

# **AFTER THE PARTY, IS THERE A CURE FOR THE HANGOVER? THE CHALLENGES OF THE GLOBAL ECONOMY TO WESTPHALIAN SOVEREIGNTY**

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**Abstract:** - *Nation-States and their authority referred to here as national sovereignty is under threat from forces within the global economy. Although globalisation is considered to be a recent phenomenon that has now attracted the attention of writers, its origins lie with those of the nation-state as the nation-state clawed its way to dominate the international community. Nation-states achieved their pre-eminence and dominance of the international community on the backs of free enterprise and capitalism; and now this dependence threatens their very existence. Now belatedly nation-states are attempting to regulate the global economy through the IMF and the World Bank and other means. This paper examines the effect that the global economy has upon the traditional understanding of sovereignty.*

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# AFTER THE PARTY, IS THERE A CURE FOR THE HANGOVER? THE CHALLENGES OF THE GLOBAL ECONOMY TO WESTPHALIAN SOVEREIGNTY

## I. Introduction

For over 300 years, Nation-States have been the most important political units in the international system.<sup>1</sup> Moreover Nation-States have claimed that their authority, their national sovereignty, was a legal monopoly of power to be exercised within their geographic domain, free from interference from external actors. Put simply their sovereignty was “absolute”, an assertion that Nation-States vigorously defended particularly regarding their right to legislative competence. The origins of national sovereignty can be traced as far back as the period of the Roman Empire, where the Roman Emperor was considered absolute simply because Rome had either through conquest or other means consumed most if not all other forms of political communities in Europe.<sup>2</sup>

In the 16<sup>th</sup> century, Jean Bodin, a French political thinker offered the first systematic approach to national sovereignty.<sup>3</sup> In his famous work, *Six Books of the Commonwealth*, in 1576, he defined sovereignty as follows: ‘Sovereignty is the absolute and perpetual power of a Commonwealth,..’<sup>4</sup> and further ‘For he is absolutely sovereign who recognises nothing, after God, that is greater than himself’<sup>5</sup> and that the word sovereignty meant ‘the most high, absolute, and perpetual power over the citizens and subjects in a commonwealth.’<sup>6</sup> Bodin’s emphasis on ‘absoluteness’ is clear. Its importance was that it determined who was the

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<sup>1</sup> See FRANCIS H. HINSLEY, *SOVEREIGNTY* 2 (2d ed. 1986): ‘In a word, the origin and history of the concept of sovereignty are closely linked with the nature, the origin and the history of the state.’ Hinsley believed that the development of sovereignty required the development of the Nation-State.

<sup>2</sup> M Olivier, *Aspects of the Establishment of Sovereignty and the Transfer of Government Authority* 14 *SOUTH AFRICAN YEARBOOK OF INTERNATIONAL LAW* (1988-1989) 85.

<sup>3</sup> Jarat Chopra, *The Obsolescence of Intervention under International Law*, in, *SUBDUING SOVEREIGNTY, SOVEREIGNTY AND THE RIGHT TO INTERVENE*, 41 & 56 (M. Heiberg eds, 1994).

<sup>4</sup> JEAN BODIN, *ON SOVEREIGNTY FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH*, 1 (Julian Franklin ed & trans. 1992).

<sup>5</sup> *Id.* at 4.

sovereign and therefore absoluteness was the defining element of sovereignty. He also described sovereignty to have two sides to it, external and internal.<sup>7</sup>

The international community was configured and is still based on the notion of supposedly equal absolute sovereigns, therefore creating a dichotomy of absolute power domestically within the Nation-State and limited power beyond the Nation-States' borders aimed at ensuring non-interference by one sovereign in the affairs of another.<sup>8</sup> Thus what Nation-States mean and what they desire to protect most of all, when they refer to absolute sovereignty, is primarily that within the context of their borders their government has; *'the competence to organise the Nation-State's domestic management at its own discretion...'*<sup>9</sup> In other words freedom from external forces; *political independence*.

Relating the notion of freedom from external interference to contemporary developments in the global economy, multiple trading conglomerates who are not limited by national borders (indeed do not owe any national allegiance) have combined with technical innovations in communications to forge forces (especially economic) that now seriously challenge the so-called "absolute" authority of many Nation-States. This phenomenon called here "globalisation" seems not only to ignore national sovereignty but appears to be immune to the actions of Nation-States and their attempts at regulation. Globalisation therefore poses the greatest threat to national sovereignty in the history of the Nation-State, since it threatens the very core of national sovereignty; the ability of Nation-States to remain *independent*.

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<sup>6</sup> GRIFFITHS ET AL., INTRODUCING THE LAW, 38 (4<sup>th</sup> ed. 1993).

<sup>7</sup> Initially sovereignty implied just the powers of the feudal lord (prince) however *with the emergence* of 'Nation-States' in the 16th and 17th centuries, it now included the external element. INGRID DETTER DE LUPIS, INTERNATIONAL LAW AND THE STATE 3 (1974).

<sup>8</sup> This has led to the development of a split legal persona, that is domestic or internal sovereignty and international or external sovereignty. Throughout this thesis the term domestic or inward or internal refers to the exercise of sovereignty within a nation-state's own territory and external, outward or inter -Nation-State refers to the exercise of sovereignty beyond the nation-state's borders.

Globalisation has both positive and negative aspects. The negative perceptions of globalisation are embedded in the response of Nation-States to the perceived threat of losing their identity. The issue that the Article deals with is globalisation as a construct of the Nation-State and seeks to address whether globalisation (specifically in the economic sphere), has outgrown the Nation-State and now enslaves national sovereignty to foreign economic interests and thus a gradual disappearance of the Nation-State bit by bit under economic globalisation especially considering that globalisation of the economy relies upon large amounts of money and capital moving across political boundaries and affects foreign exchange, interest rates, stock market investment levels, employment levels and government tax revenues.

Part II of the Article introduces the genesis of the globalisation threat which incidentally had its roots in the imperialistic and hegemonic agendas of European States. The frequent occurrence of war and changing nature of warfare in the early days of the modern Nation-State—standing professional armies and new warfare technology—dictated a need to devote a great deal of financial resources to military expenditure. Imperialistic success was hinged on military and economic resources—the ability to guarantee control of new territory against other challengers as well as the capacity to meet the opportunities and challenges that new, expanding markets offered. It would appear that the Nation-State initially keen to develop a global platform for its nationalistic agendas through use of both public and private finance, was in the end caught “off-guard” with the emergence of fully-fledged transnational corporations in the 20<sup>th</sup> century. Part III of the Article moves the discussion from the postulations laid down in Part II to the contemporary ramifications on the global stage that technological change, increasing production, greater consumption and rising world trade and

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<sup>9</sup> Olivier, *supra* note 2, at 94. This includes such things as the capacity to formulate a constitution, to make laws that affect the population of that particular ‘real estate’.

financial flows wrought. It discusses globalisation generally with a bias to its economic dimension. In Part IV the Article discusses the global governance and regulatory regimes cultivated by the global forces which have had the cumulative effect of increasing the power and influence of multilateral institutions at the expense of the Nation-State's ability to maintain its traditional economic aristocracy due to increasing needs for State accountability and responsibility in an ever-increasing global environment. It should be noted that globalisation is not a unitary process but affects each nation differently, with variances stemming from a number of factors, including size, wealth and power.

## **II. The Emergence of the Nation-State and the Origins of Globalisation.**

The development of national sovereignty and the development of a global community comprised of Nation-States are so closely linked that answering the question of which enabled the other to develop is unclear.<sup>10</sup> Regardless of the answer to that question, the origins of both lie in Western Europe, in the Roman Empire and the authority of the Emperor.<sup>11</sup> The collapse of the Roman Empire created a power vacuum in which the modern Nation-State and its obsession with sovereignty as a mantle to ward off external pressure and cement its internal authority then began a process of evolution with that enabled, assisted or even forced the modern concept of national sovereignty to develop.<sup>12</sup> The fact that not one of the emerging political communities in Europe could assert their dominance over all other rivals, despite obvious efforts, resulted in almost a constant state of warfare, "hot or cold", for most of these

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<sup>10</sup> Determining this question is similar to resolving the age-old question of which came first; the chicken or the egg. However, in a sense the answer is neither the chicken or the egg. Hinsley, *supra* note 1, at 2: 'In a word, the origin and history of the concept of sovereignty are closely linked with the nature, the origin and the history of the state.' See *supra* note 1.

<sup>11</sup> Olivier, *supra* note 2 at 85; Hinsley, *supra* note 1, at 222-223 See Bleimaier, *The Future of Sovereignty in the 21st Century*, [1993] 6 HAGUE Y.B. INT'L L 17. Whilst Bleimaier believed that sovereignty preceded the nation-state, he still ascribed the origins of sovereignty to the Roman Empire. See p.16.

<sup>12</sup> See Hinsley, *supra* note 1, 73, 101 & 124-126; PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS, ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500-2000*, 24, (1989); BRUCE D. PORTER, *WAR AND THE RISE OF THE STATE, THE MILITARY FOUNDATIONS OF MODERN POLITICS*, 25 (1994).

communities, often against multiple enemies.<sup>13</sup> The role of virtual continual warfare in the development of the body politic into an executive was crucial.<sup>14</sup> As the political communities expanded, so did the need for centralised government.<sup>15</sup> The rise of strong centralised governments was a direct result of frequent warfare which created a self-perpetuating cycle of war, expansion and war again.<sup>16</sup> Frequent internal as well as external conflicts necessitated the need for emerging central authority to assert itself decisively both within and without so as to overcome other competing political authorities.<sup>17</sup> This was also an important reason why early theorists such as Bodin declared sovereignty to be absolute. However there was an even more important effect of this constant state of warfare and quest for dominance within Europe by the emerging political communities: it created the concept of a market economy and “western” capitalism.

The introduction of gunpowder And the subsequent development of new weapons radically changed the nature of warfare, the types of armies and tactics used by any political leader or community. But more significantly it changed irrevocably the cost of warfare, increasing it to the point that it bankrupted many emerging European communities.<sup>18</sup> The fact that no single community could obtain ascendancy created an environment that demanded constant innovation, experimentation with tactics, weapons and military theories, but also

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<sup>13</sup> KENNEDY, *supra* note 12, Chapter 2, particularly at 39-94.

<sup>14</sup> For an excellent discussion of the role of warfare in the development of the nation-state, see generally PORTER *supra* note 12 at 28. The author advocates a five-step process by which war provided the necessary stimulus for the creation.

<sup>15</sup> HINSLEY, *supra* note 1, at 32. Hinsley believed that the development of sovereignty required expansion of the community beyond a certain size. This then created the need for an executive administration separate from the community. See 30-36 & 32 where he states that the creation of the Empire created ‘the beginnings of an association between the government and the community...’. Hinsley therefore, when referring to the body politic, is referring to the development of the executive. See below.

<sup>16</sup> PORTER, *supra* note 12, at 58.

<sup>17</sup> Such as smaller feudal lords. *Id.*, at 29-31.

<sup>18</sup> Such as France and Spain in 1557; Spain again in 1607. See Kennedy’s discussion of this point in the author’s Chapter 3. KENNEDY *supra* note 12, at 89-111.

experimentation with finances and developing new and more efficient means of raising and collecting the necessary revenue for continuing their struggles.<sup>1920</sup>

As imperialistic agendas stretched public resources, European leaders became increasingly dependent upon private finance to plug the gap between State ambition and available public funds. States thus sought to create an environment that encouraged the development of merchants and bankers. Bankers, arms dealers and artisans became essential, not peripheral members of society..<sup>21</sup>

Commenting on the ‘Financial revolution’ of this era that gave birth to western capitalism, Kennedy observes that:

Gradually, unevenly, most of the regimes of Europe entered into a symbiotic relationship with the market economy, providing for it domestic order and a non-arbitrary legal system (even for foreigners), and receiving in taxes a share of the growing profits from trade.<sup>22</sup>

The significance of a market economy was its dynamic nature; once it had been “created” society was changed irrevocably.<sup>23</sup> Alongside its dynamic nature, economic growth occurs, because of another inherent characteristic, namely that it is/was a Darwinian style-system that encouraged the survival of the fittest; non-profitable organisations do not survive unless there is intervention into the market by national governments. Thus there is an adjustment of the use of land, a reallocation of resources, capital, and labour to those who were most efficient and profitable; a cycle that builds upon itself, since the increased resources results in greater profits, which in turn encouraged more resources to be “reallocated” to that entity. <sup>24</sup>

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<sup>19</sup> *Id* at 100-109.

<sup>20</sup> This enabled Britain to have the ‘decisive margin’ in men and ships at crucial moments. See *Id*,at 100-109.

<sup>21</sup> *Id.*, at 24

<sup>22</sup> *Id.*, Kennedy describes this as the “Financial Revolution”.

<sup>23</sup> A fact realised by writers such as Marx. See ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS*, 19 (1987).

<sup>24</sup> *Id.*,at 18-20.

As Nation-States in Europe were born, so too was globalisation, as the Nation-States' relationship with the market economy and capitalism in Western Europe gradually became a dependency;<sup>25</sup> and so Nation-States, in their use of capitalism in their quest to affirm their very existence sowed the seeds of a phenomenon that was later to chisel away at the very foundation of their authority, their national sovereignty. At the early stage of the emergence of Nation-States, very few could predict that corporations would become so powerful, or that one day Nation-States would lose control not only of the global economy but much of their own national economies. After all international trade, that is the shipment of goods from one political territory to be sold or traded in the territory of another, was as old as Nation-States themselves and rather than be a threat was perceived as a benefit.<sup>26</sup>

The advent of the 20<sup>th</sup> century and the technological advancements (especially in telecommunications) that dominated the era marked a turning point for global trade. Technological breakthroughs liberated transnational corporations from their previous dependence on State controlled networks and patronage. So successful have transnational corporations been in harnessing the advantages offered by technology and the opportunities created by global trade that by the end of the 20<sup>th</sup> century, half of the top 100 economies in the world were not Nation-States but corporations.<sup>27</sup> International trade and corporations had evolved far beyond the simple nature of a national firm trading in a foreign market.<sup>28</sup> Multi-national corporations [or MNC's] as these new corporations became known, duplicated their activities, i.e. retailing the same products and their organisations in different Nation-States and taking advantage off lower labour costs and more liberal national environmental laws to

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<sup>25</sup> Gilpin describes it in this manner: 'The economic well-being of peoples and the fate of nations have become intimately joined to the functioning and consequences of the market.' *Id.*, at 5.

<sup>26</sup> Howe Martyn, *Development of the Multinational Corporation* in ABDUL. A. SAID & LIUZ R. SIMMONS, THE NEW SOVEREIGNS, MULTINATIONAL CORPORATIONS AS SOVEREIGN POWERS, at 30-44, in particular p. 31, (Abdul. A. Said & Liuz R. Simmons, ed.s, 1975).

<sup>27</sup> CLIVE PONTING, PROGRESS AND BARBARISM, THE WORLD IN THE TWENTIETH CENTURY, 99, (1998)

<sup>28</sup> *Id.*, at 110.

move parts of their “manufacturing/production” process to other Nation-States. As Ponting notes: ‘... by the 1980’s a third of *all* world trade took place as transactions *within* transnational corporations.’<sup>29</sup>

What this did was to open up States to foreign corporations which simply relocated or set up part of their operations enabling them to tap the resources contained therein, an important strategy in fuelling globalisation. The rapid expansion of MNC’s and corporations in the 20<sup>th</sup> century and their heavy involvement in international trade especially after the Second World War was accelerated by two main factors. Firstly, the initial immaturity of technology; which limited their ability to access new markets and thus ensured the economic ascendancy of Nation-States over trading collectivities, with their large pool of personnel and resources, was swept aside by technological breakthroughs. Though domestic markets, particularly those the size of the US had initially satisfied the needs of corporations, telecommunication and transport advancements dramatically threw open the globe by pushing down costs and facilitating secure and instantaneous forms of communication. Once dramatic improvements had been made in transport and communications, and importantly in the ability to *market* their products, corporations quickly outgrew their national borders.<sup>30</sup>

Secondly, unlike Nation-States who were responsible for all of their citizens, corporations were concerned for their shareholders only. Nation-States, particularly after their experience in the Great Depression of the 1920’s sought full employment and low inflation for all their citizens.<sup>31</sup> Nation-States had to govern for all elements of their communities and so often had

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<sup>29</sup> *Id.*, at 101.

<sup>30</sup> Air travel made an important difference, since important officials and managers no longer had to spend months wasted at sea. See Martyn, *supra* note 26, at 37. Secondly, the improvement in transport reduced the cost of transport, thus goods could be sold in new markets more cheaply, or at least at a similar cost to the domestic market -and thus become more available to developing markets.

<sup>31</sup> GEORGE KENWOOD & A.L. LOUGHEED, *THE GROWTH OF THE INTERNATIONAL ECONOMY 1820-2000*, 338 (George Kenwood & A.L. Lougheed eds, 4<sup>th</sup> ed. 1999), at 336.

to shift resources from successful provinces to a less profitable one.<sup>32</sup> The governing bodies of corporations' had a much narrower focus than national governments; the sole purpose of corporations was to generate profit, allowing them to more easily concentrate their energies to realise this goal. MNCs developed an efficiency that the Nation-State would not match as the 'middle-man' in international trade thus beginning the process of displacing the Nation-State and its role. Conflict between Nation-States and corporations often occurred as their goals were diametrically opposed to one another. Summing this up Gilpin observes:

Whereas powerful market forces in the form of trade, money, and foreign investment tend to jump national boundaries, to escape political control [by Nation-States] and to integrate societies, the tendency of government is to restrict, to channel, and to make economic activities serve the perceived interests of the State and of powerful groups within it.<sup>33</sup>

As a consequence of their own policies designed to further the golden goal of vibrant, dynamic economic growth, Nation-States lost 'control' (Did they ever have control?) of corporations for the simple reason it was inevitable that corporations would outgrow their national borders or indeed any political border.<sup>34</sup> The very nature of corporations (which Nation-States sought to use for their own benefit) their dynamic, innovative competitiveness, would always push corporations to expand and therefore to seek out new markets. After all a market means greater sales and greater sales meant greater profits, the *raison d'etat* of corporations.

This part of the Article as carried out a tour de horizon of the genesis of the global phenomenon and the role of the State as midwife in the process. The discussion as sailed into the 20<sup>th</sup> century, which marked the maturation of global trade. Although this is a rather simple

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<sup>32</sup> See KENICHI OHMAE, *THE END OF NATION-STATES, THE RISE OF REGIONAL ECONOMIES*, 41-59, (1996) & KENICHI OHMAE, *THE BORDERLESS WORLD, POWER AND STRATEGY IN THE INTERLINKED ECONOMY*, (1990).

<sup>33</sup> GILPIN, *supra* note 23, at 11.

explanation of the history of the growth of the international economy over two centuries, and doesn't include many factors such as the role of oil prices, the discussion aims to make one point clear; Nation-States realising that corporations and the market economy would assist them in the struggle for survival in the international community created an environment conducive for corporations to develop. This cooperation with corporations allowed Nation-States to flourish but also led to the development of MNC's: entities that not only owed no allegiance to Nation-States, but were now beyond their control. So in a reversal of roles, Nation-States now sought to cooperate with one another to regulate the threat posed by corporations.

The next issue is: how has the Nation-States sovereignty fared in the swirl of global economic contemporary forces that it helped create? The next part of the Article will give an overview of globalisation vis-à-vis sovereignty. It will raise the issues of the redefinition of the Nation-State identity, the reshaping of the fixed and firm Westphalian boundaries between the national and international spheres and the fracturing of the statist centred monistic order. Globalisation of the world economy with its quest for international integration arguably provides one of the tools for the chiselling away of sovereignty by decentralising national economies and wresting control from the State.

### **III. The Globalisation Challenge to Sovereignty**

As Dunne notes, “[l]ike most concepts in politics and international relations, the meaning of globalisation is contested. This is the principal reason why it is necessary to bring philosophical and sociological insights to bear on the study of globalisation. Since globalisation is not apparent to our sensory experiences--though of course we may be able to

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<sup>34</sup> Do corporations really owe any allegiance to the country of their origin? Their desire for profits would suggest a negative answer to that question.

observe some of its effects--we need theoretical tools to guide us in framing the appropriate kinds of questions to ask.”<sup>35</sup> One of the more widely used working definitions is Anthony Giddens’s suggestion that globalisation represents “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.”<sup>36</sup> But beneath this accessible description lie many layers of complexity. Globalisation is not an economic or a socio- political process, it is both. Globalisation is a set of “intersecting processes,” with limits and trends. Globalisation “. . . represents the perception of the world as an interconnected whole and the consciousness that a number of issues can no longer be addressed purely at a local level.”<sup>37</sup> Globalisation involves the development of transnational processes, for example labour or cross-border labour mobility and the world market with the cross-border transfer of goods, services and capital, and exists as a developing continuum.<sup>38</sup> In essence, globalisation is the deterritorialisation of culture,<sup>39</sup> and the formation of a total and integrated economic system, stimulating political interaction between States and promoting the cultural diversity of identity.<sup>40</sup> Globalisation strains the ideals so that people redefine groups based on culture, religion, moral and political values, instead of defining groups based on the division of borders.<sup>41</sup>

Globalisation raises many troubling questions with regard to the Nation-State, the traditional primary player in the international arena. Among these concerns ‘... are perceived fears that

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<sup>35</sup> Tim Dunne, *Symposium on Globalization at the Margins: Perspectives on Globalization from Developing States: The Spectre Of Globalization*, 7 IND. J. GLOBAL LEGAL STUD. 17, 20 (1999).

<sup>36</sup> Anthony Giddens, quoted in Jan Aart Scholte, *The Globalization of World Politics*, in THE GLOBALIZATION OF WORLD POLITICS 14, 15 (John Baylis & Steve Smith eds., 1997).

<sup>37</sup> NIKOS PAPASTERGIADIS, THE TURBULENCE OF MIGRATION 77 (2000).

<sup>38</sup> *Id.*, at 85, see also RONALD M. BOSROCK, COMPETITION AND CONFRONTATION; FROM OLYMPIAN IDEALS TO NATIONALIST ISOLATION, GLOBALIZATION TAPS THE SPECTRUM OF ECONOMIC, POLITICAL AND SOCIAL EMOTIONS, *Star Trib. (MN)*, Sept. 25, 2000 at 3D.

<sup>39</sup> See PAPASTERGIADIS, *supra* note 37, at 76

<sup>40</sup> *Id.*, at 77.

<sup>41</sup> *Id.*, at 87

globalisation eradicates the identity of the Nation-State, imposes Western ideals on non-Western nations, exploits weak Nation-States to the benefit of powerful, rich nations in essence taking from the poor to feed the rich, dilutes national management, control and politics in favour of international integration, and imposes an international legal process (some may say democracy) upon individual nations through political influence and pressure, resulting in the destruction of national culture.<sup>42</sup> Not surprising, sovereignty seeks to target globalisation as the primary figure in the annihilation of national identity. Globalisation seems to be a force that works with both common and competing interests towards the achievement of a “minimum world order.”<sup>43</sup> By targeting the economic sphere and steadily loosening national governments’ economic aristocracy, globalisation has as its goal a restriction of governmental interference and elimination of trade and financial protectionism which is antagonistic to globalisation. Addressing the decline of the Nation-State’s economic aristocracy, Sassen explains that:

States today confront a new geography of power. The associated changes in the condition of the State are often described as an overall decline in the State’s significance, especially the decline in its regulatory capacities. Economic globalisation, for one, has brought with it strong pressures for the deregulation of a broad range of markets, economic sectors and national borders, and for the privatisation of public sector firms and operations.<sup>44</sup>

Globalisation is reshaping the fixed and firm boundary between domestic and international spheres and changing our conceptions of the proper domain of domestic and international politics and law. In reformulating the entrenched disciplinary assumptions underlying the conceptual definitions of the national and the international, we necessarily move the concept

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<sup>42</sup> Danielle S Petito, *Sovereignty and Globalization: Fallacies, Truth and Perception*, N.Y.L. SCH. J. HUM. RTS. 1139, 1143 (2001).

<sup>43</sup> See LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW; A POLICY ORIENTED PERSPECTIVE 411 (2d ed. 2000); Professor Lung-Chu Chen, Class Lecture (Nov. 29, 2000).

<sup>44</sup> Saskia Sassen, *What’s Wrong with International Law Scholarships The State And Economic Globalization: Any Implications For International Law?* 109 CHI. J. INT’L L., 1 (2000).

of sovereignty to the foreground. There is no doubt that the process of globalisation is transforming traditional conceptions and constructions of sovereignty; the conventional image of Westphalian sovereignty associated with exclusive territorial jurisdiction is no longer theoretically or empirically serviceable in the face of the internationalisation of economic and social activity.<sup>45</sup>

The concept of the sovereign State as an entity that has exclusive jurisdiction over its territory (with the concomitant limitation on external encroachment on its power), as well as the notion of an internal sovereignty reflected in the internal unity of the State and its “monistic” legal order, is under transformation. As Jayasuriya observes, “[t]he notion of a single unified system of internal sovereignty has become increasingly problematic in a global political economy surrounded by islands of sovereignty, rather than by a single, central decision-making authority.”<sup>46</sup> With the globalisation of economic relations, there is a growing incongruity between a territorial notion of sovereignty and the flow of economic activity which disrupts the internal unity or coherence of the State.<sup>47</sup> Increasingly, various agencies and institutions within the State develop a high degree of autonomy and independence; this fragmentation of the domestic order of the State is central to the development of international forms of regulatory governance.

It is apparent that the increasing complexity of globalisation brings with it a global system of governance and regulation. The regulatory forms have two main features. First, they are governed by both networks of State agencies as well as multilateral institutions acting not on behalf of the State but as independent actors. Second, the emergent international regulatory

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<sup>45</sup> Kanishka Jayasuriya, *Globalisation, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance* (1999) IND. J. GLOBAL L. STUDIES 425, (1999).

<sup>46</sup> *Id.*, at 426.

<sup>47</sup> *Id.*, at 438.

order is concerned with laying down standards and general regulatory principles. Developments in both global governance and international regulation suggest the emergence of a system of decentralised enforcement or the regulation of self-regulation in which the Nation-State does not necessarily have the upperhand. This Article in addressing the globalisation challenge to sovereignty will in the next part focus on global governance and regulation of the economy and the necessary requirement of the internationalisation of State agencies and institutions. While this two aspects go hand in hand, the Article seeks to discuss them in two different sections so as to highlight two distinct factors, firstly the power and influence of the IMF and the World Bank through its linkage of conditions to loans disbursement as a means of cultivating sound economic policies especially in emerging economies. Secondly, the fragmentation of the State, a form that sovereignty takes in an increasingly global economy and an overview of the WTO's role in laying down a rule based international framework which arguably is intrusive upon certain traditional spheres of the State's law-making competence and freedom of action.

#### **IV. Global Governance and Regulation**

##### *4.1. Multilateral Institutional Order and Global Governance*

Central to the global economy is the disjunction between the territorial nature of sovereignty and the increasing global nature of economic flows. In short, the territorial jurisdiction of the Modern State over economic life is increasingly constrained by the globalisation of economic and social relations.<sup>48</sup> Susan Strange, in a sophisticated analysis of these changes in the global political economy,<sup>49</sup> provides a two-fold argument: one, that all States--small and weak--have had their authority and functions greatly diminished because of the integration of States into

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<sup>48</sup> *Id.*, at 433-434

<sup>49</sup> See generally SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996) (analyzing the circumstances and conditions that have contributed to the decline of the Westphalian model).

the global economy; and, two, that “some of the fundamental responsibilities of the State in a market economy--responsibilities first recognised, described, and discussed at considerable length by Adam Smith over 200 years ago--are not now being adequately discharged by anyone.”<sup>50</sup>

The emergence of a mostly private international institutional order wherein the strategic agents are not the national governments of leading countries, but a variety of private actors, may well have the effect of reducing the scope and exclusivity of the State’s authority and law-making competence. In Sassen’s words, “...this new institutional order also has normative authority--a new normativity that is not embedded in what has been (and to some extent remains) the master normativity of modern times, *raison d’etat*.”<sup>51</sup> In Sassen’s view, ‘economic globalisation, has emerged as a key dynamic in the formation of a transnational system of power which lies in good part outside the formal interstate system;<sup>52</sup> Despite the role the State retains in regulation of the economy (mainly the *national* economy), we are seeing a repositioning of the State in a broader field of power and with global forces reconfiguring the work of States. This broader field of power is partly constituted through the formation of a new private institutional order linked to the global economy, but also through the growing importance of a variety of other institutional orders, from the new roles of the international network of multilateral institutions in global governance issues and transnational regulatory frameworks.<sup>53</sup>

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<sup>50</sup> Id.

<sup>51</sup> Saskia Sassen, *Embedding the Global in the National* in SMITH, SOLINGER, AND TOPIK, EDS, STATES AND SOVEREIGNTY IN THE GLOBAL ECONOMY (1999), at 111.

<sup>52</sup> *Id.*, at 109.

<sup>53</sup> See, for example, Thomas J. Biersteker, Rodney Bruce Hall and Craig N. Murphy, eds, *Private Authority and Global Governance* (forthcoming); Rodney Bruce Hall, *National Collective Identity* (Columbia 1999); *Special Issue on The Internet and Sovereignty*, 7 IND. J. GLOBAL LEGAL STUD. 423 (1999); CHRISTIAN JOPPKE, ED, CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES (Oxford 1998).

One of the most important manifestation of the increase in power of non-State actors and corresponding decrease in state power is the international capital market.<sup>54</sup> Although figures vary, there is an estimated daily trade of over a trillion US dollars.<sup>55</sup> The volume of its annual trade is estimated to be ten [10] times *the whole world's* GNP.<sup>56</sup> The market was deregulated in the 1960's creating 'stateless capital',<sup>57</sup> which 'rushes in and out of national financial markets without any political regulation and unhinged for long periods from underlying fundamentals of the real economy.'<sup>58</sup> This market is unregulated by any Nation-State, though multilateral institutions play an increasingly important role that even overshadows the legislative and regulatory efforts of Nation-State governments. Both Cohen and Strange provide a valuable analysis of the growing disjunction between the functional domain of economic activity and territorial reach of the sovereign; from this persuasive premise, they reach the conclusion that sovereignty is subject to a process of gradual erosion, or to use Strange's phrase, the "diffusion of authority from state to market."<sup>59</sup> Emerging forms of "complex sovereignty" break down the internal structural coherence of the State, replacing it with often autonomous regulatory agencies whose purpose is to mediate between the international and the local or national.<sup>60</sup>

Another manifestation of the power and influence of non-State actors in the globalisation of markets and the global economy is that Nation-States (especially in the Third World) are increasingly 'held to ransom' by multinational corporations. Close relationships between governments and multinational corporations give rise to profits for both the corporations and

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<sup>54</sup> The market has been dubbed the "*global casino*".

<sup>55</sup> The figure is approximately 1.3 trillion US dollars, estimated in June 1995. The US stock market by comparison has less than ten [10] billion US dollars a day. H Henderson & AF Kay, 'Introducing Currency Competition to the Global Currency Markets', (1996) Vol. 28, No.4, *Futures*, pp. 306-307.

<sup>56</sup> Emphasis ours. *Id.* p. 306.

<sup>57</sup> The effect of deregulation has been described as 'piracy'. S. SOLOMON, *THE CONFIDENCE GAME*, 92 (1995).

<sup>58</sup> *Id.* p. 437.

<sup>59</sup> Strange, *supra* note 49 at 197.

<sup>60</sup> Jayasuriya, *supra* note 45, at 425.

governments, but also importantly, the corporations exercise a great deal of influence over governmental policy.<sup>61</sup> Nation-States when determining domestic policies, can ignore them but they face the risk of losing foreign capital, foreign investment and foreign technology, all of which could have a dramatic impact on that Nation-State's economy.

Technology by removing the importance of national borders in commerce has had the effect that constituent units or regions of a Nation-State now are no longer dependent on their national governments for trade. In a very interesting work, Kenichi Ohmae believes that the Nation-State will be replaced by 'regional economies', communities unified by economic reasons rather than political or cultural.<sup>62</sup> He describes them as 'natural business units in today's global economy' that either have or desire direct access to the global market and do not rely upon their respective national/central governments for economic assistance and in fact wish to be free from their controls as well.<sup>63</sup> His basic hypothesis is that national sovereignty has been effectively weakened by the level of economic interdependence and also by the opportunities which are made available by the global economy; Nation-States are no longer the efficient 'middle-man'.<sup>64</sup> The cause for the decline of the Nation-States' control over their economies is due mainly to their inability to respond to new challenges such as technology, which enables vast sums of capital to be transferred instantaneously and access to information which has created increasingly universal consumer preferences (the author describes this as the 'Californisation' of preferences); changes in industry dynamics and

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<sup>61</sup> See Frank B. Rampersad, *Coping with Globalisation: A Suggested Policy Package for Small Countries*, 570 ANNALS 115, 116-118 (2000).

<sup>62</sup> KENICHI OHMAE THE END OF THE NATION-STATES, THE RISE OF REGIONAL ECONOMIES, *supra* note 31.. Examples can be found in his Chapter 7. One such example is the region containing Menden (Indonesia), Penang (Malaysia), Phuket (Thailand). Although from the examples given they will share some if not many similarities particularly in their approach to economics and their desires for lifestyles of their citizens. In many respects Ohmae's regional states are very similar to Khan's 'free states'. See KHAN, L.A., THE EXTINCTION OF NATION-STATES, A WORLD WITHOUT BORDERS, (1995) .

<sup>63</sup> OHMAE, THE END OF NATION-STATES, THE RISE OF REGIONAL ECONOMIES, *supra*, note 31, at 5.

<sup>64</sup> *Id.* p. 4;

business attitudes. Also that Nation-States are burdened by outdated policies such as maintaining the civil minimum,<sup>65</sup> subsidies for the national interest; and protectionist tariffs.<sup>66</sup>

In seeking to circumvent the ‘inefficiency’ of the Nation-State in a bid to balance the many common as well as competing interests of a global economy, global forces have generated an “. . . expanding web of transnational regulatory institutions. . .,” and other multilateral institutions, with the result that commercial activity continues to move farther away from the Nation-State government.<sup>67</sup> This move is reflected in the growth in power and authority of multilateral institutions such as the IMF, the World Bank, the WTO, and the EU, and with their expanding declarations, conventions, and international legal instruments. Thus, Nation-States are faced with transnational commercial practices and the regulatory institutions, which globalisation engenders. These multilateral institutions provide substitutes (albeit imperfect) for the functions of global markets without global governance.<sup>68</sup> However, this leaves open the question and concern for small, lower-income countries with only limited abilities to comprehensively protect themselves.

The general uneasiness by weak Nation-States over the predatory tendencies of multinational corporations is almost matched by their distaste for the increasing entrenchment of strict conditionalities and mandatory appraisals imposed by multilateral institutions Such as the IMF, the World Bank, the WTO and the Basle Committee of Banking Supervisors. A key

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<sup>65</sup> The Civil Minimum refers to the political necessity for subsidising often unnecessary as well as unprofitable development in areas that are considered marginal or economically repressed such as roads and bridges in Hokkaido, Japan, or to insure equality of infrastructure throughout the nation-state. See the author’s Chapter 4 for further detail, *Id.* at 41-59.

<sup>66</sup> *Id.* at 59-71 and 79 for a summary. See the author’s Chapter 5 also.

<sup>67</sup> Louis Henkin, Symposium, Keynote Address: *The Global Market as Friend or Foe of Human Rights: The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT’L L. 17 (1999).

<sup>68</sup> *Petito*, *supra* note 42, at 1149. See Leslie A. Burton, *Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty*, 5 ANN. SURV. INT.’L & COMP. L. 205 at n. 63-64 (1999). See generally Louis Henkin, *supra* note 117: “In an era of globalization, basic institutional structures that shape our daily interactions transcend national boundaries.” *Id.*

example reflecting the authority of multilateral institutions in the global economy and the significant leak of economic power from State to non-State actors is reflected in the role of the IMF and the World Bank in the aftermath of the Asian Crisis. Under the arrangement of global governance reflected in conditional aid by these two Bretton Woods institutions, the economic policies of the Nation-State are mediated by the dictates of these institutions. The Article now turns to consider this in the next section.

#### 4.1.1. *The IMF & The World Bank: Economic Dictatorship?*

Conditionality, defined as “the linking of the disbursement of a loan to understandings concerning the economic policy which the government of the borrower country intends to pursue,”<sup>69</sup> now forms a cornerstone in both the IMF and the World Bank’s financing programmes. These conditions enable the IMF and the World Bank “independently to examine the country’s need for balance of payments assistance and to require the adoption of corrective policies before funds are disbursed.”<sup>70</sup> Common conditions imposed by both institutions include restrictions on the credit provided by domestic banks, decreasing the fiscal deficit, depreciation of the exchange rate, and trade liberalisation measures.<sup>71</sup> The World Bank’s conditionality practice often exceeds the macroeconomic corrections prescribed by the IMF as its lending has “evolved ... [in]to detailed reforms affecting the public administration itself”<sup>72</sup> that often affect governance issues.

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<sup>69</sup> PAUL MOSELY, A THEORY OF CONDITIONALITY, IN DEVELOPMENT FINANCE AND POLICY REFORM 129, (Paul Mosely, ed., 1992).

<sup>70</sup> See Rajesh Swaminathan, *Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights*, 37 COLUM. J. TRANSNAT’L L. 161 166 (1998). Although the author is referring specifically to the IMF, this is an apt description of the Bank’s conditionality practices as well.

<sup>71</sup> See Lance Taylor, *IMF Conditionality: Incomplete Theory, Policy Malpractice*, in THE POLITICAL MORALITY OF THE INTERNATIONAL MONETARY FUND 33, 34 (Robert J. Myers ed., 1987). Although IMF conditions are not published, “they do tend to become public knowledge indirectly through governments, commercial banks and the media.” Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT’L L.J. 443, 452, (1997).

The Asian “tigers” experienced the phenomenon of loss of control over the national economy first-hand. Three ugly features of the globalised economy were reflected in the Crisis. First, the threat posed by international capital markets in effectively devaluing a Nation-State’s currency; secondly the horrendous effects on the domestic economies and policies of the Nation-State and lastly, the intrusiveness of multilateral institutions on the Nation-State’s economic aristocracy through dictation of monetary and fiscal policies. What began as a simple recession in Thailand turned into one of the worst global economic disasters in history.<sup>73</sup> Nation-States watched helplessly as the contagion<sup>74</sup> caused widespread panic and economic chaos in its wake. Like a row of dominoes, one by one, nations succumbed to the contagion. By the time the worldwide crisis concluded, the currencies of such disparate nations as Canada, Chile, and Australia had plummeted.<sup>75</sup>

Reflecting on the Asian Crisis, Tsai observes that:

The experiences during the Asian Financial Crisis exemplify how globalisation has weakened national sovereignty and a state’s ability to defend itself against deleterious events by foreign actors. Globalisation, particularly the speed of capital movement and near-instantaneous communication, made nearly every country susceptible to the contagion. States’ defensive sovereignty is threatened because they can no longer shield themselves from the effects of events occurring outside of their territory.<sup>76</sup>

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<sup>72</sup> IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* 59 (Franziska Tschofen & Antonio R. Parra eds., 1991).

<sup>73</sup> For a brief and concise account of how the crisis unfolded, see Mary C. Tsai, *Globalization And Conditionality: Two Sides Of The Sovereignty Coin* 31 *LAW & POL’Y INT’L BUS.* 1317,1322-1328 (2000).

<sup>74</sup> The contagion was caused by a combination of investors and banks withdrawing their capital from these nations. For example, Brazil, for a time, lost foreign reserves at a rate of \$1 billion per day. See NICHOLAS D. KRISTOF with SHERYL WuDUNN, "The World's Ills May Be Obvious, but Their Cure Is Not," *New York Times*, February 18, 1999 at A9. Furthermore, weak banks in one country called in loans from other countries, leaving economic disaster in their wake. See Steven Pearlstein, *Understanding the Asian Economic Crisis*, *WASH. POST*, Jan. 18, 1998, at A32.

<sup>75</sup> See David D. Hale, *The IMF, Now More than Ever: The Case for Financial Peacekeeping*, *FOREIGN AFF.*, Nov.-Dec. 1998, at 8.

<sup>76</sup> TSAI, *supra* note 73, at 1322-1323.

The Asian crisis and its effects created a situation for IMF and the World Bank's involvement.<sup>77</sup> The Bretton Woods institutions believed that the conditions they placed on lending would prevent a recurrence of the crisis.<sup>78</sup> The two institutions sought to bolster nations' ability to withstand any future crises caused by globalisation and attempted to strengthen nations' defensive sovereignty by imposing conditions on recipient nations. However, conditionality handicaps the debtor nations' ability to develop their own solutions to economic disasters, thereby infringing on their affirmative sovereignty. Thus, the conditionality requirements imposed by the Bretton Woods institutions further exacerbated the effects of globalisation on state sovereignty. At a minimum, conditionality limits the range of economic policies at a debtor nations' disposal, while, at the extreme, it forces unwilling sovereign nations to undergo shock therapy. Effectively, with the imposition of IMF or World Bank conditions, sovereign debtor nations are forced to abandon their chosen and preferred course of economic development and to accept the vision of economic development that the IMF and the World Bank impose. Global economic integration alone introduced new challenges to traditional notions of sovereignty; however, when coupled with the Bretton Woods conditionality, sovereignty is in a more precarious position than ever before.<sup>79</sup>

#### 4.2. Regulatory Regimes and Fragmentation of the State

In both spheres of politics and economics, it is apparent that globalisation is replacing the sovereign State, and it clear that States are unable to control their own economies and territories in the same way that was possible in the era of *raison d'etat*. This phenomenon is accurately reflected in Camilleri and Falk's view that "global processes and institutions are invading the Nation-State and as a consequence dismantling the conceptual and territorial

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<sup>77</sup> See John W. Head, *Global implications of the Asian Financial Crisis: Banking, Economic Integration, and Crisis Management in the New Century*, 25 WM. MITCHELL L. REV. at 939-940, 945 (1999).

<sup>78</sup> See Stanley Fischer, *In Defense of the IMF*, FOREIGN AFF ,July-Aug. 1998, at 106.

<sup>79</sup> TSAI, *supra* note 73, at 1328-1329.

boundaries that have traditionally sustained the theory and practice of state sovereignty.”<sup>80</sup> “Transnational civil society” has its own agendas which do not necessarily accord with governmental agendas, but which it nonetheless pursues.<sup>81</sup>

States are being “invaded” by “global processes”—and stating that the more penetrated an economy becomes, the more State sovereignty is undermined is not too far-fetched an observation. One of the central aspects of the “strong” globalisation thesis is the argument that States are no longer autonomous actors; they now find themselves embedded in a web of institutions and regimes. Power seems to be leaking from States to non-state actors. As Jayasuriya observes, “[o]ne of the ramifications of State fragmentation and the greater permeability of the boundary between domestic and international domains is the emergence of a polycentric legal order that directly contradicts the “monistic” legal order implied by an internally unified State.”<sup>82</sup>

An example of the fragmentation or disaggregation of the State is the development of independent central banks. Central banks are national institutions, concerned with national matters. Yet over the last two decades or so, ‘they have become the institutional home within the Nation-State for monetary policies that are necessary to further the development of a global capital market and, indeed, more generally, a global economic system.’<sup>83</sup> ‘The new conditionality of the global economic system--e.g. the conditions that need to be met in order for a country to become integrated into the global capital market--contains as one key element the autonomy of central banks so that they may institute a certain kind of monetary policy.’<sup>84</sup>

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<sup>80</sup> JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING GLOBE* 98 (1992).

<sup>81</sup> This has become a catch-all term to include the various non-governmental organisations (NGOs) such as aid agencies, political networks, and so on. See Holton, *supra* note 130 at 35.

<sup>82</sup> JAYASURIYA, *supra* note 45, at 441.

<sup>83</sup> SASSEN, *supra* note 51, at 113.

<sup>84</sup> *Id.*, at 112.

Sovereignty is reconfigured in the sense that it is no longer exercised within a monistic legal and decision-making structure;<sup>85</sup> instead, it is parceled and diffused across a range of governmental and non-governmental authorities. Governance programs seek to build and make transparent a whole range of regulatory institutions; but, in so doing, it is necessary first to make these institutions more independent from central State apparatus, thereby constituting islands of sovereignty within the State. As a process (though it does have a different normative basis), this has some affinity with the multilevel governance of the European polity.<sup>86</sup>

One of the important features of governance mechanisms in the global economy is the emergence of a system of regulatory networks.<sup>87</sup> As the State becomes fragmented, regulatory agencies increasingly develop international connections with other regulatory agencies, thereby taking on an “international” function.<sup>88</sup> This reconstitution of sovereignty in a world of rapid globalisation takes the “internal” form of fragmentation and polycentricity and the “external” form of “network governance.” In fact, regulatory systems have become increasingly important in the management of the global economy and pose important challenges to our conception of the way international law is formulated and enforced; these regulatory webs do not depend on formal international treaties or rely on international organisations for their enforcement. In short, the emergence of an international regulatory State depends on and requires the active participation of agencies within the State.<sup>89</sup> Again,

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<sup>85</sup> For an exploration of these issues, see Christian Joerges, *Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration*, 2 EUR. L.J. 105, 106-35 (1996)

<sup>86</sup> Mark Beeson & Kanishka Jayasuriya, *The Political Rationalities of Regionalism: APEC and the EU in Comparative Perspective*, 11 PAC. REV. 311, 314-315 (1998).

<sup>87</sup> JAYASURIYA, *supra* note 45 at 446.

<sup>88</sup> *Id.*, at 447.

<sup>89</sup> *Id.*

the importance of the reconstitution of sovereignty in these new systems of global regulation should be recognised. We can term this a form of “network governance.”<sup>90</sup>

There are two significant features which stand out. First, regulatory cooperation was driven by the desire to protect sovereignty. Second, this cooperation could only be achieved by internationalising regulatory agencies, thereby rupturing the internal sovereignty of the State. Arguably, the emphasis placed on the role of the State as a regulator--which multilateral agencies seem to have recognised--requires not a reduction in the role of the State, but rather a restructuring of its governmental functions, shifting the “boundary between the public and private sectors, thereby enlarging the latter, with the government’s role changing from direct provision to regulation.”

Global processes come about in national territories, leading to a “. . . need for deregulation and the formation of regimes that facilitate the free circulation of capital, goods, information and services,” which in part denationalises a Nation-State and in part shifts elements of State sovereignty to other institutions.<sup>91</sup> As colonisation brought sovereign legal systems and commercial codes to harmonise economics, globalisation has to do the same and more. Though globalisation has not forced such a severe “. . . convergence of domestic policies and institutions,” it still brings much greater integration.<sup>92</sup> The suggestion is that this greater integration “. . . breeds friction and conflict rather than accord and harmony [.]”<sup>93</sup>

#### 4.2.1. *The WTO: Rule-Based International Framework*

One of the most important international economic regulatory regimes is the WTO. The purpose of the WTO is to provide a rule-based legal framework to resolve international trade disputes. Four characteristics give the WTO a base for strong influence and authority of the international market place, an influence which few States can match. Firstly it is a permanent

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<sup>90</sup> *Id.*

<sup>91</sup> See SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 98 (1996), at xii. “Other institutions” range from supranational entities to the global capital market.

<sup>92</sup> See Paul Krugman & Anthony J. Venables, *Globalization and the Inequality of Nations*, 5098 NAT’L BUR. ECON. RES. (April 1995);

organisation with its own Secretariat and administrative infrastructure.<sup>94</sup> Secondly, its jurisdiction is wide and in many areas covers spheres that were traditionally within the domestic jurisdiction of Nation-States.<sup>95</sup> Thirdly, there is a sense of certainty and uniformity concerning the application of the agreements of the WTO; the set of agreements apply equally to each member; and the laws and policies of each member must conform with their obligations under the Multilateral Trade Agreements and the Plurilateral Trade Agreements.<sup>96</sup> Finally it will administer a Trade Policy Review Mechanism which is designed to monitor domestic trade policies and encourage cooperation between members. In order to promote ‘global economic policy-making’ the WTO will also cooperate with the IMF and World Bank.<sup>97</sup>

It has been stated that the WTO is not intended to encroach on national sovereignty:

The WTO is in no way an assault on any country’s sovereignty. If anything it enhances it by providing a more effective dispute settlement mechanism through which countries can ensure that their rights are respected and by providing a permanent forum for adopting the international trade policy agenda to the real needs of nations.<sup>98</sup>

Similar to arguments provided by the “realists” for the European Union, the WTO strengthens national sovereignty by collective action, but also by maintaining the equality of Nation-States by restricting their external sovereignty under a centralised legal structure. However, in order to be more effective, the WTO by implementing the Trade Policy Review Mechanism [TPRM], goes one step further and becomes involved in the domestic policy making powers of Nation-States, their domestic jurisdiction. The purpose of the TPRM is to increase

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*, at 599.

<sup>95</sup> *Id.* Some examples of the areas are agriculture, textile, clothing and services.

<sup>96</sup> Susan Hainsworth, *Sovereignty, Economic Integration, and the World Trade Organisation*, 33 OSGOOD HALL L.J. 599, 583, [1995].

understanding of the trade policies of the members by greater transparency using peer review. This is done through “consultations” between the Trade Policy Review Board meeting with members being reviewed with a report being published.<sup>99</sup> Therefore the TRPM provides the WTO with the potential to erode national sovereignty:

..although national sovereignty is apparently maintained intact in the TPRM, there is a tacit acknowledgment that transparency and exposure of non-compliance is an initial step towards facilitating policy harmonisation .. The TPRM may not represent a pooling of state sovereignty,...it does however, represent a pool for “mirroring” state sovereignty in relation to international trade consensus.<sup>100</sup>

The WTO by this trade consensus raises the concern that individual trading corporations will need to refer to the WTO rather than their own national government to assist with their own planning and policy decisions:

Questions of where sovereignty actually resides and where it should be allocated for the most efficient and effective regulation of transnational economic activity (ie. at the sub-state, regional, state or supranational level) will become ever more salient.<sup>101</sup>

This phenomenon is already occurring with nearly every constituent state of the USA having official standing with the WTO and maintaining ‘trade offices’ in other Nation-States. This trend increases economic interdependence and weakens the influence of national governments. Thus the WTO is a potential replacement for Nation-States. It assists regional economies to maximise their wealth and adds a degree of protection by regulating their trade, something Nation-States are increasingly unable to do.

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<sup>97</sup> *Id.*, at 598-9.

<sup>98</sup> Former GATT/WTO Director-General Peter Sutherland as cited in *Id.*, at 621.

<sup>99</sup> *Id.*, at 606-611.

<sup>100</sup> *Id.*, at 609.

## V. Is the End of the Nation-State Nigh?

Globalisation is not the only threat to the Nation-State and sovereignty. The Westphalian system faces environmental disasters, illegal migration and mass exodus of refugees, wars, non-national terrorist organizations with potential access to biological weapons, and of course nation-state controlled nuclear weapons. Such threats are beyond the ability of even the most powerful nation-state to face alone, and instead require the cooperation of nation-states.<sup>102</sup> (Even then there is the possibility of the so-called “rogue state”.) Further, technology has made it possible for economic entities, such as MNC’s to treat the entire globe as one “internal market” which has severely reduced Nation-States’ financial ability to solve these problems.<sup>103</sup> So it is easy to understand why some commentators have predicted the end of the Nation-State.<sup>104</sup>

However, one author believes that globalisation really signals the end of the present structure of the international community, rather than an end to the Nation-State.<sup>105</sup> Instead the author sees the nation-state surviving to become an intermediary between regional entities (“super-states”) such as the EU, and NGO’s.

However, it will always remain the function of the state to transport values from the domestic order to the supra-national and international legal orders, as well as to be open to input from the international orders to the domestic scene.<sup>106</sup>

The importance of NGO’s, such as the World Bank and the WTO, in the international community is well-documented above. The significance of these NGOs as well as MNCs as

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<sup>101</sup> *Id.*, at 621-622.

<sup>102</sup> Stephan Hobe ‘The Era of Globalisation as a Challenge to International Law’ 40 *DUQ L. REV.* ,655, at p. 656

<sup>103</sup> ‘Globalisation seems to be typified by new phenomena that transcend the control capacity of the modern state.’ *Id.*

<sup>104</sup> For example, KENICHI OHMAE, *THE END OF THE NATION-STATES, THE RISE OF REGIONAL ECONOMIES,*, *supra* note 32 & KHAN, *supra* note 62.

<sup>105</sup> Stephan Hobe, *supra* note 102 at p. 656.

<sup>106</sup> *Id.* at p. 663.

major players in the international arena is further manifested by their representation and attendance at major government summits whether regional or international. In addition, they are affected indirectly and sometimes directly by norms of public international law whether it be in terms of their operations or interaction with other entities. A sore point though is that despite being affected by norms of public international law, these entities do not have recognised international legal personality.<sup>107</sup> Such a denial has important disadvantages for international organizations, since it denies these entities “relevance” and the ability to directly participate in the development of international law<sup>108</sup> Concomitantly, it has important advantages for Nation-States, the prime fountain of international law norms by giving them an upper hand in setting the agenda or at the very least influencing it.

The denial of NGOs and MNCs of a direct role in contributing to the norms of the international system cannot last forever. In the *Reparations Case* the ICJ stated that ‘the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights’ and affirmed that the UN did have standing to bring an action before the ICJ in order to enforce its rights.<sup>109</sup> There have also been consistent calls for international organisations such as the World Health Organisation to be granted international legal personality.<sup>110</sup> Nation-States have however stood firm against de jure grants of international legal personality to entities other than states aiming to protect the statist driven international system by limiting the rights of participation and contribution of non-state entities. However,

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<sup>107</sup> *Id.*, at p. 659.

<sup>108</sup> *Id.*

<sup>109</sup> *Reparations Case* [1949] ICJ Rep . 178.

<sup>110</sup> See for example the series of articles in AS. MULLER ET AL (ED.’S) THE INTERNATIONAL COURT OF JUSTICE ITS FUTURE ROLE AFTER FIFTY YEARS, (1997) as follows:- Jerzy Sztucki ‘International Organizations as Parties to Contentious Proceedings before the International Court of Justice ?’ at pp. 141-167 & Szasz, ‘Granting International Organisations *Ius Standi* in the International Court of Justice’ at pp. 169- 188 & Ignaz Seidl-Hohenveldern, ‘Access of International Organizations to the International Court of Justice’ at pp. 189-203. In particular Sztucki’s article lists the following famous and well-regarded former judges of the ICJ and academics; Judge Sir Hersch Lauterpacht in 1950; Sir Wilfred Jenks in 1964; Leo Gross & Judge Sir Gerald Fitzmaurice in

this state of affairs has developed significant cracks. Certain NGOs have developed de facto vestiges of international legal personality. The fight against the influence of MNC's and NGO's is a fight that nation-states will finally lose. Concessions that are granted from time to time based on "pragmatism" will eventually become cemented in practice and cross from their shadowy grey-area habitat as implicit rules of expedience into a black-white habitat as explicit rules of operation and interaction. Indeed if Nation-States are to survive this onslaught then they need to adapt, to bend before the wind, and the first step would be to acknowledge the international legal personality of non-nation-state actors in the international legal system.<sup>111</sup>

Another way for nation-states to survive is through the formation of regional trading entities such as the EU. This is Kenichi Ohmae's work; he believes that the nation-state will be replaced by 'regional economies', communities unified by economic reasons rather than political or cultural.<sup>112</sup> This phenomenon has already begun in Europe with the development of "super-regions".<sup>113</sup> For example, Padania in Northern Italy;<sup>114</sup> and in France the Rhone-Alpes area, with Lyons its capital, the so-called 'Alpine Diamond' which by-passes Paris and has virtually an independent commercial policy.<sup>115</sup> Other regional areas are developing their own state-like bureaucracies and developing their own infrastructures to access the global economy directly.<sup>116</sup> By shifting the physical border to its furthest extent, the EU overcomes this problem, by simply engulfing these smaller economic regions into one physical entity

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1976; Judge Roberto Ago in 1990; Derek W Bowett in 1992 and Sir Robert Jennings in 1993. See Sztucki, *supra* at p. 153.

<sup>111</sup> Stephan Hobe *supra* note 102, at p. 663.

<sup>112</sup> Kenichi Ohmae, THE END OF NATION-STATES, THE RISE OF REGIONAL ECONOMIES *supra* note 32, One example is the region containing Menden (Indonesia), Penang ( Malaysia), Phuket (Thailand). Ohmae's regional states are very similar to Khan's 'free states'. See Khan L.A., *supra* note 104.

<sup>113</sup> Large economic zones that transcend national boundaries. J. Newhouse, 'Europe's Rising Regionalism' FOREIGN AFF Jan./ Feb. 1997, p. 69.

<sup>114</sup> The reason why the Northern League was so successful in Italian elections was because the industrialised areas in northern Italy were protesting at their rate of taxes as high as 39%, which were being used to subsidise the South, which had a high rate of unemployment and was unproductive. *Economist*, May 25th 1996.

<sup>115</sup> For example, Lyons planned to build a high speed private train service to Turin Italy on its own initiative. Alpine Diamond is the area framed by Lyon , Turin and Geneva. Newhouse, *supra* note 113, p.72

<sup>116</sup> *Id.*

controlled by one super central government in Brussels. As national governments' policies become increasingly subservient to regional economic controls or legislative bodies, then this creates the opportunity for ethnic groups, 'peoples', to refer not to the national governments that once united them, but to regional governments, thus accelerating the decline of the importance of national sovereignty.

Ohmae concludes: -

In today's borderless world, the lesson for central government is clear: hold onto economic control too long, and it becomes worthless. Burdens increase, and no one will pay for them but you. Give it up early, however, or better, transmute it into one or another form of catalysis, and the global economy will rush in to help.<sup>117</sup>

In other words nation-states will become nothing more than service providers, some sort of technology guardians, maintaining and supplying the necessary infrastructure to enable these areas continued access to the global economy.

## **VI. Conclusion**

From the foregoing, it is clear that the process of globalisation has transformed the traditional understandings of sovereignty and its embrangement with specific and exclusive jurisdiction over a given territorial area. The erosion of the internal sovereignty of the State is perhaps the first noticeable manifestation of the transformation of sovereignty. This is particularly the case because a key feature of the Westphalian model (and critical to the separation of the public and private in capitalism) is the internal unity of the State, which in turn implies a monistic legal order. Externally these changes in the form of sovereignty have been evident in

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<sup>117</sup> Ohmae, THE END OF NATION-STATES, THE RISE OF REGIONAL ECONOMIES *supra* note 32, at p. 140.

the emergence of global governance standards and regulatory regimes all of which are governed by a network of multilateral institutions.<sup>118</sup>

The State still continues to dominate international political interaction but in modes and forms that are shaped by global forces. State sovereignty, is in the process of a significant transformation, at least among States that wish to reap the benefits a global marketplace can provide.<sup>119</sup> The emergent, often imposed, consensus in the community of states to further globalisation has created a set of specific obligations on participating States. The State remains as the ultimate guarantor of the “rights” of global capital, in other words, the protection of contracts and property rights. Thus the State has incorporated the global project of its own shrinking role in regulating economic transactions.<sup>120</sup> Firms operating transnationally want to ensure the functions traditionally exercised by the state in the national realm of the economy, notably guaranteeing property rights and contracts.<sup>121</sup>

Globalisation has resulted in a significant reconfiguration of national sovereignty. Though sovereignty still manifests the highest or the supreme authority within a political community, it has lost its all encompassing nature especially in the economic sphere as governments have increasingly been sidelined as the ultimate monetary and fiscal policy makers.<sup>122</sup> As technology continues to advance and fuel globalisation, the nation-state finds itself caught in the eye of a storm, it can either seek to put in place laws to facilitate an effective harnessing of

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<sup>118</sup> Jayasuriya, *supra* note 45, at 448-449.

<sup>119</sup> Christopher Rudolph, *Globalization, Sovereignty, and Migrations: A Conceptual Framework 1998-1999*, 3 UCLA J. INT'L LAW & FOREIGN AFFRS 325, at 354.

<sup>120</sup> ROBERT W. COX, PRODUCTION, POWER, AND WORLD ORDER: SOCIAL FORCES IN THE MAKING OF HISTORY (Columbia 1987); Leo Panitch, *Rethinking the Role of the State in an Era of Globalization* in MITTELMAN, GLOBALIZATION at 83-113 (MITTELMAN, ed); Stephen Gill, *The Emerging World Order and European Change* in RALPH MILIBAND AND LEO PANITCH, EDS, NEW WORLD ORDER? THE SOCIALIST REGISTER, 157 (Ralph Miliband and Leo Panitch, eds, 1992).

<sup>121</sup> Sassen, *Embedding the Global in the National* *supra* note 51, at 112.

<sup>122</sup> Holst, *Keeping a Fractured Peace* in M. HEIBERG (ed.), SUBDUING SOVEREIGNTY, SOVEREIGNTY AND THE RIGHT TO INTERVENE, (M. HEIBERG ed, 1994), p. 145. Holst is the former Minister of Foreign Affairs, Norway.

the benefits or it can choose to participate directly as a player, but with the critical disadvantages discussed above. Globalisation is not inhibited by political borders while technology renders geographic distance to be less relevant. The Nation-State is not only losing its many multi-faceted tentacles, but it is forced to participate in the very process that is responsible. So long as wealth or ownership of wealth can be transferred electronically, then globalisation will continue to be the driving force behind the threat to Westphalian sovereignty. However in a resource-strapped and overpopulated world of the future, the need to protect scarce and valuable resources such as water will require that a sovereign's authority be expressed territorially: it will not be enough that the owner is a corporation or an individual is located on another continent to ensure such protection, the sovereign's presence in the form of an armed guard will be required. Such dominance will in all likelihood spur a cycle of military escalation and conflict. In such an environment, Nation-States and their centuries old alibi of sovereignty expressed as protection of national interest may return simply because of their proven superior martial organisation.<sup>123</sup>

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<sup>123</sup> Porter, *supra* note 12, at p. 64.