopolistic dominance.\textsuperscript{18}

Disagreements remain on the question of efficiency as a reason for clearing a proposed merger; the EU continues to be more concerned about broader conditions such as the unemployment effects of a merger. The areas of convergence continue to exist in national contexts that are enormously diverse, including differences in the institutionalizing and implementing of antitrust rules, that is, judicial versus administrative institutionalization.

\textit{International Economic Law: Autonomous from But Inserted in National Law}

The interstate system, in its various incarnations across the last 150 years, has worked hard at securing intellectual property rights. The solutions developed over time have been centered in mutual recognition of different territorial systems.\textsuperscript{19} The Paris and Berne conventions of 1887 and 1886, respectively, provided a legal framework for intellectual property. The Berne Convention epitomizes this effort.\textsuperscript{20} However, the basic architecture of the Berne Convention cannot easily accommodate the growth of emergent global economic systems, the consequences for property rights arising out of the

\textsuperscript{18} Simply put, it could be said that to oligopoly coordination, long a major concern in U.S. antitrust policy, U.S. agencies have now added greater attention to single-firm dominance, long the central focus of EC merger review. Conversely, the EU has moved toward the U.S. approach to market definition, going beyond the measure of market share.

\textsuperscript{19} See the discussion in chapter 3 on the emergence in the late 1800s of a series of efforts to govern patents, notably the Paris Convention.

\textsuperscript{20} The nature of the protection granted can be found in article 5 of the convention: "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention." Teubner (1988) finds that there were efforts to establish harmonized copyright law, but they did not succeed.
development of digital technologies and the new possibilities for transmission of copyrighted materials, or the globalization of a variety of scientific, artistic, and other creative sectors.\textsuperscript{21} The World Intellectual Property Organisation (WIPO) is the modern institution through which states have sought to administer almost all multinational agreements on intellectual property. They have done so by means of the Agreement on TRIPS concluded during the GATT Uruguay Round in April 1994,\textsuperscript{22} through various cooperation efforts between the WTO and WIPO,\textsuperscript{23} through the European Convention relating to questions on copyright law, through “WIPO Internet Treaties,” and by means of a variety of European measures concerning copyright (Teubner 2004).

An international economic law emerged when the Marrakesh agreement, which implemented WTO in 1994, came into effect in January 1995. It established the public legal regime of trade rules among nations that are members of WTO,\textsuperscript{24} which accounts for 97 percent of world trade. At the heart of this international economic law are the provisions in the WTO (2003) agreements that spell out a regime for international property rights (IPRs). For some (e.g., Yueh), these provisions are a break with past international custom and treaty law, which had long been centered on the principle of the state’s exclusive territorial authority principle. For others, this type of law remains centered on old territorial national law (e.g., Dinwoodie 2000; Bermann 2000; Teubner 1987, 1988). Fischer-Lescano and Teubner (2004: 1020) find no harmonized international copyright since territorially bound and nationally divergent copyright guarantees remain determinate; international agreements simply mediate between different protection standards and establish reciprocal national entitlements to the implementation of minimum levels of protection.

TRIPS rests on the norm that the harmony or uniformity of laws is the ideal for the free flow of goods and services globally. This makes states key

\textsuperscript{21} The two major doctrines under public international law concern territoriality (property rights are to be protected under each state’s rules) and independence (the rules under which property holds in one state are not to be forced on another state). But after World War II, an increasing concern for innovation and the benefits of diffusion, especially to LDCs, led to challenges to this legal norm. Yueh (2003) finds that enabling development in LDCs seemed to justify a reduction of benefits to the innovator. The two doctrines were seen as having lost relevance with the implementation of the WTO TRIPS provisions. Since 1995 LDCs have been compelled to adopt TRIPS, which gives inventors some monopolistic rights so as to ensure that innovation takes place, and includes provisions that recognize some of the issues of concern to LDCs.

\textsuperscript{22} This has been in force since January 1, 1995.

\textsuperscript{23} The Agreement between WIPO and WTO (December 22, 1995) provides WIPO resources to WTO members. The TRIPS agreement specifies a continuing role for WIPO, including in the periodic reviews of TRIPS implementation.

\textsuperscript{24} As of April 2003.
implementers of this new regime: they must do the work that it takes to implement WTO international standards protections. These will go into national law. In this regard, some of the implications of WTO law are the denationalizing of specific components of national law. For several scholars the difficulties of enacting WTO and of achieving harmonization and effective implementation point to the difficulties of overcoming national territorial criteria for protections and the need to do so in today's global age. Thus Dinwoodie (2000) and Berman (1993) argue that moving away from territoriality (and adopting functional regime affiliation) would mean that the division of jurisdictional competencies and the normative preconditions for substantive decisions could no longer be inferred from each local legal order involved. For Dinwoodie the "facade of copyright rules based upon territoriality needs to be stripped away, and a new approach constructed. Some uncertainty is an inevitable, but worthwhile, short-term cost" (2000: 469, 573). Underlying these propositions is an understanding of global law as centered on a multiplication of global but partial regimes that address the needs of specialized sectors. Teubner's work is a brilliant examination of such an alternative conception of global law. He posits that a move toward property rights protections that would work in today's world would require a reorienting away from conflicts between national legal orders, and their refocusing upon conflicts between sectoral regimes, such as is the case in the context of collisions among WIPO, WTO, EU, and national laws. From my perspective, there are two sites for the making of global law. One is along the lines posited by Teubner. The second is the state, but in its denationalized mode. The implementation of WTO law is a good example. Unlike Teubner, I do not see the coexistence of these two sites for the making of international economic law and more generally global law as contradictory, a subject I return to in the last section of this chapter.

A NEW INSTITUTIONAL ZONE OF PRIVATIZED AGENTS

A critical and growing component of the broader field of forces within which states operate today is the proliferation of specialized types of

---

23 The conditions take account of the variable capacities of countries depending on level of development. Developing countries are granted a one-year transition to adjust their national law to these new requirements. Countries coming out of centrally planned economies are given five years. Countries lacking product patent protections in a particular domain would have ten years to do so; the exception is pharmaceutical and chemical-agricultural products, where they must recognize and protect intellectual property rights from the day of filing for WTO admittance.
private authority. These include the expansion of older systems, such as commercial arbitration, into new economic sectors, and they include new forms of private authority that are highly specialized and oriented toward specific economic sectors, such as the system of rules governing the international operations of large construction and engineering firms. The proliferation of self-regulatory regimes is especially evident in sectors dominated by a limited number of very large firms. These trends indicate the extent to which the global economic system needs governance, though of a different sort from that associated with the older normativity of the Keynesian state. These and other such transnational institutions and regimes raise important and difficult questions about the relation between the state and economic globalization. As Rosenau (1992) has noted, because so many processes are transnational, governments increasingly are not competent to address some of the major issues confronting our societies; this is not the end of sovereignty but an alteration in the "exclusivity and scope" of the competence of governments.26

One system that captures the proliferation of private authority in the global corporate economy is international commercial arbitration, today's leading contractual method for the resolution of transnational commercial disputes.27 It allows each party to avoid being forced to submit to the courts of the other and to maintain the secrecy of the process. Such arbitration can be "institutional" and follow the rules of institutions such as the International Chamber of Commerce in Paris, the American Arbitration Association, the London Court of International Commercial Arbitration, the World Bank's International Center for the Settlement of Investment Disputes, and others. It can also be

26 There is a wider systemic process here that needs to be distinguished from the effects of globalization. It is a worldwide and apparently growing distrust of governments and bureaucracies. Already earlier Shapiro (1993) found that this had contributed to the emergence of certain commonalities in law, notably the growing importance of constitutional individual rights that protect the individual from the state and other organizations. The particular hallmark of American constitutionalism is constitutional judicial review, which now has also emerged endogenously in Germany and Italy, and to some extent even in France (where there now is an active constitutional court and a constitutional bill of rights). The Court of Justice of the EU has evolved into a constitutional court (which entailed that constitutions and rights had to come about in Europe) (Sassen 1996: chapters 2 and 3).

27 It represents one mechanism for business disputes. The larger system includes arbitration controlled by courts, arbitration that is parallel to courts, and various court and out-of-court mechanisms such as mediation. The following description of international commercial arbitration is taken from Deitel and Garth (1996); for these authors, today "international commercial arbitration" carries a different meaning from what it did twenty years ago. It has become increasingly formal and more like U.S.-style litigation as it has become more successful and institutionalized. Today international business contracts for, e.g., the sale of goods, joint ventures, construction projects, or distributorships typically call for arbitration in the event of a dispute arising from the contractual arrangement.
ad hoc, typically adopting the rules of the UN Commission on International Trade Law (UNCITRAL). The arbitrators are private individuals selected by the parties; usually a case uses three arbitrators. They act as private judges: they hold hearings and issue judgments. There are few grounds for appeal to courts, and the final decision of the arbitrators is more easily enforced among signatory countries than would be a court judgment (under the terms of the widely used 1958 New York Convention).

The ascendance of this system as economic corporate globalization grew is indicated by the sharp growth in the number of arbitration centers over a short period of time in the 1990s, when a large number of countries became "integrated" into the global economy. Excluding those concerned with maritime and commodity disputes—an older tradition—there were 120 centers by 1991, with another seven created by 1993; among the more recent centers are those of Bahrain, Singapore, Sydney, and Vietnam. There were about 1,000 arbitrators by 1990, a number that had doubled by 1992 and seems to have stayed at that level.28 There has been a sharp growth in arbitration cases and a sharpening competition among arbitration centers to get the business. The development of the market for multinational legal services has further sharpened the competition as the large law firms can choose the centers that work best for their clients. In Europe there has been a reinvigorating of arbitration laws beginning in the 1980s, mostly oriented toward the interests of firms seeking international arbitration. In the United States such a revision was brought about through the Supreme Court in 1985 (Carboneau 1990). The overall trend has been toward strengthening international arbitration and further freeing it from the regulation of national court systems. One open-ended question is whether the formation of new structures, notably WTO, NAFTA, and the EU, will require some new legal elements in the international arbitration world.

The reasons for the Americanization of international commercial arbitration are somewhat interrelated: the rationalization of arbitration know-how; the ascendance of large Anglo-American transnational legal services firms; and the emergence of a new specialty in conflict resolution (Desalay 1992).29 The large Anglo-American law firms that dominate the international market

28 Smit and Fehorta (2004); Desalay and Garth (1996); Aksan (1990). Yet the international arbitrators are a tight community, with relatively few important institutions and limited numbers of individuals in each country who are the key players both as counsel and arbitrators. There is a kind of "international arbitration community," a "club," and arbitration has become big legal business (Salacuse 1991; Carboneau 2004). Desalay and Garth (1996) found that the large English and American law firms have used their power in the international business world to impose their conception of arbitration and, more largely, of the practice of law.

29 Anglo-American practitioners tend not to support the continental, highly academic notion of a lex mercatoria. The so-called lex mercatoria was conceived by many as a return to an international law of business independent of national laws (Carboneau 1990; de Ly 1992).
of business law include arbitration as one of the array of services they offer—a kind of litigation that uses a different forum than courts. Specialists in conflict are practitioners formed from the two great groups that have dominated legal practice in the United States: corporate lawyers, known for their competence as negotiators in the creation of contracts; and trial lawyers, whose talent lies in jury trials. The growing importance from the 1980s onwards of such transactions as mergers and acquisitions, antitrust, and other litigation contributed to a new specialization: knowing how to combine judicial attacks and behind-the-scenes negotiations to reach the optimum outcome for the client. Dezalay and Garth (1996) note that under these conditions judicial recourse becomes a weapon to be used in a situation that will almost certainly end before trial.

Another example of a private regulatory system is debt security or bond-rating agencies, which have come to play an increasingly important role in the global economy. Thus in the mid-1980s Moody’s and Standard and Poor had no analysts outside the United States; ten years later they each had about one hundred in Europe, Japan, and Australia. Three ratings agencies dominate the international market: Moody’s, Standard and Poor, and Fitch Rating. Sinclair points that these agencies function as mechanisms of “governance without government”: they have leverage because of their distinct gatekeeping functions on investment funds sought by corporations and governments. In this regard they can be seen as a significant force in the operation and expansion of the global economy. And as with business law, their

---

30 There are two agencies that dominate the market in ratings, with listings of $4 trillion each. They are Moody’s Investors Service, usually referred to as Moody’s, and Standard and Poor’s Ratings Group, usually referred to as Standard & Poor. The European-based Fitch Ratings is the third largest credit rating agency in the world. IBCA bought Fitch in 1997, creating Fitch IBCA, which in 2001 became Fitch Ratings. Fitch Ratings is part of the Paris-based company Fimalac, S.A. While there are several rating agencies in other countries, these are orientated to the domestic markets.

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

32 Their power has grown in good part because of disintermediation and the globalization of the capital market. The functions fulfilled by banks in the capital markets (i.e., intermediation) have lost considerable weight in the running of these markets; insofar as banks are subject to more government regulation than what has replaced banks, the lesser role of banks inevitably brings with it a decline in government regulation over the capital markets. Rating agencies, which are private entities, have taken over some of the functions of banks in organizing information for suppliers and borrowers of capital. An important question here is whether these agencies and the larger complex of entities, such as those represented by Wall Street, has indeed formed a new intermediary sector (cf. Thrift 1987; Sassen 2001: chapter 5), one largely not regulated the way the banking sector is.
expanded influence overseas is to some extent both a function and a promoter of U.S. financial orthodoxy, particularly its short-term perspective. The two large European rating agencies have also grown in importance.

A third type of private authority can be seen in the so-called lex constructio. This combines the notion of an autonomous system of rules internal to a sector with the fact of a few large firms having disproportionate control over a sector, which thereby facilitates the making of such private systems of rules. It is a combination of rules and standard contracts for cross-border construction projects. The sector is dominated by a small number of well-organized private associations: the International Federation of Consulting Engineers (FIDIC), the International European Construction Federation (FIEC), the British Institution of Civil Engineers (ICE), the Engineering Advancement Association of Japan (ENAA), and the American Institute of Architects (AIA). In addition, the World Bank, UNCITRAL, UNIDROIT, and certain international law firms also contribute to developing legal norms for how the sector is meant to function. Because of the nature of large construction and engineering projects, this case also illuminates the ways in which having an autonomous system of rules and having the type of power that large global firms have does not mean that these firms can escape all outside constraints. Thus, these firms increasingly “need” to address environmental protection. The way this issue gets handled in the lex constructio is also emblematic of what other such autonomously governed sectors do: largely a strategy of deference that aims at externalizing the responsibility for regulating the environmental issues arising out of large-scale construction projects. The externalizing is to the “extra-contractual” realm of the law of the host state, using “compliance” provisions that are today part of the standard contract.

These and other such transnational institutions and regimes 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 constructio is a self-regulatory regime in a major economic sector dominated by a limited number of large firms. Along with other such institutions, they have emerged as important governance mechanisms whose authority is not centered in the state.

But for all of this to happen, it took a broader normative transformation in matters concerning the substantive rationality of the state—matters concerning raison d’État. In good part this normative transformation is en-
acted outside the state and originates outside the interstate system. Further, there are multiple private agents, some minor, some not so minor, that ensure and execute this new normative order. Nowhere is this transformation as developed and influential as in the normative weight gained by the logic of the global capital market in setting criteria for key national economic policies. In this sense, the global capital market is a heuristic space for understanding the normative power evinced by what are represented as private formations notwithstanding their norm-making capacities in the public domain. This is the argument I develop in the next section.

**THE GLOBAL CAPITAL MARKET: POWER AND NORM-MAKING**

In the many negotiations between national states and global economic actors we can see a new normativity derived from the operational logic of the capital market that has imposed itself on important aspects of national economic policymaking in the 1990s. Some of the more familiar elements are the new importance attached to the autonomy of central banks, privileging anti-inflation aims over employment growth, exchange rate parity, and the variety of items usually referred to as IMF conditionality.\(^3\) In this new normative order, certain claims and criteria for policymaking emerge as legitimate. In addition, other types of claims are delegitimated—generally expenditures concerning the well-being of people at large, which are now often evaluated as making states “less competitive” in a normative context where states are expected to become more so.

I try to capture this normative transformation with the notion of a privatizing of capacities for making norms, capacities we have associated with the state in our recent history. This brings with it strengthened possibilities of norm-making in the interests of the few rather than the majority. In itself this is not novel. What is novel is the formalization of these privatized norm-making capacities and the sharper restricting of who might benefit, two features that evince sharp divergence from the prior Keynesian phase of many Western states. This process also brings with it a weakening and even elimination of public accountability in domains of norm-making which when in the public sector were, at least in principle, so subject. Again, while in practice this might not appear to be much of a difference, it is the formalizing of this withdrawal from the sphere of public accountability that is important.

---

\(^3\) Since the Southeast Asian financial crisis there has been a revision of some of the specifics of these standards. For instance, exchange rate parity is now evaluated in less strict terms.
The formation of a global capital market represents a concentration of power capable of systemically influencing national government economic policy and, by extension, other policies. The key concern here is the fact that the global financial markets are not only capable of deploying raw power but also have produced a logic that now is seen as setting the criteria for "proper" economic policy. IMF conditionality has some of these features. In a way these markets can now exercise the accountability functions formally associated with citizenship in liberal democracies: they can vote governments' economic policies out or in; they can force governments to take certain measures and not others. The issue here is not so much that these markets have emerged as a powerful mechanism where those with capital can influence government policy. 34 It is rather that the overall operation of these markets has an embedded logic that calls for certain types of public sector economic policy objectives. Given the properties of the systems through which these markets operate—speed, simultaneity, and interconnectivity—the orders of magnitude they can produce signal a politico-economic situation where the outcome is much more than the sum of the parts. This weight can be exercised on any country integrated into the financial markets, and this is a rapidly growing number.

The issue of the power of today's global market for capital, its features, and its premises raises two critical questions. One of these is whether today's global capital market is different from earlier ones; the other, whether it is in fact a larger market than that of earlier global eras. My answer to the first question is yes, and that this difference matters as we seek to understand the power of this market when it confronts states and national economic actors. My answer to the second question is that whether it is larger or smaller than previous world markets, as counted in value, is of secondary importance to the character of its globality—that is, under what conditions it is articulated with national states and economies. The size of the market does matter in a relational sense: can it overwhelm national central banks, national investors, and national capital markets?

Distinguishing Today's Market for Capital

There has long been a market for capital and it has long consisted of multiple, variously specialized financial markets (e.g., Eichengreen and Fishlow

34 See, e.g., Arrighi (1994).
1996; Helleiner 1999). It has also long had global components (Arrighi 1994; Eichengreen 1996). Indeed, a strong line of interpretation in the literature is that today's market for capital is nothing new and represents a return to an earlier global era at the turn of the century and, then again, in the interwar period (Hirst and Thompson 1996). However, all of this holds at a high level of generality, and when we factor in the specifics of today's capital market some significant differences emerge with those past phases. There are two major sets of differences. One has to do with the level of formalization and institutionalization of the global market for capital today, which is partly an outcome of the interaction with national regulatory systems that themselves gradually became far more elaborate over the last hundred years (see Sassen 1991 and 2001: chapters 4 and 5). The second set of differences concerns the transformative impact of the new information and communication technologies, particularly computer-based technologies (henceforth referred to as digitization). In combination with the various dynamics and policies we usually refer to as globalization they have constituted the capital market as a distinct institutional order, one different from other major markets and circulation systems such as global trade.

Two sets of interrelated empirical features of these markets can function as preliminary or elementary indicators of rapid transformation since the 1980s. One set concerns the accelerated growth of finance over the last two decades, partly as a result of the electronic linking of markets—both nationally and globally—and of the sharp rise in innovations enabled by both financial economics and digitization. The second set concerns the sharp growth in the use of a particular type of financial instrument, the derivative, a growth evident both in the proliferation of different types of derivatives and in its becoming the leading instrument in financial markets. This diversification and dominance of derivatives has raised the complexity of operations and has further facilitated the linking of different financial markets. I argue that together these two sets of empirical features partly distinguish the financial markets emerging in the 1980s.

Beginning in the 1980s, finance functioned on a different growth curve from other globalized sectors that have also grown sharply. Since 1980,

---

35 There are other factors that are significant, particularly institutional changes, such as the bundle of policies usually grouped under the term deregulation and, on a more theoretical level, the changing scales for capital accumulation. For a full analysis of these issues, see Eichengreen (2003) and Eichengreen and Fishlow (1996) on deregulation and re-regulation in the financial markets today; on new scales for capital accumulation, see Dicken (2003) for one of the most exhaustive analyses of all major economic sectors involved.

36 See p. 350 in chapter 7 for a brief description.
the total stock of financial assets has increased three times faster than the aggregate GDP of the twenty-three highly developed countries that constituted the Organisation for Economic Cooperation and Development (OECD) for much of this period; and the volume of trading in currencies, bonds, and equities has increased about five times faster and now surpasses aggregate GDP by far. The worldwide (notional) value of traded derivatives, which accounts for most financial market transactions, was $30 trillion in 1994, over $65 trillion in 1999, over $80 trillion by 2000, $97 trillion by 2001, and $220 trillion by 2004, for a 120 percent increase as of 2001, pointing not only to higher levels in values traded but also to an increase in the growth rate (BCBS 2005b: 21). To put this in perspective it is helpful to compare it to the value of other major components of the global economy, such as the value of cross-border trade ($11 trillion in 2004) and global foreign direct investment stock ($6 trillion in 2000 and $8.2 trillion in 2003 [WTO 2005: 3; UNCTAD 2005: 9]). Annual foreign exchange transactions were ten times as large as world trade in 1983 but seventy times larger in 2004, even though world trade also grew sharply over this period.\(^{17}\) In 2001, the average daily turnover in foreign exchange markets was $1.3 trillion and in 2004, $1.8 trillion (BCBS 2005b), equal to almost one-fifth of the total annual value of world trade in 2003.\(^{38}\)

In many ways the international financial market from the late 1800s to the interwar period was as massive as today’s if we measure its volume as a share of national economies and in terms of the relative size of international flows. This fact is critical to scholars who argue that globalization is not new (e.g., Hirst and Thompson 1996). The international capital market in the earlier period was large and dynamic, highly internationalized, and backed by a healthy dose of Pax Britannica to keep order. The extent of its internationalization can be seen in the fact that in 1920, for example, Moody’s rated bonds issued by about fifty governments to raise money in the American capital markets (T. Sinclair 1994). The depression brought on a radical decline in the extent of this internationalization, and it was not until very recently that Moody’s was once again rating the bonds of about fifty governments. Indeed, as late as 1985, only fifteen foreign governments were borrowing in the

\(^{17}\) The foreign exchange market was the first one to globalize, in the mid-1970s. Today it is the biggest and in many ways the only truly global market. It has gone from a daily turnover rate of about $5 billion in the 1970s, to $60 billion in the early 1980s, and an estimated $1.3 trillion in 1999 and $1.8 trillion in 2003. In contrast, the total foreign currency reserves of the rich industrial countries amounted to about 1 trillion in 1999 and 3 trillion in 2004.

\(^{38}\) WTO (2003) and BCBS (1999); author’s calculations.
U.S. capital markets. Not until after 1985 did the international financial markets reemerge as a major factor.⁹

One type of difference concerns the growing concentration of market power in institutions such as pension funds and insurance companies. Institutional investors are not new, but what is different beginning in the 1980s is the diversity of the types of funds and the rapid escalation of the value of their assets. There are two phases in this short history, one going into the early 1990s and the second one taking off in the later 1990s. Focusing briefly on the first phase and considering pension funds, for instance, their assets more than doubled in the United States from $1.5 trillion in 1985 to $9 trillion in 1993. Pension funds grew threefold in Britain and fourfold in Japan over that same period, and they more than doubled in Germany and Switzerland. In the United States, institutional investors as a group came to manage two-fifths of U.S. households' financial assets by the early 1990s, up from one-fifth in 1980. As table 5.1 shows, by 2001 these assets had reached $19.2 trillion. Further, the global capital market became an increasingly necessary component of a growing range of types of transactions, such as the diversity of government debts that began to get financed through the global market—kinds of debt that were thought to be basically local, such as municipal debt, are now entering this market. The overall growth in the value of financial instruments and assets also held for U.S. institutional investors whose assets rose from 59 percent of GDP in 1980 to 136.3 percent in 1993, and 191 percent in 2001.

While all of these trends continued in the second phase that took off in the 1990s, it is the rise of hedge funds that stands out. Hedge funds are among the most speculative of financial institutions; they sidestep certain disclosure and leverage regulations by having a small, private clientele and, frequently, by operating offshore. While they are not new, the growth in their size and their capacity to affect the functioning of markets grew enormously in the 1990s and they emerged as a major force by the late 1990s. According to some estimates they numbered 1,200 with assets of over $150 billion by mid-1998 (BCBS 1999), which exceeded the $122 billion in assets of the total of almost 1,500 equity funds as of October 1997 (UNCTAD 1998). By 2002 they numbered over 8,000 and global hedge funds assets stood at a reported $600 billion (BCBS 2005b: 79). Both types of funds need to be distinguished from

⁹ Switzerland's international banking was, of course, the exception. But this was a very specific type of banking and does not represent a global capital market, particularly given basically closed national financial systems at the time (I have examined this difference in Sassen 1991: chapter 4).
Table 5.1

<table>
<thead>
<tr>
<th>Country</th>
<th>1993</th>
<th>1999</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>435.9</td>
<td>757.3</td>
<td>794.3</td>
</tr>
<tr>
<td>France</td>
<td>906.3</td>
<td>1691.1</td>
<td>1701.3</td>
</tr>
<tr>
<td>Germany</td>
<td>729.8</td>
<td>1529.0</td>
<td>1478.4</td>
</tr>
<tr>
<td>Japan</td>
<td>3610.7</td>
<td>4928.2</td>
<td>3644.8</td>
</tr>
<tr>
<td>Netherlands</td>
<td>465.2</td>
<td>799.3</td>
<td>722.3</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1543.6</td>
<td>3321.3</td>
<td>2743.3</td>
</tr>
<tr>
<td>United States</td>
<td>9051.7</td>
<td>19274.0</td>
<td>19257.7</td>
</tr>
</tbody>
</table>

Percentage of OECD1

<table>
<thead>
<tr>
<th></th>
<th>1999</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage</td>
<td>90.6</td>
<td>87.2</td>
</tr>
</tbody>
</table>


1 Percentages based on author’s calculation.

2 Netherlands’ figure for 2001 excludes non-life insurance.

Asset management funds, of which the top ten are estimated to have $10 trillion under management.40

A second set of differences has to do with the properties that the new information technologies bring to the financial markets. Two sets of properties need to be emphasized here. A first set concerns the technical features of these technologies: instantaneous transmission, interconnectivity, and speed. The second concerns the increased digitization of transactions and the associated increase in capacities to liquefy assets. The new technologies have enabled the electronic linking of markets inside and across countries, and the technical properties mobilized have enabled sharp increases of transactions within a given time frame. The digitization of financial instruments has meant that many more than just the cognoscenti can derive advantages from the accelerated innovation and increased complexity in the instruments involved. This holds especially for derivatives, now the main instrument in financial transactions.

The particular properties of the new interactive and digitization technologies explain to a significant extent some of the key empirical fea-

40 In that same period, assets of insurance companies increased by 110 percent (from $1.6 trillion to $3.3 trillion), assets of commercial banks grew by 100 percent (from $3.5 trillion to $7 trillion), and deposits of commercial banks increased by 79 percent (from $2.5 trillion to $4.5 trillion) (Investment Company Institute 2003: 1–2, n. 4). The level of concentration is enormous among these funds, partly as a consequence of mergers and acquisitions driven by the need for firms to reach what are de facto the competitive thresholds in the global market today.
tures of these markets today, specifically, empirical features that distinguish them from earlier phases. These properties—instantaneous transmission, interconnectivity, and decentralized access—are partly interrelated, but it is useful to isolate their effects on markets. Vast computer networks enable the first two features, and both of these, in turn, assume a whole new potential in the context of the third feature, insofar as the latter raises the number of participating investors. The combination of these three features leads to growth in the amount of capital mobilized by raising the number of transactions that can be executed within a given time frame, and it leads to an increase in the velocity at which a given set of transactions can produce a given amount of value added as compared, for instance, with instantaneous transmission between only two points. This clearly also raises the potential for total value lost in the case of a financial crisis. The ability to realize (or lose) value from a transaction happens at a larger scale and faster, thus raising the value gained (or lost) and decreasing the time span between investment and realized profit (or loss). As each transaction can in principle be completed in increasingly shorter intervals, as long as the majority of investments yield a profit, more value is produced in less time. It signals a kind of built-in potential for exponential growth in value added through the multiplication of transactions. This is a capability that other major sectors in the economy, such as trade and direct investment, lack. When it comes to the instruments traded in this environment, the key technical condition that contributes to distinguishing today’s derivatives from past instantiations of this type of instrument is digitization.

The impact of decentralized access on the market for capital has been conditioned on a set of distinct policy changes in each country that has become integrated into this market. Since the late 1980s, a growing number of financial markets have become globally integrated. This integration was, and continues to be, based on a crucial conditionality, the adoption of a bundle of policies generally referred to as economic deregulation. At the same time, the possibility of decentralized access greatly facilitated the direct incorporation and simultaneous participation in the global market for capital by a rapidly growing number of national financial markets.

As for the digitization of instruments, it has been critical for the possibility of simplifying the use of complex instruments. This possibility takes on its full import if we consider that one of the marking features of the financial era that began in the 1980s is its drive to produce innovations and raise the level of complexity of instruments. In fact, a key feature of the global financial markets today is accelerated innovation. The multiplication of types of instruments and the intensity of transactions is one feature distinguishing
today's derivatives trading markets from their historical predecessors. Digitization has enabled innovations, and derivatives are the key type of instrument on which innovation has centered. Innovations, in turn, have been crucial in raising the supply of financial instruments that are tradable. One way of interpreting this drive toward innovation is the push to raise the level of liquidity in the system given the sharply increased thresholds of capital needed for executing a growing number of large transactions, for example, mergers of large firms or privatizations of huge, once public utilities. In addition, a crucial incentive for innovation is the push to liquefy forms of wealth hitherto considered non-liquid. This can require enormously complex financial instruments and has driven much innovation. The possibility of using computers has not only facilitated the development of such instruments but also has enabled the widespread use of these instruments insofar as much of the complexity can be contained within the software. Use does not require full understanding of the financial mathematics or the software algorithms involved.

The properties of interactive and digitization technologies assume added meaning because they enable a multiplication of the number of transactions that can be executed within a given time frame. This multiplication of transactions is evident in the lengthening distance between the financial instrument and actual underlying asset, that is, the increased number of intermediate transactions, each of which can produce a profit (or a loss). The values of cross-border transactions in bonds and equities as the percentage of GDP capture this at the macro-level (table 5.2). Table 5.2 also shows the recency of the accelerated increase. For instance, the value of such transactions represented 4 percent of GDP in 1975 in the United States, 35 per-

---

31 A key component of innovation over the last two decades has been the increase in speculation, a fact that has added to the complexity of instruments. The 1990s also saw the proliferation of institutional investors with speculative investment strategies.

32 While currency and interest rates derivatives did not exist until the early 1980s, and represent two of the major innovations of the current period, derivatives on commodities, so-called futures, existed in some version in earlier periods. Amsterdam's stock exchange in the seventeenth century—when it was the financial capital of the world—was based almost entirely on trading in commodity futures.

33 There are significant differences by country. Securitization is well advanced in the United States but only began to take off in the late 1990s in most of Europe and Japan.

34 Perhaps the most familiar case is the invention of instruments that represent real estate (Real Estate Investment Trusts [REITs]) and that became a major source of innovations in the 1980s.

35 For instance, after the Mexico crisis and before the first signs of the Asian crisis, the leading financial services firms negotiated a large number of innovative deals that further expanded the volumes in the financial markets and incorporated new sources of profit, thereby ensuring liquidity even in a situation of at least partial crisis. Typically these deals involved novel concepts of how to sell debt and of what is a salable debt.
Table 5.2
Cross-Border Transactions in Bonds and Equities* as Percentage of GDP, 1975–2002
(Selected Years)

<table>
<thead>
<tr>
<th></th>
<th>Percentage of GDP</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>4</td>
</tr>
<tr>
<td>Japan</td>
<td>2</td>
</tr>
<tr>
<td>Germany</td>
<td>5</td>
</tr>
<tr>
<td>France</td>
<td>—</td>
</tr>
<tr>
<td>Italy</td>
<td>1</td>
</tr>
<tr>
<td>Canada</td>
<td>3</td>
</tr>
</tbody>
</table>

* Denotes gross purchases and sales of securities between residents and nonresidents.

cent in 1985 when the new financial era was in full swing, had quadrupled by 1995 and risen to 292 percent by 2002. Other countries show even sharper increases. In Germany this share grew from 5 percent in 1975 to 464 percent in 2002; in France it went from 5 percent in 1980 to 430 percent in 2002. In part, this entails escalating levels of risk and innovation driving the industry. We have seen this acceleration only over the last decade and a half.

Today, after considerable deregulation in the industry, the incorporation of a growing number of national financial centers into a global market, and the sharp use of electronic trading, we might think that the actual spatial organization of the industry would reflect increasingly market-driven locational dynamics, unlike what may have been the case in the earlier highly regulated phase. This should hold especially for the global market given the earlier prevalence of highly regulated and closed national markets. There has, indeed, been geographic decentralization of certain types of financial activities, which has been aimed at securing business in the growing number of countries becoming integrated into the global economy. Many of the leading investment banks have operations in far more countries than they had twenty years ago. The same can be said for the leading accounting, legal, and other

---

* Beginning in the 1980s there has been growing worldwide deregulatory pressure by key state and nonstate actors involved in the global capital market across the political spectrum; the aims are market linking, global integration, and intersectoral mobility within finance. Thus London saw its "big bang" of 1984 and Paris saw "le petit bang" two years later under governments as diverse as the Tories in England and the Socialists in France.
specialized corporate services whose networks of overseas affiliates have seen explosive growth (Taylor, Walker, and Beaverstock 2002; see generally GAWC). And it can be said for some markets. For example, in the 1980s all basic wholesale foreign exchange operations were in London while today these are distributed among London and several other centers (even though their number remains far smaller than the number of countries whose currency is being traded).

But empirically what stands out about the global financial markets after two decades of deregulation, worldwide integration, and major advances in electronic trading is the extent of locational concentration and the premium firms are willing to pay to be in major centers (Sassen 2001: chapters 4 and 7). Large shares of many financial markets are disproportionately concentrated in a few financial centers. This trend toward consolidation in a few centers also is evident within countries. Further, this pattern toward the consolidation of one leading financial center per country is a function of rapid growth in the sector, not of general decay in the losing cities.

The sharp concentration in leading financial markets can be illustrated with some empirical data. London, New York, Tokyo (notwithstanding a national economic recession), Paris, Frankfurt, and a few other cities regularly appear at the top and represent a large share of global transactions. This holds even after the September 11 attacks that destroyed the World Trade Center (though this was largely not a financial complex) in New York and were seen by many as a wake-up call about the vulnerabilities of urban agglomerations and concentration in a few sites. Table 5.3 shows the extent to which pre-September 11 levels of concentration in stock market capitalization in a limited number of global financial centers continued to hold after the attacks. The top twelve exchanges accounted for 90 percent of global market capitalization. Table 5.4 shows foreign listings in major markets have sharply higher numbers than most markets, further indicating that location in the leading markets is one of the features of the global capital market. London, Frankfurt, and New York account for an enormous world share in the export of financial services. London, New York, and Tokyo account for over one-third of global institutional equity holdings. For instance, London, New York, and Tokyo account for 58 percent of the foreign exchange market, one of the few truly global markets; together with Singapore, Hong Kong, Zurich,

47 For updated figures see the International Bank for Settlements, IMF national accounts data; specialized trade publications such as the Wall Street Journal's WorldScope, and Morgan Stanley Capital International; The Banker; data listings in the Financial Times and in The Economist; and, especially for a focus on cities, the data produced by Technometrix, Inc. (now part of Thomson Financials) and the World Federation of Stock Exchanges. These and additional names of standard, continuously updated sources are listed in Sassen (2001).
### Table 5.3
Major Markets by Capitalization for Top 12 Markets for 2000–2004 (bn USD)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>NYSE</td>
<td>12,707.6</td>
<td>34.2</td>
<td>9,015.3</td>
<td>39.5</td>
<td>11,534.5</td>
<td>37.1</td>
</tr>
<tr>
<td>NASDAQ</td>
<td>3,532.9</td>
<td>9.5</td>
<td>1,994.5</td>
<td>8.7</td>
<td>3,597.1</td>
<td>11.6</td>
</tr>
<tr>
<td>Tokyo</td>
<td>3,557.7</td>
<td>9.6</td>
<td>2,069.3</td>
<td>9.1</td>
<td>3,193.9</td>
<td>10.3</td>
</tr>
<tr>
<td>London</td>
<td>2,865.2</td>
<td>7.7</td>
<td>1,856.2</td>
<td>8.1</td>
<td>2,612.2</td>
<td>8.4</td>
</tr>
<tr>
<td>Euronext</td>
<td>2,441.3</td>
<td>6.6</td>
<td>1,538.7</td>
<td>6.7</td>
<td>2,271.7</td>
<td>7.3</td>
</tr>
<tr>
<td>Osaka</td>
<td>2,287.0</td>
<td>6.2</td>
<td>1,491.9</td>
<td>6.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deutsche Borse</td>
<td>1,994.5</td>
<td>3.2</td>
<td>686.0</td>
<td>3.0</td>
<td>1,270.2</td>
<td>4.1</td>
</tr>
<tr>
<td>Toronto</td>
<td>1,177.5</td>
<td>2.8</td>
<td>570.2</td>
<td>2.5</td>
<td>766.2</td>
<td>2.5</td>
</tr>
<tr>
<td>Spanish Exchange</td>
<td>940.7</td>
<td>2.5</td>
<td>461.6</td>
<td>2.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Swiss Exchange</td>
<td>826.0</td>
<td>2.2</td>
<td>547.0</td>
<td>2.4</td>
<td>792.3</td>
<td>2.5</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>861.5</td>
<td>2.3</td>
<td>463.1</td>
<td>2.0</td>
<td>623.4</td>
<td>2.0</td>
</tr>
<tr>
<td>Italy</td>
<td>789.6</td>
<td>2.1</td>
<td>477.1</td>
<td>2.1</td>
<td>768.4</td>
<td>2.5</td>
</tr>
</tbody>
</table>

Percentage of Total World Capitalization

|                | 89.3 | 92.7 | 90.8' |


Note: Data on market capitalisation exclude investment funds, and include common and preferred shares, shares without voting rights, otherwise stated. Euronext includes Brussels, Amsterdam, and Paris.

The top 12 for 2000 did not include Osaka or the Spanish Exchanges (BME). The Spanish Exchanges did not exist in 2000. Instead Spain (which preceded the Spanish Exchanges) was eleventh with market capitalisation of $504.2 billion and Australia was twelfth with market capitalisation of $372.8 billion.

1 This figure indicates the percentage represented by the top 12 exchanges in terms of market capitalization for 2000 (including the exchanges in Spain, 1.6%, and Australia, 1.2%).

Geneva, Frankfurt, and Paris, they account for 85 percent in this, the most global of markets.

The trend toward consolidation in a few centers, even as the network of integrated financial centers expands globally, is also evident within countries. In the United States, for example, the leading investment banks are concentrated in New York; the only other major international financial center is
Table 5.4
Foreign Listings in Major Exchanges, 2000–2004

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th></th>
<th>2002</th>
<th></th>
<th>2004</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Foreign Listings</td>
<td>Percentage of Foreign Listings</td>
<td>Number of Foreign Listings</td>
<td>Percentage of Foreign Listings</td>
<td>Number of Foreign Listings</td>
<td>Percentage of Foreign Listings</td>
</tr>
<tr>
<td>NASDAQ</td>
<td>488</td>
<td>10.3</td>
<td>445</td>
<td>11.0</td>
<td>340</td>
<td>10.5</td>
</tr>
<tr>
<td>NYSE</td>
<td>433</td>
<td>17.5</td>
<td>461</td>
<td>19.2</td>
<td>459</td>
<td>20.0</td>
</tr>
<tr>
<td>London</td>
<td>448</td>
<td>18.9</td>
<td>409</td>
<td>17.5</td>
<td>351</td>
<td>12.4</td>
</tr>
<tr>
<td>Deutsche Borse</td>
<td>241</td>
<td>24.5</td>
<td>235</td>
<td>23.9</td>
<td>159</td>
<td>19.4</td>
</tr>
<tr>
<td>Euronext</td>
<td></td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>334</td>
<td>25.1</td>
</tr>
<tr>
<td>Swiss Exchange</td>
<td>164</td>
<td>39.4</td>
<td>149</td>
<td>36.2</td>
<td>127</td>
<td>31.1</td>
</tr>
<tr>
<td>Tokyo</td>
<td>41</td>
<td>2.0</td>
<td>38</td>
<td>1.8</td>
<td>30</td>
<td>1.3</td>
</tr>
</tbody>
</table>


Note: 2000 figures are year-end figures.


Chicago, Sydney and Toronto have equally gained power in continental-sized countries and have taken over functions and market share from what were once the major commercial centers, Melbourne and Montreal, respectively, as have Sao Paulo and Bombay, which have gained share and functions from Rio de Janeiro and New Delhi, respectively. These are all enormous countries and likely could sustain multiple major financial centers.⁴⁰

There is both consolidation in fewer major centers across and within countries and a sharp growth in the numbers of centers that become part of the global network as country after country deregulates its economy. This mode of incorporation into the global network is often at the cost of losing functions that these cities may have had when they were largely national centers. Today the leading, typically foreign, financial, accounting, and legal services firms enter their markets to handle many of the new cross-border

⁴⁰ In France, Paris has larger shares of most financial sectors than it did ten years ago and once important stock markets like Lyon have become “provincial,” even though Lyon is today the regional hub of a thriving cross-border economic area. Milano privatized its exchange in September 1997 and electronically merged Italy’s ten regional markets. Frankfurt now concentrates a larger share of the six financial centers in Germany than it did in the early 1980s, as does Zurich, which once had Basel and Geneva as significant competitors.
Incorporation in the global market typically happens without a gain in their global share of the particular segments of the market they are in even as capitalization may increase, often sharply, and even though they add to the total volume in the global market.

Why is it that at a time of rapid growth in the network of financial centers in overall volumes and in electronic networks there is such high concentration of market shares in leading global and national centers? Both globalization and electronic trading are about expansion and dispersal beyond what had been the confined realm of, respectively, national economies and floor trading. Indeed, one might well ask why financial centers matter at all. I return to these particular issues in Part 3 as a way of specifying the limits of capital mobility and implications for governance in the public interest from this ongoing territorial insertion. That the global capital market is partly located in these specific terrains needs to be distinguished from the notion that it is encased in national territories: the institutional arrangements and professional practices involved in the operations of these markets may well have the effect of denationalizing the financial centers and hence constitute a spatiality that is distinct from that of national territoriality.

**Governments and the Global Market for Capital**

What are the mechanisms through which the massive growth of financial flows and assets and an integrated global capital market can shape states’ economic policymaking? A global capital market could be simply a vast pool of money for investors without conferring power over governments. That it can discipline government economic policymaking is a distinct power, one that is not ipso facto inherent in the existence of a large global capital market. There are several mechanisms through which the global capital market exercises its disciplining function on national governments and pressures them to become accountable to the logic of these markets. The power of governments over their economies in market-centered systems has traditionally been based on the ability to tax, to print money, and to borrow. Before the deregulations that took off in the 1980s for several major developed countries and in the 1990s for most of the world, governments had considerable control over the amount of bank lending through credit controls and ceilings on interest rates, which made monetary policy in principle more effective than it is today.

---

9 This also holds for highly developed countries that do not have Anglo-American legal systems.
The global financial markets have affected all three sharply. With deregulation of interest rates in more and more highly developed countries, central banks now have to rely simply on changes in interest rate levels to influence the level of demand in the economy. They can no longer use interest rate ceilings. But the impact of interest rates on the economy, in turn, has been diminished by the widespread use of derivatives. Derivatives (futures, swaps, options) are meant to reduce the impact of interest rate changes and thereby can be seen as reducing the effectiveness of interest rate policy by governments on the economy. Indeed, an estimated 85 percent of U.S. Fortune 500 firms make some use of derivatives to insulate themselves from swings in interest rates and currency values, as do public sector entities, exemplified in the notorious case of the municipal government of Orange County in California. Most of these derivatives are actually on interest rates, which means that as their use expands, the power of central banks to influence the economy via interest rates will decline further, no matter how much significance the media attribute to central bankers making a change in rates. At the same time, insofar as many firms and sectors now operate with levels of capital far larger than they were in the past, interest rate changes can represent massive amounts of money in absolute terms.

In addition to the reduced impact central banks can have through interest rate policy, the power of governments to influence interest and foreign exchange rates and fiscal policy can be severely reduced, if not neutralized, by the foreign exchange markets and bond markets. For example, the markets can respond to a cut by the U.S. government in interest rates by raising the cost of loans to the U.S. government through an increased yield in long-term bonds. This has

---

50 Since these derivatives entail a redistribution of interest sensitivities from one firm or sector to another in the economy, one could argue that the overall sensitivity to interest rates in the economy remains constant. But the fact is that different firms may have different sensitivities to changes in interest rates; we can assume that the risk is being shifted from highly sensitive firms to less sensitive firms, thereby reducing the overall impact of interest rates on the economy. Through the use of derivatives, interest rate sensitivity is switched to less sensitive sectors.

51 Media coverage of the heads of central banks, notably Alan Greenspan in the United States and, earlier on, Hans Tietmeyer in Germany, portray them as extremely powerful. The suggestion is the whole country is hanging on their every word. The stock market is sensitive to their decisions on interest rates. Further, in such gatherings as the World Economic Forum, held annually in Davos (Switzerland), which offers an opportunity for the CEOs of the 1,000 largest corporations in the world to mix with central bankers (and presidents and prime ministers), one central banker after another will hold forth at length about his bank's autonomy from government and the financial markets. But it is not at all certain that just because central bankers find themselves in this increasingly strategic position that their autonomy from the financial markets is the same as the power to contest the logic of the latter. (See Sassen 1996 for a further discussion.)
emerged as a standard procedure. The channel through which central banks have traditionally carried out their monetary policies is the banking sector. However, in the United States for instance, its role is shrinking because of the new financial institutions and instruments. Changes in the industry due to consolidation have further reduced the significance of this role of banks. Thirty years ago banks provided three-fourths of all short- and medium-term business credit; by 1995 this was down to 50 percent (The Economist 1995). By 1999 the share of commercial banks in total financial assets was less than 20 percent (The Economist 1999). The rise of electronic cash further reduces the control capacity of central banks over the money supply. Electronic money moves through computer networks, bypassing the information-gathering system of central banks.

All of these conditions have reduced the control central banks have over the money supply. It is certainly a matter of thresholds, since this control was never total, but now it is seriously partial, given the rules of the game under which central banks operate. Clearly these outcomes vary in severity depending on the country's banking structure. Overall the impact of financial deregulation and innovation has made the effect of a change in interest rates on a national economy more uncertain and increased the opportunities for mistakes. A perhaps countervailing tendency is the increasing convergence among central bankers in terms of policy, which we have seen over the last decade, along with the increasing acceptance of central bank autonomy.

Private firms in international finance, accounting, and law, the new private standards for international accounting and financial reporting, and supranational organizations such as the IMF all play strategic non-government centered governance functions in the global capital market. The events following the well-documented Mexico crisis provide some interesting insights about these firms' role in changing the conditions for financial operation, about the ways in which national states participated, and the formation of a new institutionalized intermediary space.

---

52 There is the famous case of George Soros and his Quantum fund, which made $1 billion in profits on Black Wednesday in 1992 by helping to push the British pound out of the European Exchange Rate Mechanism.

53 Another issue is the currency markets. Governments with large debts are partly in the hands of investors—whether foreign or national—who can switch their investments to other currencies, and increasingly in the hands of so-called vulture funds that will now take governments to court, breaking the tacit rules that have governed sovereign debt (see appendix to this chapter). Governments and their central banks have been losing control over long-term interest rates. This is no minor matter if one considers that 60 percent or more of private-sector debt in the United States, Japan, Germany, and France is linked to long-term interest rates.

54 There is a separate discussion to be had about who benefited from the earlier period, for example, in the United States when the Federal Reserve had greater control. Even though many were excluded, the beneficiaries were a far wider spectrum of workers, communities, and firms than they are today.
J. P. Morgan worked with Goldman Sachs and Chemical Bank to develop several innovative deals that brought investors back to Mexico's markets.\footnote{The $40 billion emergency loan package from the IMF and the U.S. government and the hiring of Wall Street's top firms to refurbish its image and find ways to bring it back into the market helped Mexico "solve" its financial crisis vis-à-vis the global market for capital; it did not solve the crisis of middle-class mortgage owners and devastated economic sectors. Goldman organized a $1.75 billion Mexican sovereign deal in which the firm was able to persuade investors in May 1996 to swap Mexican Brady bonds collateralized with U.S. Treasury bonds (Mexican Brays) were a component of almost all emerging market portfolios until the 1994 crisis for a thirty-year naked Mexican risk. This is quite a testimony to the aggressive innovations that characterize the financial markets and to the importance of a whole new subculture in international finance that facilitates the circulation, i.e., sale, of these instruments (Sassen 2001: chapter 7).} Further, in July 1996, a large $6 billion, five-year deal that offered investors a Mexican floating rate note or syndicated loan—backed by oil receivables from the state oil monopoly PEMEX—was twice oversubscribed. It became somewhat of a model for asset-backed deals from Latin America, especially oil-rich Venezuela and Ecuador. Key to the high demand was that the structure had been designed to capture investment-grade ratings from Standard and Poor and Moody's. This was the first Mexican deal with an investment grade. The intermediaries worked with the Mexican government, but on their terms—this was not a government-to-government deal. This secured acceptability in the new institutionalized privatized intermediary space for cross-border transactions—evidenced by the high level of oversubscription and the high ratings. It allowed the financial markets to grow on what had been a crisis and remained a crisis for much of the economy.

This period saw many innovative deals that contributed to further expand the volumes in the financial markets and to incorporate new sources of profit, that is, debts for sale. Typically these deals involved novel concepts of how to sell debt and what could be a saleable debt. Often the financial services firms structuring these deals also implemented minor changes in depository systems to bring them more in line with international standards. The aggressive innovating and selling on the world market of what had hitherto been thought to be too illiquid and too risky for such a sale further expanded and strengthened the institutionalization of this intermediary space for cross-border transactions operating partly outside the interstate system. The new intermediaries have done the strategic work, a kind of "activism" toward ensuring growth in their industry and overcoming the potentially devastating effects of financial crises on the industry as a whole and on the notion of integrated global financial markets.

Central banks and governments appear to be increasingly concerned about pleasing the financial markets rather than setting goals for social and economic well-being. One is reminded of the Argentinean and Brazilian
governments after the Mexican crisis, which promised not to devalue their currencies and to do whatever it took to avoid this—including plunging the lower-middle classes into poverty. Governments try to guard perhaps excessively against inflation, in a trade-off with job growth. It also holds for developed countries, as was evident in the critiques leveled by the middle sectors in Germany against Hans Tietmeyer, the much-admired head of the German Central Bank in the 1990s. It could be argued that there may be some positive effects as well: if national debts become too large, bond holders will demand higher yields (that is, raise the cost of a loan to governments) and lower the value of a national currency, as was clearly the case with the dollar in the United States from the mid-1980s to the early 1990s. In the past, inflation was a way of coping with growing debt. But today the bond markets will raise the yields and hence the cost of loans to governments, thereby sometimes terrorizing governments into keeping inflation under control.

These conditions raise a number of questions concerning the impact on states of this concentration of capital in markets that enable rapid circulation in and out of countries. How does this affect national economies and government policies? Does it alter the functioning of democratic governments? Does this kind of concentration of capital reshape the accountability that has operated through electoral politics between governments and their people? A critical question is whether the citizenries of the pertinent countries want the global capital market to exercise this discipline over their governments and impose such criteria for national economic policy and to do so at all costs—jobs, wages, safety, health—and without a public debate. The

This happened only after more than a decade of excessive spending on defense by the Reagan administration. Indeed, the money to pay for the added debt was extracted from the mix of state expenditures on the social wage, on infrastructure, on public housing construction, school buildings, parks, etc. The dollar had plunged by 60 percent against the yen and German mark since the mid-1980s; this could be seen as a verdict on U.S. economic policies on borrowing at the time.

Further, the global financial markets discipline governments in a somewhat erratic way: they can fail to react to an obvious imbalance for a long time and then suddenly punish with a vengeance, as was the case with the Mexico crisis, the Asian crisis, the 1998 Russian crisis, and more recently the 2001 Argentine crisis. The speculative character of many markets means that they will stretch the profit-making opportunities for as long as possible, no matter what the underlying damage to the national economy might be. Investors threw money into Mexico even though its current account deficit was growing fast and reached an enormous 8 percent of GDP in 1994. Notwithstanding recognition by critical sectors in both the United States and Mexico that the peso needed a gradual devaluation, nothing was done. A sudden sharp devaluation with the subsequent sharp departure of investors threw the economy into disarray. The nationality of the investors is quite secondary; an IMF report says it was Mexican investors who first dumped the peso. Gradual action could probably have avoided some of the costs and reversals. Even in late 1994 many Wall Street analysts and traders were still urging investment in Mexico. It was not until late 1994 that ratings began to change.
ongoing embeddedness of the global capital market in a network of financial centers operating within national states, not offshore, is crucial to understanding regulation and the role of the state in the global capital market. But it will take different types of regulatory interventions from those premised on older notions of state territorial authority (Sassen 2003a).

**THE PARTIAL DISEMBEDDING OF SPECIALIZED STATE OPERATIONS AND NONSTATE ACTORS**

One outcome of these various trends is the emergence of a strategic field that entails a partial disembedding of specific state operations from the broader institutional world of the state geared to national agendas. It is a fairly rarified field of cross-border transactions among government agencies and business sectors aimed at addressing the new conditions produced and required by economic globalization. The transactions are strategic, cut across borders, and entail specific interactions with private actors. They do not entail the state as such, as in international treaties, nor are they confined to the types of intergovernmental networks examined by Slaughter (2004). Rather, these transactions consist of the operations and policies of specific subcomponents of the state (for instance, technical regulatory agencies, specialised sections of central banks, such as those in charge of setting particular monetary policies), components of the supranational system linked to the economy (IMF, WTO), and private nonstate sectors. These are transactions that cut across the private-public divide and across national borders in that they concern the standards and regulations imposed on firms and markets operating globally. In so doing these transactions push toward convergence at the level of national regulations and law 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 in the process of becoming structured. The transactions take place in familiar settings: the state and interstate system for officials and agencies of governments and of the supranational system; the "private sector" for nonstate economic actors; and so on. But the practices of the agents involved are constituting a distinct assemblage of bits of territory, authority, and rights that function as a new type of field for operations. In this regard it is a field that exceeds the institutional world of the interstate system. Insofar as interactions with private actors provide substantive public rationality, it is a field of practices within which
denationalized state agendas get defined and enacted. This field of transactions entails a partial and often highly specialized unbundling of the condition of state bundling preceding the current period. This unbundling is also one element in the broader dynamic of a changed relation between state authority and national territory.

The stickiness of multilateral agreements (Stephen 2002) illustrates some of these issues. It produces a kind of disembedding from the context of national lawmaking; this effect is further strengthened if the multilateral agreement is constructed through top-down lawmaking. Stephan (2002) notes that the adoption of a general norm through multilateral agreements, if done consistently, leads to "legal stickiness." Once in place, these agreements typically require unanimity for their modification or replacement, which Stephan finds functions as a barrier to adjustment and evolution. We see at work here a kind of cumulative causation in a given direction within specialized domains, a dynamic I have found in several of these domains. Stephan further finds that "[w]idespread adherence to a difficult-to-change set of legal rules may produce an evolutionary dead end, rather than a clear and optimal regime" (2002: 311). He argues that given lawyers' built-in bias for harmonization in the context of multilateralism, and given the enormous diversity across national legal systems, supranational institutions are the ones legal analysts will see as preferable further reinforcing "legal stickiness."

The other feature of this field of transactions is the proliferation of rules that begin to assemble into partial, specialized systems of law. Here we enter a whole new domain of private authorities—fragmented, specialized, and increasingly formalized but not running through national law per se.

Toward Global Law Systems: Disembedding Law from Its National Encasement

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 on what is emerging as a transnational public domain and at the other are systems that are completely autonomous and private. Some scholars see in this development an emergent global law. We might conceive of it as a type of law that is disembedded from national law systems. At the heart of the notion of global law lies the possibility of a law not centered in national law and thus distinct from international law, and going beyond harmonizing the different national laws. Much of the supranational system that addresses economic globalization, environmental issues,
and human rights does not go much beyond such harmonizing. Autonomous highly differentiated systems of rule have grown rapidly.

For some scholars this multiplication does not amount to global law: whatever might approach global law is actually a site where multiple competing national systems interact. The project is then one of harmonizing differences through conflicts, law, or force. Much of the scholarship on global governance comes from this type of perspective. Dezalay and Garth (1996) note that the “international” is itself constituted largely from a competition among national approaches; there is no global law (Shapiro 1993). Thus the international emerges as a site for regulatory competition among essentially national approaches, whatever the issue—environmental protection, constitutionalism, human rights, and so forth. From this perspective “international” or “transnational” has become in the most recent period a form of “Americanization,” an outcome of regulatory competition. The most widely recognized and general instance of this is of course the notion of a global culture

18 Shapiro, writing in the early 1990s (1993) notes that there is not much of a regime of international law, either through the establishment of a single global law giver and enforcing or through a nation-state consensus. He also points that if there was, we would be dealing with an international rather than global law. Nor is it certain that law has become universal—i.e., that human relations anywhere in the world will be governed by some law, even if not by a law that is the same everywhere. Globalization of law refers to a very limited, specialized set of legal phenomena, and Shapiro argues that it will almost always refer to North America and Europe and only sometimes to Japan and other Asian countries. There have been a few common developments and many parallel developments in law across the world. Thus, as a consequence 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 where the two or more parties create a set of rules to govern their future relations. Such a system of private lawmaking can exist transnationally even when there is no transnational or supranational court.

19 Charny (1991); Trachtenman (1993). There are two other categories that may partly overlap with internationalization-as-Americanization, but are important to distinguish, at least analytically. One is multilateralism and the other is what Ruggie (1988) has called multilateral institutions.

20 None of this is a smooth linear progression. There is contestation everywhere, some of it highly visible and formalized, some of it not. In some countries, especially in Europe, we see resistance to what is perceived as the Americanization of the global capital market’s standards for the regulation of their financial systems and standards for reporting financial information. Sinclair (1994) notes that the internationalization of ratings by the two leading U.S. agencies could be seen as another step toward global financial integration or as an American agenda. There has clearly been resentment against U.S. agencies in Europe for many years, as became evident on the occasion of the 1991 downgrading of Credit Suisse and, in early 1992, the downgrading of Swiss Bank Corporation. It is also evident in the difficulty that foreign agencies have had in getting SEC recognition in the United States as Nationally Recognized Statistical Rating Organizations. There have been reports in the media, for example in the Financial Times, about private discussions in London, Paris and Frankfurt about the possibility of setting up a Europe-wide agency to compete with the major U.S.-based agencies.
that is profoundly influenced by U.S. popular culture. But, though less widely recognized and more difficult to specify, this has also become very clear in the legal forms that are ascendant in international business transactions. Through the IMF and the World Bank as well as GATT/WTO this vision has spread to—some would say been imposed on—the developing world. There is a distinction to be made here between international law (public or private) that is always implemented through national governments and the policies generated by entities such as the WTO and the IMF that aim to further globalization. Yet both may reflect legal elements of particularly powerful countries. The competition among national legal systems or approaches is particularly evident in business law where the Anglo-American model of the business enterprise and competition is beginning to replace the continental European model of legal artisans and corporatist control over the profession.

61 For a discussion of the concept of globalization, see King (1998); Robertson (1992). Robertson’s notion of the world as a single place, or as the “global human condition,” is addressed to a particular type of issue—the possibility of a novel subjective condition. I would say that globalization is also a process that produces differentiation, but the alignment of differences is of a very different kind from that associated with such differentiating notions as national character, national culture, and national society. For example, the corporate world today has a global geography, but it isn’t everywhere in the world: it has highly defined and structured spaces and is increasingly sharply differentiated from noncorporate segments in the economies of the particular locations (e.g., cities such as New York) or countries where it operates.

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

63 The best-known instance of this is probably the austerity policy imposed on many developing countries. This process also illustrates the participation of states in furthering the goals of globalization, since these austerity policies have to be run through national governments and reprocessed as national policies. In this case it is clearer than in others that the global is not simply the non-national; global processes materialize in national territories and institutions.

64 U.S. dominance in the global economy over the last few decades has meant that the globalization of law through private corporate lawmaking assumes the form of the Americanization of commercial law (Shapiro 1993). Certain U.S. legal practices are being diffused throughout the world, e.g., the legal device of franchising. Shapiro notes that it may not only be U.S. dominance but also a receptivity of common law to contract and other commercial law innovations. He posits that (in the late 1980s and early 1990s) it was common in Europe to think that EC legal business goes to London because its lawyers are better at devising legal innovations to facilitate new and evolving transnational business relations than is the civil law of the continent. For whatever reasons, it is now possible to argue that American business law has become a kind of global jus commune incorporated explicitly or implicitly into transnational contracts and beginning to be incorporated into the case law and even the statutes of many other nations (Shapiro 1993: 39).
This holds even for international commercial arbitration. Notwithstanding its deep roots in the continental tradition, especially the French and Swiss traditions, this system of private justice is becoming increasingly "Americanized."

For other scholars, global law is emergent and is centered on the development of autonomous partial regimes. The Project on International Courts and Tribunals (PICT) has identified 125 international institutions in which independent authorities reach final legal decisions. These range from those in the public domain, such as human rights courts, to those in the private sector. They function through courts, quasi-courts, and other mechanisms for settling disputes, such as international commercial arbitration (see, e.g., Alford 2003). They include entities as diverse as the international maritime court, various tribunals for reparations, international criminal courts, hybrid international-national tribunal instances, trade and investment judicial bodies, regional human rights tribunals, convention-derived institutions, as well as regional courts such as the European Court of Justice, the EFTA Court, and the Benelux Court. The number of today's private systems reflects sharp growth in the last decade.

Strictly speaking, the formation of global regimes is not premised on the integration, harmonization, or convergence of national legal orders. In this sense, then, it goes beyond the type of international economic law arising out of the WTO TRIPS agreements. Most prominently, Teubner (1987) sees a multiplication of sectorial regimes that is an overlay on national legal systems. The outcome is a foundational transformation of the criteria for differentiating law: not the law of nations or the distinction between private and public but the recognition of multiple specialized segmented processes of juridification, which today are largely private. "Societal fragmentation impacts upon law in a manner such that the political regulation of differentiated societal spheres requires the parceling out of issue-specific policy-arenas, which, for their part, justify themselves," in 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" (Teubner 2004: 41).

---

65 See http://www.pict-pei.org. PICT was founded in 1997 by the Center on International Cooperation (CIC), New York University, and the Foundation for International Environmental Law and Development (FIELD). From 2002 onward, PICT has been a common project of the CIC under the Centre for International Courts and Tribunals, University College London.

66 PICT has gathered good documentation on legal frameworks and expiratory literature. See Shelton on the area of human rights (1999); on hybrid courts, see Dickinson (2003: 295).

67 For instance, the Internet Corporation for Assigned Names and Numbers (ICANN) is one of these specialized transnational regimes. See Lehmkühl (2002: 61–78, 71ff.).
CONCLUSION

The issues addressed in this chapter engage above all the relation between the state's territoriality and the emergent and increasingly institutionalized territoriality of the global economy. The ascendance of diverse forms of private authority and the incipient development of global law are producing institutional encasements of a space of operations for global firms and global markets. But I argued that part of the territoriality for global firms and markets is produced inside the nation-states articulated with the global economy. To illustrate this I used the case of the global, largely electronic, capital market, precisely one of the most extreme instances of the ability to transcend the geographic jurisdictions of the national state. I showed that it is simultaneously global and in need of multiple insertions in national territories. In this regard it can be seen as a natural experiment that tests the limits of both the state's exclusive territoriality and global capital's transnational jurisdictions.

While the state participates in enabling the expansion of the global economy, it does so in a context increasingly dominated by deregulation, privatization, and the growing authority of nonstate actors, some of which assume new normative roles. In many of these new dynamics and conditions, the state continues to play an important role, often as the institutional home for the enactment of the new policy regimes we associate with economic globalization. This institutional home within the state has evolved sharply over the last two decades and today consists largely of the executive branch and a proliferation of regulatory agencies. Another key component of the national as institutional home for global processes and actors exists in the private economic domain, through the corporate economy and the formation of strategic spaces for global operation, including global cities and, on a more micro level, financial centers.

My concern with unpacking this particular issue stems from the embeddedness of much of globalization in national territory under conditions where national territory has been encased in an elaborate set of national laws and administrative capacities. The new geography of global economic processes and the strategic spaces for economic globalization had to be produced, both in terms of the practices of corporate actors and the requisite technical and institutional infrastructure (that is, global cities), as well as in terms of the work of the state in producing or legitimating new legal regimes. This signals a necessary participation by the state, including in the regulation of its own withdrawal. The question then becomes one of understanding the
specific type of authority/power this participation gives to the state or attaches to various institutions of the state, as might be the case with some of the increasingly specialized technical regulatory agencies.

The mode in which this participation by the state has evolved has been toward strengthening the power and legitimacy of privatized and denationalized state authorities. The outcome is an emergent new spatio-temporal order that has considerable governance capabilities and structural power. This institutional order strengthens the advantages and the claims of certain types of economic and political actors and weakens those of others. It is extremely partial rather than universal, but strategic in that it has undue influence over wide areas of the broader institutional world and the world of lived experience yet is not fully accountable to formal democratic political systems. While partially embedded in national public and private institutional settings, it is distinct from them. Insofar as it is partly installed in national settings, its identification requires a decoding of what is national in what has historically been constructed as the national.

These developments have consequences for certain features of the state and the interstate system, and in this regard inevitably perhaps for liberal democracy as well as for international law and the modes of accountability therein contained. First, the growth in cross-border activities and global actors operating outside the formal interstate system affects the competence and scope of states and of international law, as these have been constituted historically. Second, this domain is increasingly being institutionalized and subjected to the development of private governance mechanisms, which affects the exclusivity of state authority and the (albeit always partial) exclusivity of international law. Third, the growing normative powers in this private domain affect the normative power of international law. Fourth, the state's participation in the re-regulation of its role in the economy and the incipient denationalization of particular institutional components of the state necessary to accommodate some of the new policies linked to globalization transform key aspects of the state. In so doing this participation by the state also alters the organizational architecture for democratic accountability inside states and the organizational architecture for the interstate system and for international law.

My emphasis on the multiple ways, including very minor ones, in which the new regime for the implementation of the global economy is constituted in good part through the work of states is predicated on a critical understanding of the public-private division as constructed in liberal democratic discourse. But it also aims at understanding the possibilities for constructing new forms of state authority under current conditions. This would include
forms of state authority that would not be confined to furthering economic globalization but aim at greater equity and accountability. In this regard, then, my position is not comfortably subsumed under the proposition that nothing has much changed in terms of state power. Nor can it be subsumed under the proposition of the declining significance of the state. It aims rather at mapping an intermediate zone marked by great possibilities for changing current alignments—a highly dynamic intermediate zone with different outcomes depending on the types of political work that get done.
APPENDIX

VULTURE FUNDS AND SOVEREIGN DEBT: EXAMPLES FROM LATIN AMERICA (NOVEMBER 2004)

Brazil

1. Case involving vulture fund(s): Dart Container Corp., with some $1.4 billion in Brazilian debt, threatened to derail Brazil’s efforts to restructure its foreign debt in the early 1990s. Dart ultimately failed because it did not have the 5 percent in debt holdings needed to stop Brazil’s deal with other creditors.

2. Debt situation: The value of Brazilian foreign debt in 1998 reached 29 percent of the country’s GDP.

3. Social factors: In 1990, 17.4 percent of the population lived below the poverty line. In 1997, 17.4 percent of the population lived on less than $2 a day. Public expenditure on education has gone up from 3.6 percent of GDP in 1980 to 5.1 percent in 1997. Public spending on health between 1990 and 1996 was 3.4 percent of GDP.

Panama

1. Case involving vulture fund(s): In October 1995, the New York fund Elliott and Associates L.P. purchased approximately $28.7 million of Panamanian sovereign debt for about $17.5 million. In July 1996, Elliott brought suit against Panama seeking full repayment of the debt. The fund obtained a judgment and attachment order, ultimately receiving over $57 million in payments with interest included.

2. Debt situation: The value of Panamanian external debt in 1998 was 78 percent of the country’s GDP.

3. Social factors: In 1997, 37.3 percent of the population lived below the poverty line. From 1980 to 1997 public expenditure on education increased only modestly from 4.9 percent of GDP to 5.1 percent.
VULTURE FUNDS AND SOVEREIGN DEBT

Peru

1. Case involving vulture fund(s): Elliott and Associates also bought Peruvian debt in 1996. Although the fund bought $20.7 million in debt for $11.4 million, after suing the Peruvian government, it managed to collect $58 million. The U.S. Court of Appeals in New York City reversed the prior verdict in Peru’s favor.

2. Debt situation: The value of the debt of Peru was 55 percent of the country’s GDP in 1998.

3. Social factors: In 1997, 49 percent of the population lived below the poverty line. Public expenditure on education decreased from 3.1 percent of GDP in 1980 to 2.9 percent in 1997. Public expenditure on health from 1990 to 1998 was 2.2 percent of GDP.

Ecuador

1. Case involving vulture fund(s): Gramercy Advisors, whose sole mission has been to collect Ecuadorian and Russian defaulted debt, has emerged as one of the loudest defenders of “bond holder’s rights.” They are a fund of small creditors of Ecuador, holding $10 million in debt. Although they did not sue the government of Ecuador, traditionally bit players in major debt workouts tend to drive the hardest bargain because governments will pay off a small claim to facilitate a large deal with major creditors.

2. Debt situation: Foreign debt payments consume half of Ecuador’s tax revenues. The total of foreign debt nearly equals its $14.5 billion annual output. The value of the debt in 1998 was 75 percent of the country’s GDP.

3. Social factors: In 1994, 35 percent of the population lived below the poverty line. Government expenditure on education decreased from 5.6 percent of GDP in 1980 to 3.5 percent in 1997, while public expenditure on health from 1990 to 1998 reached 2.5 percent of GDP.

Argentina

cleared the way for bond holders to identify state-owned commercial assets that could be subject to seizure. Argentina’s government hired a group of attorneys to claim diplomatic immunity for the assets seized. (ii) Argentina initiated its official debt restructuring process in early 2005. The offer was accepted by 76.15 percent of the country’s creditors. Two hedge funds who did not participate in the exchange decided, instead, to sue the Argentine government. The funds were EM Ltd.—a fund linked to the (in) famous investor Kenneth Dart—and MNL Ltd., a Cayman Islands–based fund linked to Elliott Associated (the hedge fund that sued Peru for $58 million in 1996). The Argentine debt restructuring settlement was held up while deliberations in New York City were underway, delaying the exchange of old bonds into new ones—a distressing outcome for a government that had finally reached a restructuring agreement with the majority of its creditors on debt in default for almost four years. Finally, in May 2005, the panel of the Second Circuit Court of Appeals in Manhattan decided to uphold an earlier decision by Judge Thomas Griesa on March 31, 2005, against the creditors. Griesa deliberated that the creditors could not seize $7 billion in Argentine bonds until the debt exchange had been completed, because they were owned by the bond holders, and hence were to be considered liabilities of the Argentine government, not its assets. After the debt swap, the bonds would be canceled under the terms of the exchange, leaving them without value to the plaintiffs. This was considered a significant victory by the Argentine government, not only because it made the exchange finally viable, but because it made evident to other (potential) vulture/holdout creditors that litigation was not to be considered a lucrative avenue in dealing with their defaulted bonds.

2. Debt situation: After defaulting on over $80 billion worth of debt in 2001, in February 2005 Argentina offered bond holders about $41 billion in new bonds in exchange for the $102.6 billion outstanding in principal and interest. This was considered the biggest loss of principal taken on by creditors of a sovereign government of any sovereign debt restructuring in modern times.

3. Social factors: The crisis that culminated with the decision to default on sovereign debt was the worst the country has faced. Already high levels of unemployment (18.3 percent in October 2001) jumped to 21.5 percent in May 2002 (six months after the announcement of the suspension of payments on sovereign debt owed to private creditors). Job loss was sharp, especially in the formal sector where employment fell 10.5 percent since June 2001 (as of November 2002). World Bank estimates for twenty-eight
urban centers indicate an increase in poverty rates from 38.3 percent in October 2001 to a peak of 58 percent by the end of 2002. The number of people living below the indigence line doubled in the same period. Income distribution worsened, suggesting that the poorest segments of the population suffered more than the more well off. This dramatic context has had a strong impact on the health and education sectors where there is a growing evidence of deterioration in service delivery. Violence has increased. As of July 2003, spending targeting the poor had increased by 21 percent from the pre-crisis level. However, the large increase in the number of impoverished during the crisis means that real spending per poor person has actually declined by 16 percent.

4. Economic Developments: Despite these great difficulties, Argentina achieved a 9 percent real GDP growth in 2004. Also, the government managed to run a fiscal surplus of around 3.2 percent of GDP (as of mid-2005) that pleased international investors and especially credit rating companies. For example, Standard and Poor’s upgraded Argentine swapped bonds, making those increasingly more attractive to international investors looking for relatively high returns (of approximately 16 percent annually in mid-2005) at a time when interest rates in developed countries remain low (approximately 4 percent annually). Nevertheless, keeping the fiscal surplus will remain a challenge for the Argentine government, which faces increases in spending, especially linked to debt repayment.

Nicaragua

1. Case involving vulture fund(s): A group of U.S. investors is suing the government for full repayment of defaulted commercial bank debt from the 1980s, plus accrued interest. Eight years ago, Leucadia National Corp., a troubled New York–based conglomerate, and Van Eck, a New York investment fund, bought the debt for a few cents on the dollar. If they get their way, their Nicaraguan investment will repay spectacularly. Van Eck alone bought about $50 million in face value Nicaraguan loans, which would be worth $250 million if it were to collect on the full debt and accrued interest.

2. Other factors: Nicaragua is a poor country that has suffered civil wars, natural disasters, and a series of corruption scandals that have led to the detention in jail of former president Arnaldo Aleman. The present government states that it is trying to end corruption, reduce poverty—average incomes are just $500 a year—and qualify for debt relief under the
Highly Indebted Poor Country Initiative (HIPC), sponsored by the World Bank.¹