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Of Maps, Law, and Politics: An Inquiry into the Changing Meaning of Territoriality

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DIIS Working Paper 2011:03

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DIIS WORKING PAPER 2011:02

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Cover Design: Carsten Schiøler
Layout: Ellen-Marie Bentsen
Printed in Denmark by Vesterkopi AS
ISBN: 978-87-7605-430-4
Price: DKK 25.00 (VAT included)
DIIS publications can be downloaded
free of charge from www.diis.dk

This working paper is part of a special series linked to the DIIS research initiative "Shifting Sovereignties & Power". The present paper was presented at the first international workshop in this framework titled "Sovereignty, Territory and Emerging Geopolitics" held at DIIS, 3-4 May 2010.

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ABSTRACT

This paper examines the changing meaning of "territoriality" by focusing on the problem of representation. It examines the two-dimensional homogenous space as it has been increasingly used in "mapping" the international system as an area of mutually exclusive zones of jurisdiction. This way of mapping has reinforced the notion of "sovereignty" as exclusion, despite the growth of competing jurisdictional claims based on a variety of principles, which the emergence of private international law attempted to mediate during the heydays of the nation state. It also placed international regimes and international organizations "above" the state where they became "invisible", thereby again reinforcing the territorial conception of law and politics.

The new systems theory of Niklas Luhmann and Gunther Teubner claims to provide a better representation of contemporary social and political reality, as it no longer uses the part/whole distinction as its main conceptual tool and is thus more open to "legal pluralism" both domestically and internationally. Nevertheless, the conceptualization of autonomous functional systems does not do justice to the special role that law plays in constituting and transforming these supposedly autonomous "auto-poietic" systems. For that reason the new systems theory fails to address also problems of non-territorial "imperial" formations as evidenced by the political project of "governance" and "best practices", universal human rights, and extra-territorial regulation as exemplified e.g. by the European REACH initiative and the EU's neighborhood policy.

1. INTRODUCTION

In ruminating about the changing order Pascal in the sixties of the 17th century takes issue with the notion that "each should follow the custom of his own country" and contrasts it with the alternative vision of true "equity", thereby chastising legislators who have taken "as their model the fancies and caprice of Germans and Persians" instead of taking heed of "unchanging justice" which

> …we should have seen it set up in all the States on Earth and in all times….Three degrees of latitude reverse all jurisprudence; a meridian decides the truth. Fundamental laws change after a few years of possession; right has its epochs; the entry of Saturn into the Lion marks us the origin of such and such a crime. A strange justice that is bounded by a river! Truth on this side of the Pyrennees, error on the other side.[1]

This passage is remarkable for various reasons. It is an argument about law's privileged position as a system of meaning for practical choices and it is a defense of the old idiom of justice which tied to universalism by employing a notion of truth that is based on an ontological speculation. Only in this way can truth and equity to be shown to be the two sides of "being". But the passage is obviously occasioned not only by taking issue with the traditional "error" of the maxim, when in Rome do like the Romans, but by the significant change in the practices which Pascal observes: Law is no longer something which is "discovered" or found, or made by God. It is the modern sovereign who claims legislative authority on the basis of his jurisdiction in a certain territory. In other words not only does positivism raise its ugly head which the debate about the meaning of *ius* – whether it was derived from *iustum* (the just) or from *iussum* (from command) already had addressed – but it seems to engender an even more principled criticism. After all, these legislative powers were now – in the absence of the Law of God or natural law which Bodin[2] still admitted – limited only by territorial boundaries.

Despite its, for us contemporaries, strange idiom there is a certain resonance of this argument with contemporary discourses, as we also witness fundamental changes in our social world while trying to find our way. The appeal to "universality" is on the rise again. Even in the absence of a belief in God, human rights and human dignity have become now the religion for agnostics. We notice it in new conceptions such as *jus cogens*, the "responsibility to protect" and the somewhat contorted way in which the international Commission of Jurists dealing with the allied intervention in Kosovo tried to square the circle between "sovereignty" and its derivative notion of territorial integrity, and human rights: the intervention *was illegal but legitimate*.[3]

But while human rights might be the most visible part, our practices seem indeed more and more at odds with the fundamental principle of sovereignty and the alleged license to "exclude". Not only have trans-boundary flows – ranging from goods to people, to information – undermined the old notion of the sovereign state as a container or "billiard ball" in a mechanically conceived system of states, the emergence of self-contained regimes and the

1 Blaise Pascal, *Pensées* (1670) (New York: Dutton and Co., 1958): 84f.

2 See Jean Bodin, *The Six Books on the Commonwealth* (Cambridge, Mass.: Harvard University Press, 1962).

3 Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2001): especially 163-98.

fragmentation of the international legal order[4] – hotly debated among international lawyers and some sociologists of the Luhmannian persuasion[5] – suggests that the old Westphalian map is seriously misleading and no longer provides us with the necessary orientation[6].

A similar and perhaps even more central challenge to the "exclusivity" thesis – this time in form of a challenge to the legislative monopoly of the state – comes from legal pluralists who showed that not only colonial regimes had to "incorporate" some "native" law into their legal system, even in well-developed legal orders the issue of "custom" and the existence of different normative orders on the same territory were the rule rather than the exception. Otherwise, it would have indeed been surprising why until the end of last century all legal theorists focused so intensively on finding "the" demarcation criterion for law (as opposed to morals, societal conventions or whatever).

Finally, any analysis of the actual practices in international relations also suggests that the "map" of excusive zones of jurisdictions – popularized already by Leibniz[7] – was largely a myth. This "program" seemed to have resulted from the representational difficulties in cartography, when one attempted to show different layers of law overlaying and interpenetrating each other, rather than from an accurate depiction of social reality. Thus the misleading notion of "extraterritoriality" that Mattingly derives from the problem of having nonconformist religious practices in e.g. an ambassador's residence in a foreign country[8], might have more to do with cartography than actual practice.[9] After all, the inviolability of the ambassador's residence is based on immunity from the jurisdiction of the sovereign to whom s/he is accredited, and it is this personal status and that of family members rather than some imaginary territorial enclave that serves as the *explanans*.

The last remark also indicates why jurisdiction could be extended and sovereigns did so not only in the still largely personalistic era of the dynastic politics, but even more so during the hey-days of the sovereign state. Here the institution of diplomatic protection, of extradition treaties, of the legal doctrine of comity, and the growth of international "private" law show various ways in which the inevitable and evolving conflicts were addressed. Thus the notion of the exclusivity of the Westphalian order – and of modern practice to boot – is just little more than a quaint lesson derived from a visit at "Lego-land" which serves apparently as the preferred theme-park for many international relations specialists.

The upshot of the argument is that in order to understand how our concepts work, we cannot rely on the nation that their meaning is contained in their *reference* and that our task is

4 See e.g. Martti Koskenniemi, Paevi Leino, "Fragmentation of International Law? *Leiden Journal of International Law,* vol. 15 (2002): 553-579. The ILC Study Group on Fragmentation (Koskenniemi 2003) can be accessed under www.un.org/law/ilc/sessions/55fragmentationoutline.pdf; The report A/CN.4/L.628, 237ff, can be found under: www.un.org/law/ilc/index.htm.

5 See e.g. Gunther Teubner, "Global Bukowina" in Gunther Teubner, *Global Law Without a State* (Brookfield: Dartmouth, 1997).

6 For a fundamental critique see Bonaventura de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization and Emancipation*, 2nd edition (London: Butterworth, 2002).

7 Leibniz, *Nova Methodus discendae docendaequae Jurisprudentiam* (1667); *Theatrum Legale* (1675) see Patrick Riley, *Leibniz' Universal Jurisprudence* (Cambridge, Mass,: Harvard University Press, 1996).

8 Garrett Mattingly, *Renaissance Diplomacy* (Boston: Houghton Mifflin, 1971).

9 Here I differ from John Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations", *International Organization,* vol. 47, No 1 (1993): 139-74.

to bring the world "out there" under our concepts that ought to have sharp boundaries and sort reality according to taxonomic criteria. We have to see how concepts work in context, i.e., investigate the semantic field in which they are embedded and see which practices are thereby enjoined, permitted or demanded. To that extent "territoriality" is, despite its seemingly referential link to physical nature, a "social" rather than a "natural kind". It means that the boundaries are *status ascriptions* rather than simple descriptive designations[10]. This river or that mountain range *are* not a boundary, but *serve* as a boundary, the ideology of "natural boundaries" à la Louis XIV notwithstanding. Furthermore, such an enterprise will always involve us in a "historical" investigation of the semantic fields and of the changing practices thereby engendered. Such an enterprise not only prevents us from projecting back a reading which is based on current understandings, as well as from the mistaken reading of maps of bygone times. It also has the critical and productive intent of not submitting to wrong analogies when analyzing our contemporary problems, or to assume a priori that the changes we observe are only surface phenomena of deep structures that work themselves out behind the back of the actors.

In order to make good on these claims, my argument will take the following steps: In the next section I will take Calvin's case as my foil by demonstrating that a purely territorial reading of the state system has never been accurate and that the construction of "extra-territoriality" was a prop to come to terms with the contradictions that appeared when the mapping of politics was attempted in purely spatial terms. In section three I deal with the issue of legal pluralism and with the challenge to the mapping exercises of "law" as a "system" of norms. In particular I try to show that the thesis of modern systems theory suggesting that functional differentiations and codes replace territorial notions of jurisdiction (Teubner, Luhmann) is problematic, as the "fragmentation" debate in international law suggests. In section four I want briefly to reflect on the problem of re-thinking the territorial element in ordering by drawing attention to imperial, but in a way non-statist, formations of rule, that play an important part in contemporary politics, by reconfiguring the meaning of territoriality. Here both the "law's migration" thesis advanced by Resnik and the EU's "neighborhood" policy serve as my foil. A brief summary (section five) concludes this essay.

2. DOMINIUM, CALVIN'S CASE AND CARTOGRAPHY

The sources of many international institutional arrangements in Roman private law are well known.[11] Two of the most important are "contract" (treaties) by means of which the persons of sovereign authority could create particular rights and obligations, and *dominium* that gave identifiable content to the otherwise rather imprecise concept of "sovereignty".[12] Sovereignty, one of the few concepts that have no classical counterpart, emerged within the medieval political discourse as a claim to superior authority, but since it was a *relational* concept, it mapped the rights and duties of vassals vis-à-

10 For a further discussion, see John Searle, *The Construction of Social Reality* (London: Penguin, 1995): chaps. 4 and 5.

11 See e.g. Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Hamden Ct: Anchor, 1970).

12 See Friedrich Kratochwil, 'Sovereignty as Dominium', in G. Lyons and M. Mastanduno (eds), *Beyond Westphalia: State Sovereignty and Intervention* (Baltimore: Johns Hopkins Press): 21-42.

vis each other, so that some lower individuals could have several sovereigns.

It is here that the institution of *dominium* proved helpful. Taken from Roman private law it concerned the bundle of rights coming with the "land" or real-estate property. While the Germanic customary legal orders contained various "use rights" – so that the possession of e.g. a piece of forest did not bar others from herding their swine there, or from collecting wood – a custom still recognizable in the saying "by hook and by crook" since people had the right to pull down the braches they could reach – Roman law was exclusive. Thus, all rights belonged to the owner and he alone could decide of how to make use of it. Only a vertical division of property was possible and thus no rights could be acquired for e.g. a second story of a house[13]. The institution of real estate property meant precisely what Roman law said: "*usque ad inferos usque ad coelum*", i.e., "everything down to hell and up to the heavens" belonged exclusively to the owner and could only be conveyed in this fashion to somebody else.

But by saying that it provided a helpful analogy I do not want to suggest that it can by itself explain modern politics. Both the "state" and the "subject" had to be re-thought and related to it. Nevertheless, it is clear that "boundaries" attained thereby a new meaning. Not that they had not existed before, but since jurisdiction and various rights and obligations of the persons living on a given piece of land hardly ever coincided, there was no clear demarcation even in cases when "linear boundaries" instead of floating frontier zones existed. Thus the possessions of a count might be demarcated by natural features like a river or the clear boundaries of a parish, since canon law was territorial rather than personal. But as the count might have obligations to an over-lord in another province or even to "kingdom" and have only shaky jurisdiction over some of the monasteries within his "territory", boundaries were far from clearly specifying the "jurisdiction" and thus the political and legal obligation of the "subjects" in given area.

True, even feudal politics depended on "land" and on the exchange of protection for certain services (early on to be transformed into serfdom of the peasantry), but land "meant" something entirely different. The medieval conception of politics distinguished between those who shared in power and those who were "the people", i.e. those without participation or influence. No common conceptual space of a "public" and of being a member of this *res publica* on a given piece of land was conceivable under such circumstances. This meant however, that other criteria had to determine how one was to distinguish those entitled to rule or participate, from those "others". This was done through a faith-based criterion (Christendom, *res publica Christiana*) and the "blood line" which particularly in ruling houses (and those aspiring to rule) led to entirely fictitious genealogies dating back at least to Aeneas or Hercules, or in general through the inheritable status in an "order" or estate.[14]

Even from this thumbnail sketch of the developments it should be clear, however, that it was the synergies which developed between

13 For a further discussion, see Fritz Schulz, *Classical Roman Law* (Oxford: Clarendon Press, 1951): 386ff; and J.A. Crook, *Law and Life of Rome* (Ithaca: Cornell University Press, 1984): especially chap. 5.

14 One of the leading French chronicles of the 17th century named the Trojan Priamus as the first king of France and as late as 1714 the scholar Nicholas Feret was thrown into the Bastille for attempting to show that the Trojan origins of the French were a myth since the Franks were Germans. See George Huppert, *The Idea of Perfect History: Historical Erudition and Historical Philosophy in Renaissance France* (Urbana, Il: University of Illinois Press, 1970): especially chapt. 4.

these three conceptions rather than the "logic" of one institution alone (dominium) which explains the future trends. Thus the "sovereign" could now claim "*Landeshoheit*", i.e. *exclusive* jurisdictional authority on the basis of his "possession", as well as on the basis of the status as source of law. Scope and domain of his authority were now in a way secure against at least most of normative challenges by his nobles, although, of course, quarrels about legacies and the proper order of legal succession led here – as in private families – to the most intense fights. Thus the developing international system after Westphalia looked still very much like a dynastic rather than purely territorial order. No wonder that the first "history" of the emerging "system of states" is still recorded in terms of "ruling houses"[15]rather than "states", despite of its title. Even the famous *ius armorum*, i.e. the capacity to make alliances, that the "*estates"* – in Krasner's version they simply become "states"[16] – had been once more ensconced in the Westphalian settlement. This "rights" was not an innovation but of feudal origin and had belonged to the estates of the realm. Actually Westphalia restricted this right in that now no alliance against the emperor was considered legal.

The last few remarks correct some of the misconceptions about the actual practice of internal "sovereignty" and the too facile application of the private law analogy of "dominium" to the emerging practices of sovereigns. There are not only significant "remnants" of the feudal order, but part of the problem lies also in the fact that the developing institution of the "state" is not only a territorial order but also a personal one. The territorial sovereign might have succeeded in eliminating intermediary political institutions and he might now face his "subjects" directly and without interference from pope or emperor. But he can be "absolute" only as the "representative" or "servant" of the "state". Louis XIV's famous dictum *l'état c'est moi* is significant, as is Frederick II's self characterization as the "first servant of the state", because they both connect the new understanding of the state – conceived increasingly as an impersonal "sphere" of jurisdictional power – with the assertion of the sole status to exercise these powers. The absolutist monarch does not simply rely on the liberties and privileges of a feudal magnate, but claims his powers as the representative of the state.

There is of course a certain tension between the "older" conception of governmental powers on the basis of the possession of land (*dominium*) and the newer one representing the "statist" conception. Louis, as well as virtually all European sovereigns, felt comfortable speaking both languages, as his politics during the wars of "devolution" indicate. Nevertheless, it is through the notion of "representation" that the problem of rule over the subjects gets re-defined. For one, as Hobbes points out, the unity of "the people" who empower the absolute monarch, is no longer an agglomeration of estates with their own membership criteria, nor is it something that exists by virtue of mere "presence" of persons in a certain territory. Rather the notion of "the people" is created by the act of representation itself. "The people" are now no longer the collective name for those who are definitely excluded from politics and the exercise of rule, as in medieval times. They are conceived as a multitude serving as the legitimizing source for the public authority. Their unity is thus created "by the unity of the representer, not the unity of the rep-

15 See e.g. Samuel Pufendorf, *An Introduction to the History of the principal Kingdoms and States of Europe* (London, 1702)

16 Steven Krasner, "Westphalia and all that", in Judith Goldstein, Robert Keohane (eds), *Ideas and Foreign Policy* (Ithaca: Cornell University Press, 1993): 246.

resented"[17]. Although the people's consent is constitutive of the public person which comes into existence, nevertheless, their participation becomes superfluous after they have "authorized" the sovereign.[18] The people are now "subjects" but not yet "citizens" and they cannot easily change their allegiance once they have established such a sovereign.

It is this conception of a "subject" and the ascriptive status it confers which served as an important counterweight against a purely territorial conception of sovereign power and of the state as a merely territorial container of people. Sir Edward Coke provides for the Common Law the classic exposition of this problem by focusing on the status of "persons". In Calvin's Case (1608) the issue was the status of the Scottish "subjects" after the accession of James I to the crown of England. Coke argues that due to the protection they receive from the sovereign, all inhabitants of the realm, even those of alien origin, are his subjects and owe allegiance to him. It is a debt according to "natural law" that binds the subject for life. Although Coke's opinion expounds, in a way, the classical doctrine of *ius soli,* the attribution is less than perfect, since children of e.g. alien armies that occupy England would not count as subjects. After all, as public enemies, they do not enjoy the "protection" of the king. But furthermore, despite the largely territorial scope of the king's powers, his "protection" extends beyond the boundaries of the realm to his ambassadors and their children born abroad.[19]

A whole host of issues are thereby (at least indirectly) raised. For one, the argument about alien offspring of armies satisfactorily explains the lack of allegiance or of the political obligation these persons owe to the king, but it also presupposes an antecedent distinction of "friend and foe" or some other criterion which clearly establishes who is to be counted in, and who is supposed to be "out". Second, the extension of "protection" abroad – here limited only to ambassadors (as the king's representatives abroad) and to their children – attains an entirely new meaning when later "the people" have become the sovereign, and the sovereign is wronged if any of its members are mistreated abroad. This not only implies "diplomatic protection" and can possibly give rise to justifiable "intervention", but raises also the issue of the allegiance and the duties owed to the sovereign by its own citizens abroad. Finally, given that "protection" is assumed not to stop at the national boundaries, there looms already on the horizon the possibility that a sovereign might assert jurisdictional authority over non-subjects abroad, if their activities have detrimental effects on the security of the land.

These rather cursory remarks serve as a useful corrective to the notion of the state as an exclusive sphere of jurisdiction. Usually we imagine the "international system" as consisting of sovereign units that all claim an exclusive space and whose writ does not go any further. In a way this notion is correct in that no jurisdictional claim against a foreign sovereign acting in official capacity can be sustained, but it is incomplete and thus misleading. States have traditionally interfered with each other through

17 Thomas Hobbes, *Leviathan*, Part I, chapt. 16, ed. by C.B. Macpherson (Harmondsworth, Engl.: Penguin, 1968): 220.

18 On the issue of an "authorization" theory of representation, see Hannah Fennichel Pittkin, *The Concept of Representation* (Berkeley: University of California Press, 1972).

19 Gerald Neuman, *Strangers to the Constitution* (Princeton: Princeton University Press, 1996):166f.

competing jurisdictional claims, precisely because states claim jurisdiction not only on the basis of territoriality, but – among others – of "nationality". When claims concern the protection of their nationals, the *passive* nationality principle supplies the reasons, when states subject their subjects to the extraterritorial reach of domestic legislation, the *active* nationality serves as a basis. Furthermore, states claim jurisdiction over activities beyond their boundaries if those activities threaten their existence or proper functioning as a state (*protective* principle). Finally, jurisdiction can be claimed against perpetrators of international crimes on the basis of the *universality* principle, to leave aside the possibility of jurisdiction on the basis of a *special treaty* (stationing agreements).

We need not rehearse here the arguments on the merits of particular assertion of jurisdiction. Examples abound and range from the rather uncontroversial reach beyond one's own borders[20], or into spaces that were technically *terra nullius* [21], to the spectacular [22], such as diverting a plane in order to obtain jurisdiction over a terrorist (*vide* also the historic capture of Eichmann in Argentina), or to the controversial arrest of an acting head of state[23](US v Noriega). But most irritation is caused by the more mundane extension of jurisdiction, e.g. subjecting subsidiaries of US banks abroad to US regulations in violation of the local laws[24] or by attempts of extending US jurisdiction to foreign firms on the basis of the licensing agreements they have with US companies, as was done by the Reagan administration[25]. The "protective principle" also serves as the basis for jurisdictional claims over aliens *acting abroad* as long as their dealings have an "intended and actual" or "substantial and foreseeable effect" on the US[26]. Finally, US courts have held that Congressional statutes must be given effect even if such extensions "would exceed the limitations imposed by international law"[27]. With these cases in mind one can really ask what remains of the image of the bounded state and its exclusive sphere of jurisdiction.

It is indeed cold comfort that other states, including the EU, have taken similar measures reaching from the extraterritorial application of revenue laws to proactive measures, such as the REACH initiative that deeply affects other societies[28]. Similarly the "neighborhood policy" of the EU, by which the adjacent states, which are not membership candidates, are being "remade" in the image of the European "rule of law" and "free markets". But while these two last examples are modern developments, the previous cases were part and parcel of "politics"

20 See for the US e.g. *Blackmer v United States*, 184 U.S. 421 (1932).

21 *United States v Bowman*, 260 U.S.94 (1922).

22 *United States v Fawaz Yunis*, 288 U.S. App. Court (D.C.) 129, 924 F.2d 1086.

23 *United States v Noriega*, 746, F.Supp. 1506 (S.D.Fla.1990) and 117 F.3d ,1206 (11th Circuit 1997) affirming convictions.

24 This was an issue already in *United States v First National City Bank* 369 F.2d 897 (Second Circuit, 1968).

25 See e.g. President Reagan's announcement on Dec. 1981 that all export licences of all companies working with the US were suspended. For a detailed discussion see Bruce Jentelson, *Pipeline Politics* (Ithaca: Cornell University Press, 1986).

26 *United States v American Aluminum Corporation*, 148 F.2d 416 (Sec. Circuit, 1945).

27 *Federal Trade Commission v Compagie de Saint Gobain-Pont a Mousson*, 636 F.2d 1300 (D.C. Cir. 198=).

28 See Joanne Scott, "From Brussels with Love: The Transatlantic Travel of European Law and the Chemistry of Regulatory Attraction", *The American Journal of Comparative Law,* vol. 57 (2009): 897-942, showing how the EU's "Regulation on Registration, Evaluation, Authorization and Restriction of Chemicals" (REACH) is changing the US regulatory regime on chemicals due to the acceptance of the higher EU standards by several US states.

in a time when the "sovereign" state insisted on its exclusivity.

Given the historical record and the challenges of legal pluralists[29] who showed that the states never succeeded in becoming the sole source of law – even if the great codification movements of the 19th century attempted to convey this message by incorporating "customary" norms – the question still remains why an exclusivity which never was, has had such a powerful hold on our imagination. I think here cartography, i.e. the representation by maps of territory as homogenous spaces with linear divisions, exerted significant influence.

Interestingly, such cartographic devices were first applied to "colonies", as the division of the globe by the pope in the Treaty of Tortesillas (1494) showed. Later the same procedure was applied in delineating royal grants to colonial entrepreneurs or companies demarcating their possessions, e.g. in the "New World" (vide the grant to Penn or Calvert, or the Virginia Company)[30]. The territory provided for the settlement of people and/or plantations and it was treated as "terra nullius", since the "natives" were simply dispossessed and not much was known about the enclosed areas. To that extent making a map in the traditional look-down perspectives focusing on certain prominent geographical features was not possible. The area readied for colonization remained "white" (for it was unknown) and it was subsequently opened up *for* "whites".

In the old world mapping the new state of affairs proved much more difficult. Since "politics" was personal and loyalty was owed often to several overlords – depending on circumstances – maps representing geographical features or homogeneous spaces were not useful for political purposes. Thus when e.g. Charlemagne divided his empire among his three sons at Verdun (843), the divisions were noted by listing exhaustively all rights, offices, tributes and titles to which each of the sons was entitled, rather than by a cartographic device[31]. Even much later, if maps were used at all, they represented certain places or clusters of settlements rather than their distribution in a scaled geometrical space.

As is well known, it was the Treaty of the Pyrenees between France and Spain, which for the first time, in 1659, set up a linear boundary, providing for an actual marking of the border[32]. But marking the line proved difficult and it was not until well into the end of the next century that the task was accomplished, because the "locals" had offered spirited resistance to such a new understanding of jurisdiction. Thus boundary making and the centralizing tendencies of the modern state slowly "subjecting" intermediaries went hand in hand.

In France, Claude de Chastillion was charged with providing the king for tax purposes with a map of his possessions. Significantly, he provided the king again with a description of the taxes owed, of feudal allegiances or jurisdictional rights in addition to the map, men-

29 See e.g. John Griffith, "What is Legal Pluralism?", *Journal of Legal Pluralism and Unofficial Law,* vol. 1. (1998): 1-55; Sally Moore, "Law and Social Change: the Semi-autonomous Social Field as an Appropriate Subject of Study", *Law and Society Review,* vol. 7 (1973): 719-46; Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism", *Cardozo Law Review,* vol. 13 (1991/92): 1443-62, at 1445.

30 For a general discussion see Norman Thrower, *Maps and Civilization* (Chicago: University of Chicago Press, 1996); J.B. Harley, David Woodward, *History of Cartography*, 6 vols. (Chicago: University of Chicago Press, 1987-96).

31 François Ganshof, *The Middle Ages: A History of International Relations* (New York: Harper and Row, 1970): 48.

32 See Peter Sahlins, *Boundaries: The Making of France and Spain in the Pyrenees* (Berkeley: University of California Press, 1989).

tioning certain difficulties he had encountered while trying to provide the cartographic representation.

> The chateau de Passavant (Chastillion says) belongs to Lorraine, though the town and the woods are French. Baffled by the problem of distinguishing between thee areas, our cartographer has drawn a little enclave, with a chateau in the south of it. At Martinvelle, three quarters of a league from Passavant, all the hearths owe tax to the king of France; this village, according to Chastillion, was partially French and partially Lorrain. On our map it is shown as lying in Lorraine.[33]

Thus it seems that the mapping exercise introduced by eager sovereigns ran up squarely against the problem that the links between territory, powers, liberties or entitlements could not adequately be represented in a two-dimensional space.

Today such a task would even be more difficult. The possibilities of mapping in a spatial sense seem to be exhausted, as Twining's[34] exercise showed. As a professor of comparative law, Twining asked the students of his seminar on "Globalization and Legal Theory" to draw a map of the main legal orders of the world. After two extensions – for which the students had asked because of the difficulties they encountered especially in former colonial areas – Twining added as a condition for granting still another extension, that such new developments as the *lex mercatoria*, the new *ius humanitatis*, or the Pasagarda law of the squatters in Brazilian favellas which de Santos had studied, should also be included. After six weeks the students finally gave up.[35]

The last time that somebody – to my knowledge – has tried his hand at such an exercise was the geographer Wigmore in the late 1920s. But his three-volume *Panorama of the World's Legal Systems* quickly approached the utility of the apocryphal Chinese Emperor in one of Borges' stories. The emperor had ordered a map of his realm in the scale 1:1, but had no use for it when it was presented to him. This brings me to the last point: the new configuration of politics, law and territoriality under conditions of globalization.

3. THE "NEW MEDIEVALISM", FUNCTIONAL DIFFERENTIATION, AND THE FRAGMENTATION OF THE INTERNATIONAL LEGAL ORDER

In political science it has been common among a minority of researchers to point to the new medievalism when attempting to map the recent developments in international relations. As in the middle ages law seems to escape the territorial caging of the state and go "with the person" rather than with the land. Here the former "subject" who owes allegiance to one sovereign is often displaced by the person having several passports, paralleling now in a way the complicated rules of attribution, bestowing nationality on artificial persons such as "corporations" (place of incorporation, *siege social*, etc.) Actors might even subject themselves to rules that trans-national professional associations have developed or which public/pri-

33 David Buisseret, "The Cartographic Definition of France's Eastern Boundary in the Early 17th Century", *Imago Mundi,* vol. 36 (1984): 72-80, at 78, as quoted in Jordan Branch, "Mapping the Sovereign State", *International Organization* (forthcoming).

34 William Twining, *Globalization and Legal Theory,* (London: Butterworth, 2000).

35 ibid. at 149.

vate partnerships have codified (vide e.g. ISO standards, Basle II, ILO standards etc.), undermining thereby the centrality of the state and impairing its capacity to set the terms through legislation.

These developments are sometimes welcomed, as new forms of organizations, such as networks or multi-level governance structures, have tried to cope with practical problems that emerge from increasing interdependencies attesting thus to the "de-nationalization" of politics[36]. Sometimes these trends become part of an even more encompassing narrative of "progress" or of "evolutions" that takes humanity from segmentary forms of societies – as exemplified by territorial states that "caged" people and prevented further differentiation across the globe by imposing a certain "sameness" (in Waltz parlance) on the "units" – to functionally autonomous and auto-poietically reproduced systems that operate now globally, as suggested by Luhmann[37] and Teubner.[38]

According to both, the complications resulting from the "undoing" of the boundaries of segmentary systems under the impact of global change require a new systems theory. This new systems thinking no longer uses the part/whole distinction but focuses instead on the process of boundary drawing by which systems differentiate themselves from their environment and transform, by means of their constitutive "code", the "irritations" coming from the outside into elements of their own system. Thus systems are no longer simply arrangements of pre-existing elements in different configurations, since neither particular persons nor actions can now be attributed exclusively to a single (sub)system, be it the "economy", the political system or "culture". So is e.g. a "payment" an economic action, but it is also simultaneously a political one, if it concerns taxes, or a cultural one, when I make a donation to the opera. Such a radical change in conceptualization has important repercussions for methodology, theory building and "ontology", which would lead me far afield, if I tried to follow up on them. Here I want to mention briefly that such a perspective clearly emphasizes process over ontology and is more interested in how systems deal with the conflicts generated in the process of reproduction instead of examining how a stable equilibrium is created in societies. The latter was the traditional problem, sometimes called "the Parsonian problem of order".

This means that systems "are" only by being continuously made through the process of differentiation following the logic of auto-poiesis, but also that there are two critical intersections to which the new systems theory has to attend: one is the conflict created by the interplay of segmentary and autonomously reproducing systems, the other the "irritations" that these different auto-poietic systems create for each other. The former interprets this process towards a "world society" not only in terms of the old logic of functionalism, but as an "evolutionary" achievement, while still recognizing the existence of the segmentary territorial orders cutting across these global systems. Luhmann has devoted one of his last works to this problem[39] and Teubner, as a legal scholar, focuses more on the latter problems. He sees a "global Bukowina" in the offing and considers any attempt of harmonizing the existing norm

36 **Michael Zuern,** *Regieren jenseits des Nationalstaats,* 2nd ed. (Frankfurt, Ger.: Suhrkamp, 2005).

37 **Niklas Luhmann,** *Die Gesellschaft der Gesellschaft,* 2 vols. (Frankfurt, Ger.: Suhrkamp, 1997).

38 **Gunther Teubner,** *Global Law without a State* (Aldershot: Dartmouth, 1997).

39 **Niklas Luhmann,** *Die Gesellschaft der Gesellschaft,* 2 vols (Frankfurt: Suhrkamp, 1997).

or regime-collisions futile. But be that as it may. Two questions remain.

One concerns the imagery of a global Bukowina, i.e. the part of the territory of the old Austro-Hungarian Empire where a variety of ethnic groups co-existed under the shadow of the emperor as the political head of the empire. Is this analogy apt for highlighting the distinctive features of modern modes of governance? Is not the process of functional differentiation, such as e.g. the disembedding of the financial sector from the "real economy", really analogous to the coexistence of several segmented societies sharing the same space? I do not think so.

The second problem arises out of the root metaphor of "irritation" that systems use in the process of auto-poiesis in order to reproduce the elements of their specific system. If systems are closed – even only in the act of drawing the boundaries – nothing really can get through. As Roberts once suggested, we have then something like a plane flying through heavy weather.[40] But the planes' skin serves as a Faraday cage that not only prevents the people on the inside from falling out, but also insures that the lightening cannot destroy or "transform" anything inside (such as the engines or the navigational system). Is this really what is going on when we consider e.g. the effects of the REACH initiative by the EU that forces importers of chemicals or chemically treated materials (in practice, virtually everything) not only to disclose components, manufacturing processes, tests, risks assessments etc., but also to bring their products in conformity with the stipulated standards? The simple fact is that it is the particular logic of the EU, rather than that of "manufacturing" or of the "economy", that compels importers to change and adopt the EU standards, since they are otherwise barred from access to the EU market.

Finally, returning to the fragmentation of the international legal order, without some form of "constitutionalization" – or as I shall argue below a new conception of territorialization – the problems created by "free standing" regimes are real. They cannot be papered over by juristic tricks, as proposed by the proponents of a "world administrative law", since important issues of legitimacy are touched upon and politics raises its ugly head. But in order to understand what is going on we have to take leave from the optimistic interpretation of the early regime theory and of the judicialization literature. In both approaches the dilemmas are either "solved" through "cognitive evolution" (as for example by Haas), or by the existence of effective dispute resolution mechanisms. In either case "politics" disappears as it becomes administration. In any case the "growth" of law creating "islands of order" in the alleged anarchy of international relations, is simply and unabashedly interpreted as a "good thing", in accordance with the liberal maxim: "the more, the better".

But this is precisely *not* the case, and thus having more law is part of the problem and not its solution. Obviously confusion reigns supreme and we can only hope to lift the fog of conceptual befuddlement by unpacking some of the conceptual issues. Consider in this context the notion of a "regime". It originated at the Congress of Vienna, where it was used for the internationalization of certain rivers, such as the Rhine. The notion of a "free standing" regime appeared first in the Wimbledon case in the interwar years, where the Permanent Court of Justice had to decide whether the rules (appended to the Treaty of Versailles), which regulated the use of the Kiel Canal, were sufficient or needed supplemented by international law.

40 See Simon Roberts, "Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain", *Journal of Legal Pluralism and Unofficial Law*, vol. 42 (1998): 95-106, at 102.

The Court came to the conclusion that the regime was sufficient and represented therefore a "free standing regime"

Although, of course no regime can be entirely free standing[41] since the general norms of treaty law are obviously part of the regime, the term "free standing" meant originally only that the primary rules regulating the use of the waterway were sufficient for that purpose. The problem of the "free standing regimes" in more recent times – which fuelled the fragmentation debate – is quite different in that the relative isolation of the regime results from its unity of primary and secondary rules, i.e. derives from the existence of autonomous dispute resolution mechanisms. Thus the WTO devoted to free trade "sees" or phrases an issue in terms of its charter and thus rules out trade restrictions based on e.g. human rights, labor standards or environmental concerns – the later softening in the Shrimp turtle and Beef hormone cases notwithstanding.[42]

Similarly, the MOX case[43] – where Ireland sued Great Britain for its placement of a nuclear facility on the Irish Sea in three *fora* – showed whether a complaint falls under general international law, a special environmental regime, or is a matter of European Community law, is hotly contested and can give rise to hegemonial claims among different courts, as exemplified by the European Court. Furthermore, since each "court" conceptualizes the problem differently and is also in its rulings more or less "free standing" – as the Appeals Chamber of the Tribunal for Yugoslavia explicitly stated in the Tadic case[44] – its rulings have no precedential value. This not only is likely to result in conflicting and incoherent decisions, but "law" is no longer able to do its job of *prospective* ordering, despite the existence, or rather precisely *because* of the existence, of "binding" dispute-settlement.

Thus, law differs from mere expectations developed in interactions, as it is rather a system of *expectations about expectation*s. Furthermore, since conflicts among the secondary expectations might arise, law needs to resolve these issues through the decisions of "courts" which in turn are bound by expectations of how such conflicts are to be decided. Clearly in such *tertiary* expectations, considerations of the *salus publica* or some overarching purposes as indicated by a "constitution" do matter. It is no accident that these overarching notions can no longer be formulated in an "if – then" form characteristic of rules. Here abstract principles need to be adduced as well as guidance for deciding on competing interpretation is sought by reference to the legislative intent of a representative institution. Only in this way the competing readings of a case as a tax-, or environmental case, as a zoning or civil rights issue can be decided. But precisely this function cannot be served by free standing regimes and their adjudicative pronouncements.

Of course there are plenty of proposals to deal with such an embarrassment of riches.

41 See the discussion by Bruno Simma, Dirk Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", *European Journal of International Law,* vol. 17, no. 3 (2006): 483-529.

42 WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R Doc. No. 98-3899 (Oct. 12, 1998) and Appellate Body Report (U.S. and Canada complaints) WT/DS26/AB/R & WT/DS48/AB/R, (January 16, 1998).

43 MOX Plant case, Request for Provisional Measures Order (Ireland v the United Kingdom), 3. Dec. 2001) International Tribunal for the Law of the Sea (2005) 126 ILR vol. 273, at 50 Judgement of the Court of Justice in Case C-459/03. Commission of the European Communities v Ireland, Press Release No 45/06.

44 ICTY: The Prosecutor v Dusko Tadic, Judgement of 15th of July 1999 (1999) IKLM 1518.

Thus one could "constitutionalize" the UN[45], but there is little indication that such a move enjoys much support outside of academia, particularly since the representative credentials, particularly of the Security Council, are quite "underwhelming"[46]. Furthermore, as the Kadi case[47] showed, some of the "sanctions" imposed on private persons on the basis of non-vetted information, violate fundamental principles of the rule of law, and remedies are difficult to find, given the widely shared idea that each UN organ is entitled to its own interpretation of international law. But since the UN has several competitors one could perhaps give priority to the WTO and its effective dispute resolution system. But even the most ardent advocates of such a move admit that this would at a minimum require some incorporation of human rights concerns (never mind ecological concerns or basic distributional issues not only between "countries" but among different generations). Thus Petersman's proposal to add to the WTO Charter some human rights, in particular the alleged "human right to free trade", are very unlike to do the trick[48], even if the proposed "solution" has a Cartesian" ring: "I shop therefore I am".

The real problem is simply elided by such a strategy, i.e. how such a constitutionalization move is related to politics, so that "the people" can understand themselves to be the authors of the laws which the courts are supposed to apply. To derive everything from "human dignity", as some human right lawyers seem to suggest, is either to engage in an imperial project – ever so popular since Cicero when reason and Roman law became in his thought practically synonymous[49], a move paralleled more recently in the "best practice" doctrine so prevalent in the US academy – or simply missing the point. In that case the question of "who shall judge" (*quis judicabit*) and in "whose name" the selection of the application of those abstract principles to concrete cases, becomes decisive. The tendency to fill the abstract principles of a near "sacralized" conception of human dignity with the specific interpretations taken from one's familiar way of life because it allegedly instantiates the ideal best, is not imaginary, as exemplified by the argument of the "end of history".

It seem*s* therefore that together with the territorial state and/or the "nation", serving in modernity as the ultimate source of legiti-

45 See e.g. Bardo Fassbender, 'The United Nations Charter as the Constitution of the International Community", *Columbia Journal of Transnational Law,* vol. 36 (1998): 529-619.

46 For an important discussion of the constitutionalization move in international law, see Jan Klabbers, Ann Peters, Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

47 See the ECJ decision of Sept. 3, 2008 in the joint cases of Kadi and Al Barakaat (C-402/05 and C-415/5).

48 Ernst-Ulrich Petersmann, "Constitutionalism and WTO Law: From a State-Centered Approach Towards Human Rights Approach in International Economic Law", in D.L.M. Kennedy, J.D. Southwick (eds.), *The Political Economy of International Trade Law* (Cambridge, Engl.: Cambridge University Press, 2002): 32-67.

49 Marcus Tullius Cicero: *On the Commonwealth,* transl. by E.G. Zettl (Cambridge, Engl.: Cambridge University Press, 1990): 113, "All nations at all times will be bound by this eternal and unchangeable law…and those who have these things in common must be considered members of the same state". How quickly this paean of law and eternal reason mutates into an imperial project can be see from the following remarks: "Do we not see that the best people are given the right to rule by nature herself with the greatest benefit to the weak" (ibid.73). This is nearly identical with Vergil's: "Tu regere imperio memento Romane, parcere subjectis et debellare superbos". In the contemporary debate this claim recently emerged (at a conference at the EUI) – *mirabile dictu* – cloaked in an "evolutionary" garb, as we celebrated Darwin's anniversary. Consequently, it is argued that "Americans are alpha males" and thus just have to engage in propagating "best practices".

macy, we have also eliminated "the people" or "the peoples" as mentioned in the UN Charter as the source of legitimacy. Instead, we increasingly invoke "expertise" and *ex post* "acceptance" ("outcome" legitimacy). But this is largely an exercise of papering over the problem that such an "acceptance" is mostly based on ignorance and powerlessness in the face of entirely in-transparent machinations of "multi-level governance" structures, rather than based on "consent". After all, the notion of "consent" not only implies acceptance but does so precisely because it is based on the correlation of duties which obliges the decision makers to *ask for* consent of the governed and which obliges "the people" because of their choice and the uptake of the commitment this implies. It is not an acceptance simply based on acquiescence to things one has no power of changing, as in the case of e.g. the "financial system" which is run by "experts" – and which type of "experts" they really are, we can see every day of the continuing crises – who tell us that true freedom increasingly consists in following the "logics" of disembodied "systems".

Let me be clear about this, the "consent" of the "governed" might always heave been a myth rather than an accurate map of the social processes and of exerting power. But it is indeed difficult to fathom how a democratic politics can simply dispense with it and substitute for its "efficiency" (as ridiculous as this turns out to be in view of the billions of misallocations caused by speculation) or even of the "welfare" provided by a priestly class of lawyers and administrators. It is here that a re-thinking of the problem of territoriality and of reordering politics has to start. While a comprehensive treatment of some of the important issues is obviously beyond the scope of this paper, it has attempted to provide some impulses for such a reflection.

4. THE EMPIRE OF STANDARDS, LAW'S MIGRATION AND EMERGING HIERARCHIES IN INTERNATIONAL RELATIONS

According to the functionalist paradigm – form following function – and modern system theory, the "de-nationalization" of politics and the ever denser network of regimes have, if not led to the demise of the state and of politics as the central ordering systems, nevertheless outflanked the state. Evidence is quickly assembled. We have a first wave of growth of international bureaus[50], as technological and economic changes in the 19th century led to a world market but also to the recognition that international politics has to be managed continuously and not only through the peace agreements after system-wide wars. Thus a "concert" emerges in which the "Great Powers" function as managers[51], a role that is later institutionalized through permanent membership in the Security Council of the UN. This story of the "growth" of international organization – taken in its generic meaning of the collective singular – has been told many times. Here the functionalist part of the narrative presented a more or less technology-driven analysis, while the "managerial" one pointed out that new forms of international organization emerged when the "regulatory state" after WWII was transplanted to the international level[52]. The new mode of directive power is best exemplified by new supervisory functions of the IMF and the powers of specifying the "conditions"

50 See Craig Murphy, *International Organization and Industrial Change,* (New York: Oxford University Press, 1994).

51 See Paul Schroeder, Historical Reality v Neo-Realist Theory", *International Security*, vol. 19, no. 1 (1994): 108-48.

52 See Ann Marie Burley, "Regulating the World" in John Ruggie (ed.), *Multilateralism Matters* (New York: Columbia University Press, 1993): 125-56.

for granting loans. Furthermore, the role of international institutions of setting the terms of the debate due to their power of "naming" and their epistemic power have been well documented by Barnett and Finnemore[53]. Finally the literature on transnational social movements and normative entrepreneurs inciting "norm cascades"[54] highlights the "legislative" powers of institutional collaboration outside of the traditional channels of diplomacy or of international organizations

Whatever the difference in emphasis might have been, the larger storyline that emerged from these analyses was that of a "progressing" (if no longer simply "progressive") move of power to international institutions, whereby only Slaughters "governmental networks" provided, in a way, a counter-thesis[55]. Here the shift from "government" to governance is also made – practically downgrading representative political institutions and emphasizing the new managerial or administrative style of law, whereby, of course, dispute resolution by legal means attains the pride of place. But actual power accrues not to the various international organizations but to the governmental networks that emerge from the dis-aggregation of the state. Here politics – in terms of the free agreement among equals – is more or less superceded by the expertocracy of administrators and, very importantly, by judges who have to adjudicate the disputes among them. Judges, however, are also part of such an international network, but in a Freudian slip, they are supposed to form a "community" of courts. Obviously concepts are not indefinitely substitutable as the fall back to the semantics of "community" in this context suggests. But be that as it may.

The interesting point here is that instead of a simple story of progress, driven by technology or perhaps by a Kantian cunning of nature, an investigation of the "evolution" or transformative change has to examine in greater detail how this process occurs and how within it the "old" and the "new" are reconfigured. Here territoriality serves as an important prism through which the changes of international and state structures can be studied rather than seeing that "sovereignty" has "moved" to a different place, such as Brussels, where it must now somewhere lie around[56], or that the functional imperatives of autonomous self-reproducing systems are driving the transformations. What is missing in those accounts is the more fine-grained analysis of how these changes actually come or came about, instead of resorting to vague notions of progress, functionality, or "evolution", which hide the importance of the choices made and mystifies power by representing the results as necessary or "logical" outcomes of circumstances or trends.

Despite the existence of a good number of case studies on the form of regimes in different issue areas that defy such grand narratives

53 Michel Barnett, Martha Finnemore, "The Politics, Power and Pathologies of International Organizations, *International Organization*, vol. 53 (Fall 1993): 699-732.

54 See Martha Finnemore, Kathryn Sikkink, "International Norm Dynamics and Political Change", *International Organization*, vol. 54 (1998): 887-917.

55 Ann Marie Slaughter, "The Real New World Order, *Foreign Affairs*, vol. 76, no. 5 (1997): 183-92; see also her *A New World Order* (Princeton: Princeton University Press, 2004).

56 For a telling criticism of this conception see Wouter Werner, Jaap de Wilde, "The Endurance of Sovereignty", *European Journal of International Relations* vol. 7 No.3 (2001): 283-313.

or "theories"[57], only relatively recently the interplay between the domestic structures of the hegemonic power and the type of international regime has become a focus of analytical interest.[58] Thus while we had in the case of intellectual property rights a "functional" international organization, WIPO (World Intellectual Property Organization) in Geneva, the subsequent regime did not follow this functional logic but became as TRIPS agreement part of the WTO. This at first rather odd result needs an explanation, that can be provided only by carefully examining some important turning points in the regime's development. We all know that the US with the help of Europe and some other players was finally successful against the determined opposition of the developing countries and parts of the UN, which wanted a broad multilateral treaty in this issue area. Thus while the distributional results of the regime are perhaps not surprising, given the bargaining power of the US, the placement of the issue area within "trade" is, as it contradicts theories that stress functional differentiation as the engine of change.

As the history of this case shows, it was not only "politics" rather than "function" that was important, but it was a change in the domestic structures rather than in "the field" which accounted for the result. The decisive steps had been that business lobbying in the 1980s had changed the fragmented US intellectual property regime by empowering the US Trade Representative to include intellectual property criteria in his decision for granting other countries access to the US market. Having hit on an institutional solution that solved much of the compliance problem plaguing virtually every regime, the US Trade Representative emerged in the US trade law that was amended in 1984 and 1988 as the dominant institution for aggregating interests.[59] Later lobbying by the IPC (Intellectual Property Committee), an organization of 16 US CEOs, placed intellectual property rights on the agenda of the Uruguay Round. This nixed all attempts of dealing with these issues through the State Department and negotiating a treaty within the WIPO framework. Having first developed a strong domestic institutional anchor, the resulting regime reflected not only US interests but interests that were filtered through and interpreted by trade institutions rather through some "copy right or trademark" lenses through which the US Patent and Trademark Office or the US Copyright Office looked and for which the State Department was a natural ally.[60]

A similar analysis of the internet regime reveals that the present ICANN (Internet Corporation for Assigned Names and Numbers) regime, based on a private non-profit California corporation that assigns domain names – with the advice of predominantly non-state

57 See e.g. Susan Sell, *Private Power Public Law: The Globalization of Intellectual Property Rights* (Cambridge, Engl.: Cambridge University Press, 2004); Witold Henisz, Bennett Zellner, Mauro Guillen, "The Worldwide Diffusion of Market-Oriented Reform 1977-1999", *American Sociological Review,* vol. 70 (2005): 871-97; Milton Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace* (Cambridge, Mass.: MIT, 2002).

58 See however the special issue of the Review of International Political Economy introduced by Henry Farrell, Abraham Newman, "Making International Markets: Domestic Institutions in International Political Economy", *Review of International Political Economy*, vol. 17, no. 4 (2010). See also Mathias Koenig-Archibugi, Michael Zuern (eds.) *New Modes of Governance in the Global System* (New York: Palgrave Macmillan, 2006): Daniel Drenzer, *All Politics is Global* (Princeton: Princeton University Press, 2007).

59 Judith Hippler Bello, Alan Holmer, " The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 3012", *Stanford Journal of International Law,* vol. 25 (1988): 1-44.

60 See David Bach, Varieties of Cooperation: The Domestic Institutional Roots of Global Governance", *Review of International Studies*, vol. 36, no. 2 (2010): 561-89.

actors – neither followed the functional logic as embodied in the existing International Telecommunications Union (ITU) nor did it result from some normative revolution. While the private nature of this "authority" has been established "globally", the regime itself remains contested. Having outflanked the "state", the de facto hegemony of stake-holders was institutionalized, thereby marginalizing further those who cannot meaningfully participate in the actual decision making shaping the net. Some of the original pioneers of the internet, such as Jon Postel, with strong preferences for private ordering, were able to use their domestically rooted leverage to create a "private" regime that now exercises control by being also in charge of the root server system, notwithstanding the objections from various UN agencies.

One could now draw the conclusion – for "realists" certainly not surprising – that the "dominant" actor simply can have its way and that the more painstaking efforts at tracing the development of certain regimes adds perhaps color to the story but does not fundamentally alter the plot. That such a conclusion is hasty (and an invitation to do shoddy empirical work) can be seen from the next case: a policy controversy within the US. It concerns the standards for regulating the chemical industry and the implementation of environmental protection mandates, which results from the "concurrent authority" vested by the Constitution in the Federal Government and the states in these areas.

As we have seen in the brief discussion of the REACH initiative of the EU above, the far-reaching information requirements of the act have not only been welcomed by NGOs and were promptly condemned by the Federal government as costly and, because of its complexity, as unworkable. It also engendered a national debate about the sufficiency of the standards enshrined in the Federal Toxic Substances Control Act of 1976 which is administered by the Environmental Protection Agency. Both California and Massachusetts consider now bills that are in agreement with REACH, rather than the existing US regulation, in dealing with the identification of "Substances of Very High Concern".[61]

The environmental area shows a similar pattern of power sharing among the states, the Federal Government and even local jurisdictions. Most of us are familiar with the fact that in the US certain states, such as e.g. California, have more exacting standards for car emissions, than required by federal standards. In that case states can become allies in the fight for tougher emission controls throughout the country. Along the same lines, mayors of several cities, such as Seattle and Salt Lake City, adopted in 2005 official ordinances that set new "green standards" for their municipal government. The measures were designed to abide by the targets of the Kyoto Protocol for local utility emissions, which the Federal Government refused to implement. The programs were approved by the US Conference of Mayors in June of 2005, and had by February 2006 been endorsed by over 200 mayors.[62]

These developments should not be overestimated in their actual impact since the "for-

61 For a general discussion of these problems see Joan Scott, "From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction", *American Journal of Comparative Law*, vol. 57 (2009): 899-942.

62 See Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry", *The Yale Law Journal*, vol. 115, no. 7 (2006): 1574-1670, at 1646.

eign affairs preemption" doctrine[63] applied by federal courts is "controlling" the autonomy of state and local governments. But should also not be underestimated. Precisely because federal systems allow for plural law making, they create "diverse points of entry" for laws from abroad and for reconfiguring the nexus between the global and the local. While this process might not exhibit the clear "logic" of functionalism or Luhmannian systems theory, or a teleology as the narrative of progress suggests, it does show how the transformative changes which we subsume under the category of "globalization" have decisively altered what counts as local, federal, or foreign issues.

A different pattern emerges again when we look at attempts of states to transform their environment by making their laws and "practices" binding without asserting direct jurisdiction or incorporating those areas, creating thus normative hierarchies that are not sufficiently analyzed by the catch-all phrase of " global governance". The efforts of the US to embed certain accounting practices and "transparency" requirements in other legal orders, or in the qualifying criteria for assistance by international organizations are perhaps rightly considered as part of a hegemonic project, or even as a non-territorial form of empire. But the US case – through which "hierarchical" forms of rule were addressed in the hegemonic stability debate[64] – is not unique and should also not be reduced to the narrow confines of the classical public goods debate and the free-riding tendencies it engenders. The fact that the EU's neighborhood policy contains similar traits could indicate that something more fundamental is going on for which the vocabulary of exclusive territoriality and the distinctions between international anarchy and domestic hierarchy are too limited. Could it be that with the advent of this dense network of international organizations – that are in a way established "above" the states and which are used for stabilizing the expectations of both public and private actors – represents an organizational form that can only be grasped by taking "hierarchy" in international relations analysis seriously. Of course, such phenomena are not unprecedented in history: clientelism, floating frontiers and erecting bridge points in alien territory were common strategies employed by imperial powers. Perhaps the idea of hierarchy has also to be freed from its spatial representation as "levels". Today the local and the global are not "located" at different levels, but constantly being reconfigured by the links that connect a decision center with other actors and issue areas across the globe. Thus, to what extent these historical precedents "fit" the contemporary patterns, or to what extent we deal here with genuinely new phenomena could only be established by a close, historically informed conceptual analysis.

Such a research program would not have to look only at the global processes and their abstract logic of reproduction. It would have to look also close to the ground, at the laboratory where the local and the global, the concrete and the abstract meet and enable the center to molding its environment, as the center understands itself to be superior, while the environment is not made up of organizations of equal status. Any political order that emerges in such "laboratories" is not the result of negotiation and reciprocity but increasingly a function not

63 The locus classicus is *United States v Pink*, 315 US 203 (1942). For more recent decisions see *Crosby v National Foreign Trade Council*, 530 UA 363 (2000), dealing with Massachusetts' boycott of Burmese goods, and *American Insurance Association v Garameni* 539 US 396 (2003), addressing California's requiring companies to disclosing information from the Holocaust era, if doing business in California.

64 See the respective treatises by Robert Gilpin, *Order and Change in World Politics* (Cambridge, Engl.: Cambridge University Press, 1981; Robert Keohane, *After Hegemony* (Princeton: Princeton University Press, 1984).

only "structural" but of "productive power" in Barnett and Duvall's sense[65] i.e. through the operation of "diffuse social relations of constitution". To that extent we should not be surprised that in spite of different professed aims both neighborhood policy and the EU's policy in the Western Balkans have very much similar consequences.

Since the aim of the neighborhood policy is to redo these societies in the image of the EU constitutional complex (*acquis communautaire*), the result is the same strange mix of administrative and legal practices – observable at the EU level too – by which the atrophied institutions of democratic representation are used only for legitimizing the decisions of the center, "winking them through" by a legislative process that converts the external signal into "internal", supposedly "autonomous" acts. In the cases when conditionality was imposed on potentially new members during the latest round of expansion, these demands were justified by the political commitment of legitimate governments seeking membership and by the concomitantly necessary compatibility of the accession countries' structures with the already existing order. The transformations engineered by the neighborhood policy, however, aim at bringing about a "zone of compatibility" without an eventual expansion of the actual boundaries of the "community". In this transformation, law is of course the main instrument, but its role is not one of an autonomous system dealing with the irritations from the environment by reproducing itself according to the underlying code à la Luhmann. It is rather the deliberate transformation of *all other systems making up the environment* – a problem addressed, if at all, in the literature in terms of the center-periphery dynamics – that is at stake and is masking the exercise of power behind the vague concepts of "governance", "the rule of law", or functionality and efficiency.

65 See Michael Barnett, Raymond Duvall, "Power in International Politics", *International Organization,* vol. 59, (2005): 39-75.

5. CONCLUSION

This paper approached the problem of the changing nature of territoriality in an indirect fashion, i.e. by first examining into the reasons why the notion of territorial exclusivity had such a powerful grip on our imagination, while actual political praxis was rather different. I argued that the reason for this dominance was closely related to new techniques of representing space (and not simply locating some geographical landmarks on a map, as was the case in previous modes of map-making) and their connection to state-making. The concept "territory" comprised always primarily "land", but it also pointed to the various social relationships which were mediated by land, such as "possession" and "use", strategic interests, jurisdiction etc., it is not surprising that the centralizing tendencies of various state projects seized on a form of representation that tried to buttress centralizing claims by suggesting mutually exclusive zones created by linear boundaries (rather than floating zones, as in empires). The complexity of the existing social relations in regard to jurisdiction, taxes, "subjects" etc., were reduced to a two-dimensional representation that made it appear that only one perspective existed and that these questions had been settled or could easily be subordinated to such a view. The brief discussion of Calvin's case showed, that such attempts were quite at odds with actual practice, and that the representational possibilities of "mapping" more complex relations were and are – as the example of Twining's exam question showed – quickly exhausted. The drawing of lines helped also

colonial expansion, as the "unknown" needed not be represented other than as a void and thus suggested that the area was "terra nullius", thereby opening new avenues for expansion and dispossession and destruction of the indigenous population.

The surprising growth of "trans-boundary" transactions in the 19th century could be accommodated within that conceptual scheme by means of "private" international law which is "law of conflict" within "domestic" legal orders. Other newly emerging forms of organizations created greater difficulties. They had to be represented first as contractual undertakings among sovereigns (treaties). Later, when treaties increasingly also dealt with issues of "unification" and integration of formerly separate "lands", the concepts of confederations and federations added some tools of public law and "Staatsrecht", which fitted the two-dimensional template. But, interestingly enough, "free-standing" regimes and bureaus, which increasingly appeared in the later part of the 19th century, could not be accommodated and thus became "invisible". They had to be placed "above" the states, so to speak in a conceptual attic, which like the thin air above states could be mentioned, but which needed no representation.

These considerations provided the background for the discussion of the contemporary debate on "globalization" and of the "fragmentation" of the international legal order. A first cut was the challenge of legal pluralists to the state's monopoly in "steering" through law, by pointing to the existence of a plurality of law-making processes and at the attempts of comparative lawyers to bring again representation and actual practice in a closer relationship. Here Twining's and Wigmore's efforts served as my foil.

The other major attempt to "represent" the transformative changes was the modern systems theory of Luhmann and Teubner. Both tried to show that these changes have to be understood as a transformation from a "segmented" to a largely functional form of organization, in which autopoietic systems irritate and interpenetrate each other. Here the representation is largely metaphorical, understood as Bukowina or – in a more technical version – as "structural coupling". I took issue with both representations, as they misused the analogy of the Bukowina (which was a segmented order), and argued that "structural coupling" and the reproduction of autopoietic systems are not particularly helpful in understanding the dynamics of contemporary change. In my view, the challenges of free-standing regimes and the interpenetration of legal orders need a different way of representation – neither the "above" (thin air metaphor) nor the dis-aggregation of territoriality into "functional" logics seem appropriate. I suggested that we should think about "imperial" but, strangely enough, not necessarily territorially inclusive formations.

The last section of this paper was then devoted to an analysis of this paradox. Here the impact of the REACH initiative and the neighborhood policy of EU served as my examples for examining emerging power structures in international politics that have neither agential nor defined territorial boundaries but that work on the basis of structural and "productive" forms of power.