Changing Concepts of Sovereignty and Jurisdiction in the Global Economy: Is there a Territorial Connection?

by

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Abstract/Résumé/Zusammenfassung

Abstract

This paper draws on research into Re: European Information Technology Observatory, Europäische Wirtschaftliche Interessenvereinigung (EITO), C-35/97[1] an obscure, if not peculiar court case arising under German law that was eventually referred to the European Court of Justice. The case recalls that the state's ability to both claim and protect the jurisdiction of its laws remains a critical measure of its sovereignty. Analysis of the *EITO* case suggests that in spite of pragmatic, business level changes and the willingness to understand sovereignty in non-territorial terms, it will be difficult to reconcile the concept of legal jurisdiction with the exercise of "nonterritorial or "deterritorialized" state sovereignty. As claiming jurisdiction stakes out sovereignty in territorial terms, ignoring these territorial undertones denies the important political and economic consequences of claiming jurisdiction.

Résumé

Cet article est fondé sur la recherche menée à propos du cas *Re: European Information Technology Observatory, Europäische Wirtschaftliche Interessenvereinigung (EITO)*, C-35/97[1], un cas de droit allemand peu connu, voire bizarre, qui fut finalement renvoyé à la Cour européenne de justice. Ce cas nous rappelle que la capacité d'un État de revendiquer et de protéger sa compétence juridique constitue une mesure fondamentale de sa souveraineté. L'analyse du cas *EITO* laisse supposer que malgré les changements pragmatiques opérés dans le secteur commercial et la volonté de concevoir la souveraineté de façon non territoriale, il s'avère difficile de réconcilier la compétence juridique avec la mise en oeuvre de formes "non territoriales" ou "déterritorialisées" de la souveraineté nationale. La revendication de la compétence juridique établit la souveraineté de manière territoriale. D'ailleurs, negliger le sous-texte territorial de la compétence juridique serait ignorer les graves conséquences politiques et économiques qui en découlent.

Zusammenfassung

Die Arbeit diskutiert den Fall *Europäische Wirtschaftliche Interessenvereinigung (EITO)*, C-35/97[1], einen relativ unbekannten, wenn nicht eigenartigen Casus deutscher Rechtsprechung, der vor den Europäischen Gerichtshof gebracht wurde. Der Fall erinnert daran, dass die Fähigkeit des Staates, Anspruch auf Gesetzeskraft seiner Rechtssprechung zu erheben sowie diese zu verteidigen, nach wie vor ein kritischer Maßstab staatlicher Souveränität darstellt. Die Analyse des *EITO*-Falls lässt darauf schliessen, dass trotz der alltäglichen Änderungen im Wirtschaftsleben und trotz der Bereitschaft, Souveränität auf eine

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[1] *European Information Technology Observatory, Europäische Wirtschaftliche Interessenvereinigung (EITO), Re* (C402/96), C-35/97, [1997] E.C.R. I-31 [hereinafter cited as EITO; cité ci-après comme EITO].

nicht-territoriale Weise zu interpretieren, das Konzept einer legalen Jurisdiktion mit der Ausübung “nicht-territorialer” oder “de-territorialisierter" staatlicher Souveränität schwierig zu vereinbaren ist: Die Reklamation legaler Jurisdiktionen sperrt sich gegen eine territoriale Definition von Souveränität. Darüberhinaus ignoriert jede Nichtbeachtung dieses gebietshoheitlichen Untertons die wichtigen politischen und ökonomischen Folgen, die aus dem Anspruch auf legaler Jurisdiktion folgen.

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Introduction

It is widely acknowledged that the process of globalization transforms both the concept and practice of state sovereignty. The idea that state sovereignty can be defined territorially or that the concept of state sovereignty denotes an autonomous international actor is neither valid description of state sovereignty, nor valid assumption upon which to base understanding of the system of international order, for example. In particular, international relations scholars observe that globalization places the territorial sovereignty of states into question. Scholars such as Rosenau join Ruggie and others to contend that globalization "unbundles" territoriality from state sovereignty, "de-territorializing" both the concept and practice of state sovereignty. They point out, however, that even as the process of globalization erodes the territorial sovereignty of states in practice, states still have power; the decisions and actions of states continue to matter. Sovereignty continues to be a relevant concept in political, social, economic and even cultural terms. To appreciate what sovereignty means in this era of liberalized global markets, telecommunications, and e-commerce, these scholars examine the kind of state sovereignty that remains when, for instance, technical state borders are reduced, diminishing both the geographic and territorial significance of the state. This paper finds that the international relations discourse fails to contemplate the consequences of "de-territorialization" or "non-territorial" state sovereignty from a legal perspective, and especially from the perspective of state law.

The research here finds that some notion of territorial state sovereignty is embedded in the operation of a state legal system. The capacity of a state to claim legal authority over places as well as concepts is an important measure of its sovereignty. The process of de-territorialization challenges the application of a state's laws in two significant ways. First, the institutions driving de-territorialization can no longer always be situated easily within a single state jurisdiction. Second, the subsequent need to resolve potential conflict of laws among states inevitably requires the drawing of borders and boundaries along lines that are conceptually "territorial." International law connects the notion of sovereignty to state interests. Notwithstanding the arguments advanced in contemporary legal scholarship, which contend that state legal authority may not dominate the totality of law in operation or be as effective as other normative systems,[1]

[1] There is no guarantee that all norms and laws work together to achieve a cohesive legal order. On the contrary, a subset of legal studies interested in "legal pluralism" takes into account social, political, and even economic circumstances, examining social and legal fields as sites for contestation, power, and struggle. On theories of legal pluralism, see generally: P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 Hastings L. Rev. 805; J. Griffiths, "What is Legal Pluralism?" (1986) 24 J. Legal Plural. 1; S.E. Merry, "Legal Pluralism" (1988) 22 L. & Soc'y Rev. 869; and S.F. Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) Law & Soc'y Rev. 719. The concept of "legal order" builds on Weber's assertion that "a 'legal order' shall . . . be said to exist wherever coercive means, of a physical or

this article accepts the tenets of international public law which hold that, generally, a state has legal authority within its borders. What is known as the "territoriality principle" in international law is a legal imperative.[2] The need to define boundaries and borders in law is connected to a spatial understanding of state power. The territoriality principle serves as a remedy to an inter-state problem. The objective of the remedy is to keep different state laws apart and distinct. International law also recognizes that a state's legal or sovereign interests may include interests lying *outside* state borders. In principle, domestic law may apply to certain activities or individuals regardless of where they are located. Diplomatic immunity is an example. The legal concept of jurisdiction serves to identify the issues over which the laws of one state shall apply over the laws of another. In this sense, a state's jurisdiction draws boundaries around the sphere of state interests. Seen in the context of international public law, jurisdiction maps a conceptual 'territory' over which a state claims sovereign legal authority. Clearly, there is a need to consider how concepts of "de-territorialized" or "non-territorial" sovereignty play out on the legal field.

The European Court of Justice's ruling in *Re: European Information Technology Observatory, Europaische Wirtschaftliche Interessenvereinigung (EITO),* C-35/97 [3] provides a concrete example from which to test the applicability of the de-territorialization hypothesis to the legal field. In that case, classification for tax purposes of a European corporate form for cross-border collaboration as a "partnership" under German law held the firm in question to rules regarding partnership names that were both impractical and inappropriate to the firm's business needs. The German Courts had upheld the principle in German law that requires the names of *all* the member partners to appear in the corporate name of any partnership and disallowed the company in question, *EITO,* to use its descriptive corporate name, "*European Information Technology Observatory, Europaische Wirtschaftliche Interessenvereinigung (EITO)."* The application of German law to *EITO* was based on a territorial connection: in principle, German law applies to all companies registered and operating within the German state. *EITO* argued that the German rule should not apply to its choice of name because the company had chosen a mode of incorporation available under the laws of the European Union. *EITO* maintained that these European laws did not prescribe rules restricting choices of corporate names.

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psychological kind, are available . . . ." M. Weber, *On Law in Economy and Society*, trans. Rheinstein & Shils (New York: Simon & Schuster, 1954) at 17.

[2] For more in-depth discussion of territoriality principle as it applies in international trade, see *e.g.* J.-G. Castel, *Extraterritoriality in International Trade: Canada and United States of America Practices Compared* (Toronto: Butterworths, 1988) at c.1.

[3] *EITO, supra* note 1.

The legal question about which laws should apply—Member State or European Union—was a jurisdictional dispute. This dispute that had everything to do with the symbolic and political importance of preserving a defined scope of Member State sovereignty vis-à-vis the European Union, and little to do with the practical problem encountered by *EITO* or other firms in similar situations. The case raises two troubling observations about the legal implications of so-called "de-territorialized sovereignty": first, that the legal concept of "jurisdiction" appears to rest on some notion of a sovereign "territorial" state (a notion that expresses sovereignty in spatial or 'territorial' terms, in other words); and second, that if one accepts the observation that globalization challenges the concept of "territorial sovereignty," then one must also accept that certain 'territorial' assumptions underpinning state legal systems now require serious examination.

The paper begins with a synopsis of the territoriality principle under international law followed by with a summary of the ideas about deterritorialized sovereignty raised in the international relations literature. Next, the paper outlines the fundamental principles of European Union law and more specifically, European Company law, describing the initiatives under it to establish European corporate forms such as the *Council's Regulation for a European Economic Interest Grouping (EEIG)*[4] (referred to here as "Euro-Groupings"). The technical legal problems encountered in the *EITO* case are summarized. Finally, an analysis of the *EITO* case juxtaposes the international relations discourse on de-territorialized sovereignty with the legal methodology used to determine which law, European or German, would decide the *EITO* case. It is this juxtaposition that offers insights into the legal challenge that deterritorialized sovereignty presents.

It should be noted that as an academic exercise, applying a hypothesis from one discipline of study to another poses inherent difficulties and limitations. Since methodological considerations from each field may be different, a certain degree of impartiality is required to facilitate the translation of terminology and ideas from one field to another. In this paper, it is the various implications of different nuances in the meaning of the word "territory" that is of particular importance. Used in everyday language, the term refers to the extent of land under jurisdiction of a sovereign, State, city; an organized division of a country or an area defended against others.[5] The international relations discourse places emphasis on the geographic connection between sovereignty and territory – the land to be defended. In legal discourse,

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[4] EC, *Council Regulation 85/2137 of 25 July 1985 on a Regulation for a European Economic Interest Grouping,* [1985] O.J. L.199/1; EC Bull. Suppl. 3/87 [hereinafter *Council Regulation 85/2137* cited to [1985] O.J. L. 199/1].

[5] See e.g. *The Concise Oxford Dictionary, s.v.* "Territorial".

territoriality is understood in jurisdictional terms. The concept places emphasis on the connection between the state and the “area” to be defended against others.

The academic exercise of blending disciplinary rigour and melding intellectual perspectives cannot be arbitrary. There must be viable and meaningful connections to be identified among the various disciplinary perspectives under review. In this case, the disciplines under review find a close parallel with each other: state legal authority is one expression of state sovereignty, both legal authority and sovereignty are understood to have territorial implications. When international relations scholars observe that globalization changes the territorial implications of state sovereignty, it makes sense to test whether similar changes can be observed in the legal field. The research here finds that when seen from the legal perspective, the de-territorialization of sovereignty signals a crisis of significant conceptual and pragmatic magnitude.

1. Jurisdiction: The Legal Borders of a State’s “Territory”

In legal terminology, “jurisdiction” describes the legal authority of the state. The scope of that authority is manifest either in terms of a “*prescriptive jurisdiction,* the power to legislate or otherwise prescribe legal rules; [or] *enforcement jurisdiction,* the power to apply such rules through judicial or executive action.”[6] In both instances, this paper argues, any method of ascertaining the jurisdiction of a state’s laws imposes boundaries on the scope of state legal authority. The state exerts its legal sovereignty over physical and conceptual spaces. The application of state law requires that a *territorial* connection can be made between the legal question and this physical or conceptual state place. That connection is an imperative of international law, and is necessary to distinguish the applicability of one state’s laws from another’s. Even when expressed in terms of “prescription” and “enforcement”, the concept of jurisdiction evokes a certain geography, one that articulates the scope of state sovereignty in territorial terms.

The practical problem emerging is that the matter of identifying a justifiable sovereign interest is becoming more difficult. States continue to attach their laws to the corporate entity by establishing a connection between the state and either the nationality (citizenship) or territoriality (location) of the corporate body, even as these bodies become increasingly plural, multi-jurisdictional corporate groupings, whose business activities may only be carried out in the virtual, non-territorial realm of electronic commerce, for example. Such groupings can be described as “non-territorial” and contribute to the process of de-territorialization of political, economic and social sovereignty of states. Yet, if the state is to claim jurisdiction over this entity –in order to

[6] D.H. Ott, *Public International Law and the Modern World* (London: Pitman Publishing, 1987) at 137.

settle a dispute or raise taxes, for instance—these groupings must be situated within the legal territory of the state. Accepting the idea that the forces of globalization break the connection between territoriality and the exercise of state sovereignty mandates consideration of the legal implications of such a rupture.

2. The De-territorialization of State Sovereignty: An International Relations Perspective

Prominent international relations scholars such as Ruggie and Rosenau[7] note that the globalization of markets and trade, along with recent technological innovations, has challenged the territorial sovereignty of states. Economists have observed that how recent telecommunications and computer innovations have resulted in a "techno-economic paradigm shift."[8] Brunn and Leinbach contend that the new generation of technologies is "space-adjusting." These technologies have meant that industrial systems of production, marketing and distribution, for example, can be organized to function in a single global space.[9] Under such conditions, international relations scholars argue, a notion of governance that assumes states exert sovereignty over a defined territorial space is no longer practicable. Consequently, the field of international relations study has paid much attention to the means by which states both participate in

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[7] J.G. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations" (1993) 47 Int'l Org. 139; J.N. Rosenau & E.O. Czempiel*, Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992). See also J.N. Rosenau, *The Study of Global Interdependence: Essays on the Transnationalization of World Affairs* (London: Francis Pinter (Publishers) Ltd., 1980).

[8] C. Freeman & L. Soete, eds., *New Explorations in the Economics of Technical Change* (London & New York: Pinter Publishers, 1990). See also G. Dosi et al., *Technical Change and Economic Theory* (London: IFIAS and Pinter Publishers, 1988).

[9] It is understood in this paper that the process of globalization is in part driven by the advent of a "new economy." Generally, the term "new economy" refers to a new generation of technologies and capacity for innovation that has dramatically shifted production and distribution, as well as economic thinking. This definition of the new economy is based on theoretical work about the importance of adaptation to the dominant "techno-economic paradigm", work advanced by economists interested in understanding the connection between technological innovation and economic growth. Freeman and his colleagues suggest that the new economy is situated in a virtual and international economic space, a space created by computer and telecommunications networks and by the liberalization of international trade and capital movements. Their contention has prompted scholars such as Brunn and Leinbach to observe that the new economy also establishes a transnational economic space, a space that exists apart from state borders. Whitley further suggests that the business system is the product of socio-economic and cultural norms and institutions, which include markets and firms. He argues that the new techno-economic paradigm has meant that business systems can be inter-connected, in spite of geographic distances and state borders, making global production and assembly possible. Seen from the perspective of Freeman and Whitely, the "new economy" describes not only a new technological capacity, but also the ramifications of such capacity for existing organizations and institutions. It includes, as well, normative assumptions about the behaviour and practice of institutions. S.D. Brunn & T.R. Leinbach, ed., *Collapsing Space and Time: Geographic aspects of communication and information* (London & Boston: Unwin Hyman, 1991). For further discussion of "business systems", see R. Whitley, ed., *European Business Systems: Firms and Markets in their National Contexts* (London: Sage Publications, 1992) at 2 - 3.

and respond to globalization. The meaning and substance of state sovereignty are under examination: the connection between state sovereignty and state territoriality is a dynamic relationship under negotiation. MacMillan and Linklater have noted that the subject of globalization has shifted the focus of the discipline away from the contemplation of relations among states as a means to avoid anarchy, to contemplate international relations among states in the non-territorial realm of global politics.

Before assessing the legal implications of the transformation taking place, it is important to understand generally how sovereignty is defined and understood by international relations scholars. Writing from the "realist" perspective, Morganthau defined sovereignty in legal terms as "the appearance of a centralized power that exercised its lawmaking and law-enforcing authority with a certain territory." [10] He questioned, however, whether international law could impose legal restraints on sovereign states. He concluded that international law was in fact subordinate to the will of sovereign states; that ". . . national sovereignty is the very source of [international law's] decentralization, weakness, and ineffectiveness."[11] For Morganthau, and other realists, the sovereign state is the ultimate decision-maker and source of authority.

There are other perspectives within the discipline, of course, and the realist view is challenged. In the international relations field, Stone has suggested that "the global economy diminishes the regulatory capability of the nation-state and thus calls into question the conventional [realist] views of sovereignty."[12] Ruggie has examined the globalization process in terms of its impact on the relationship between the concept of absolute state sovereignty and state territoriality. These two international relations scholars and others observe that certain norms and institutions associated with the process of globalization have fundamentally altered the concept of sovereign, territorial states. These scholars focus on the consequences of "non-territoriality." In order to understand international relations in the global economy, they believe that the discipline "can no longer be regarded as the analysis of the relations between clearly and securely bounded sovereign states responding to the challenges of an immutable anarchy."[13]

In their summary, MacMillan and Linklater focused on the concept of non-territoriality engendered in "global politics." They suggest that the economic, technological, and cultural processes of global change escape the sovereign, territorial

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[10] H.J. Morganthau, *Politics Among Nations* (New York: Alfred A. Knopf, 1967) at 299-317.

[11] *Ibid.,* at 300.

[12] K. Stone, "Labor and the Global Economy: Four Approaches to Transnational Labor Regulation" (1995) 16 Mich. J. Int'l L. 987 at 988.

[13] J. MacMillan & A. Linklater, eds., *Boundaries in Question: New Directions in International Relations* (London & New York: Pinter publishers, 1995) at 4.

control of the state to advance across national boundaries. The new economy, they suggest, erodes not only the significance of conventional state boundaries, but also the territorial-based conceptions about nation-state sovereignty.[14] Ruggie has argued that the best way to understand this new description of territoriality in the global economy, or what he calls "non-territoriality," is to understand globalization as a "system of transnationalized micro-economic links . . .. [T]hese links have created a nonterritorial 'region' in the world economy--a decentred yet integrated space-of-flows, operating in real time, which exists alongside the spaces-of-places that we call national economies."[15] Arguably, the new corporate forms for cross-border collaboration such as Euro-Groupings institutionalize these micro-economic links. The process of globalization produces a new experience of territoriality. While the institutions of the global economy may surpass the territorial identity of the state, they have not eclipsed the state entirely.

Ruggie's assertion is that the concept of sovereignty remains relevant, though what sovereignty means in practice has changed. This assertion is widely accepted by a new generation of international relations scholars studying the globalization process.[16] For example, the concept of sovereignty without territoriality, sometimes referred to as "functional sovereignty," underpins Rosenau's work on international order among states. Rosenau has argued that the global economy shifts the focus of international relations discourse away from the contemplation of inter-state relations to deal with systems for "world governance."[17]

The study of state territoriality has become the specific focus of a subset of geopolitical studies within international relations discourse. Here, the issue is seen to be one of *scale*.[18] Globalization presents problems for the state in terms of its scale. The state is no longer an institutional structure that operates on a level relevant to its circumstances or interests.[19] Held has joined scholars such as Simeon and Cameron[20]

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[14] *Ibid*. at 3 - 4.

[15] Ruggie, *supra* note 8 at 172.

[16] See *e.g*. S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1995) at 5; Rosenau & Czempiel*, supra* note 8. See also Rosenau, *The Study of Global Interdependence, supra* note 8.

[17] Rosenau & Czempiel, *ibid.*

[18] The critical geography literature looks closely at globalization and the socio-political contestation of scale. See for example: N. Smith, *Uneven Development : Nature, Capital, and the Production of Space* (Cambridge, Mass., : B. Blackwell, 1991); H. Lefebvre, *The Production of Space* transl. by D. Nicholson-Smith (Cambridge, Mass.: Blackwell, 1991); D. Harvey, *Justice, Nature and the Geography of Difference* (Cambridge, Mass.: Blackwell Publishers, 1996);.

[19] See discussion in J. MacMillan & A. Linklater, eds., *Boundaries in Question: New Directions in International Relations* (London & New York: Pinter publishers, 1995) at 7.

to support the finding that the changing scale has severe consequences. Held argues, for example, that "[c]itizenship means less when influential decisions are taken outside the sovereign state and beyond the reach of established national mechanisms for promoting democratic accountability and control."[21] He contends that the globalization process hollows out the functions and purposes of traditional conceptions of the sovereign state. Held understands those concepts to mean "the political authority within a community which has the undisputed right to determine the framework of rules, regulations and policies within a given territory and to govern accordingly."[22] Held's consternation over the political ramifications of what studies in strategic management have observed is a new "ethic of collaboration"[23] has led him to examine how governments can share or divide state sovereignty among several fields.[24] The existence of a transnational European law invites application of this hypothesis to the legal field.

What does it mean that territorial sovereignty matters less? A central interest of the international relations discipline is always focused on understanding the implications for international stability and mechanisms for conflict avoidance. One significance of

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[20] D. Cameron & R. Simeon, "Intergovernmental Relations and Multilevel Governance: A Citizen's Perspective" (CPSA Conference paper: University of Ottawa, 27 May 1998) [unpublished]; and R. Simeon, *In Search of a Social Contract: Can We Make Hard Decisions as if Democracy Matters* Benefactors Lecture (Toronto: C.D. Howe Institute, 1994).

[21] D. Held, "Democracy: From City-States to a Cosmopolitan Order?" in D. Held, ed., *Prospects for Democracy: North, South, East, West* (Oxford, Polity Press) at 7.

[22] D. Held, "Democracy, the Nation-state and the Global System" (1991) 20 Econ. & Soc'y 138 at 150.

[23] The business literature identifies many things, including what Halal has called a new "ethic of collaboration" as driving strategies for competitiveness, new models for managing inter-corporate relations across multiple jurisdictions, new corporate forms, and the challenge to traditional definitions for competitive and anti-competitive practice under competition law. Collaboration can take many corporate forms, including mergers, takeovers and varying degrees of corporate integration through joint ventures. Halal observes that the "globalization of business has become so rapid that a new field of business expertise specializing in 'Global Strategic Management' has emerged. This new field is a blend of strategic management and international business which develops world-wide strategies for global corporations." W.E. Halal, "Global Strategic Management in a New World Order" *Business Horizons* 36:6 (November - December 1993) 5 at 5, 9. Halal's statements are only slightly misleading. Multinational corporations have always been managed according to worldwide business strategies. What is different now, however, is the number of firms that are implementing strategies to become "global" and the reasons why.

[24] The idea that sovereignty can be shared or divided at various levels: municipal, regional, national, and transnational; or among actors: governments, agencies, and international organizations, is the theoretical basis underpinning European law and legal order. See D. Obradovic, "Community Law and the Doctrine of Divisible Sovereignty" (1993) 1 LIEI 1; B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 283; D. Philpott, "Sovereignty: An Introduction and Brief History" (1995) 48 J. Int'l Affairs 353 at 357 - 358; and R.O. Keohane & S. Hoffman, eds., *The New European Community : Decisionmaking and Institutional Change* (Boulder: Westview Press, 1991) at 7. For summary of jurisprudential theory on the matter, see Lord Lloyd of Hampstead & M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence,* 5th ed. (London: Stevens & Sons; Toronto: Carswell, 1985) at c. 4.

"de-territorialized" sovereignty may be that it is no longer possible to construe the sovereign state as ultimate source of authority and influence in international relations – there are other influences and pressures that must be taken into account. In a similar vein, there is acknowledgment within the legal field that legal order can be better understood when the state is de-centred from the concept of legal order and sources of law. Scholars interested in "legal pluralism" point out that the totality of law in operation includes state law as well as norms, customs and practices.[25] A subset of scholars working in this field contend that the norms underpinning global business practices establish a kind of global legal order, one that operates alongside of and perhaps in competition with state law.[26] The observation is that such a global law challenges state legal authority. An analysis of the *EITO* case might have focused on substantiating this observation, but such an analysis would not have dealt seriously enough with the legal implications of de-territorialized state sovereignty. This paper focuses attention on questions about territorial sovereignty. To this end, the state is privileged in this analysis.

The international relations scholars point out that Traditional concepts of the authoritativeness of the sovereign state are now constrained in many practical ways.[27] For example, there are layers of formal, state-based legal orders such as municipal laws, international public law, and European law. There are international and regional treaty obligations and rules that bind states, defining how each one exercises sovereignty within its borders and beyond. Governance is understood to be "multi-level" or "layered."[28] It is proposed that there is a melding of jurisdictions for state legal

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[25] There is no guarantee that all norms and laws work together to achieve a cohesive legal order. On the contrary, legal pluralist studies take into account social, political, and even economic circumstances, examining social and legal fields as sites for contestation, power, and struggle. On theories of legal pluralism, see generally: P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 Hastings L. Rev. 805; J. Griffiths, "What is Legal Pluralism?" (1986) 24 J. Legal Plural. 1; S.E. Merry, "Legal Pluralism" (1988) 22 L. & Soc'y Rev. 869; and S.F. Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) Law & Soc'y Rev. 719. The concept of "legal order" builds on Weber's assertion that "a 'legal order' shall . . . be said to exist wherever coercive means, of a physical or psychological kind, are available . . . ." M. Weber, *On Law in Economy and Society*, trans. Rheinstein & Shils (New York: Simon & Schuster, 1954) at 17.

[26] On the creation of a global legal order, see *e.g.* S.E. Gordon, "The Un-Common View: Legal Perspectives on Globalization" (2000) 1 Hibernian L.J. 121; and G. Teubner, ed., *Global Law without a State* (Dartmouth: Aldershot, 1997). On the establishment of transnational legal regimes, see H.W. Arthurs & R. Kreklewich, "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34 Osgoode Hall L.J. 1; and M. Trubek, Y. Dezalay, R. Buchanan & J.R. Davis, "Global Restructuring and the Law: The Internationalization of Legal Fields and the Creation of Transnational Arenas" (1994) 44 Case W. Res. L. Rev. 407.

[27] See *e.g*. Sassen, *supra* note 17 at 5; Rosenau & Czempiel, *supra* note 8; *The Study of Global Interdependence, supra* note 1; and R.O. Keohane, ed., *NeoRealism and its Critics* (New York: Columbia University Press, 1986).

[28] For in-depth discussion of multi-level or layered governance, see *e.g.* L. Hooghe, ed., *Cohesion Policy and European Integration: Building Multi-Level Governance* (Oxford: Oxford University Press, 1996).

authority. For example, in their article on “Regionalism and Layered Governance,” the Yarboroughs provide a useful description of how multilevel governance arises:

> . . . various layers [of governance] exist under the umbrella of multilateralism embodied in the GATT. For example, the European Union and NAFTA differ greatly in their structure, but they share issues of common interest governed by the GATT. As existing and proposed regional agreements multiply, the multilateral layer of trade institutions will take on a major role in helping the various groups to cooperate rather than clash by, for example, monitoring small groups’ compliance with the provisions of large-group trade agreements and facilitating inter-group consultations on issues of mutual concern.”[29]

It is surprising that within the international relations studies there is little discussion of the problem of conflict of laws or of the challenges to sovereignty that such melding presents. Multilevel governance, for example, is described in political terms, as policy process and administration. There is no mention of the jurisdictional or legal problems that result from the negotiation of these contractual arrangements or intergovernmental agreements. Multilevel governance may be pragmatic and even an important innovation in strategies and approaches to governance, but it moves forward with little evidence of any understanding of what will happen, for example, if the parties to the agreement are found to have overstepped or unilaterally changed the lines of their jurisdiction. Even more problematic is the lack of clarity about which body has jurisdiction to review these arrangements and administrative processes in the event of a constitutional challenge or a break down in the relations among the parties. Whether these arrangements have legal standing in a court varies from state to state, agreement to agreement. Paying attention to the legal ambiguities is not simply of interest to lawyers; those who advocate for systems of multilevel governance as effective governance strategy must contemplate the constitutionality of the process, and identify the mechanisms for resolving disputes when questions of interpretation or poor implementation arise.

Scholars such as Biersteker question “where sovereignty ultimately resides: in a homogeneous people, among residents of a territorially bounded entity, or elsewhere?”[30] Biersteker and others argue that sovereignty is a social construct, best understood as being enmeshed in systems of social relations. He provides a useful starting point by separating the concept of “state sovereignty” into its two components.

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[29] B.V. Yarborough & R.M. Yarborough, “Regionalism and Layered Governance: The Choice of Trade Institutions” (1994) 48 J. Int’l Affairs 95 at 112.

[30] T.J. Biersteker & C. Weber, “The Social Construction of State Sovereignty” in T.J. Biersteker & C. Weber, ed., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996) at 2.

He defines the " 'territorial state' as a geographically-contained structure whose agents claim ultimate political authority within their domain. . . . 'Sovereignty' [is] a political entity's externally recognized right to exercise final authority over its affairs."[31] This definition assumes that the integrity of state law, the vehicle of state authority and sovereignty, remains in tact. It stands to reason, however, that by challenging both the state's political and final authority over affairs in its domain, globalization also places the integrity of state law in jeopardy.

For the legal scholar, Ruggie, Rosenau, Biersteker and others cited here argue that we are witnessing a redefinition of sovereignty, rather than its dissolution. What sovereignty does confer, they suggest, is legal authority on states that are operating under conditions of complex interdependence. This legal authority can either be exercised to the detriment of other states' interests or be bargained away in return for influence over other states' politics. The exercise of this authority is not absolute nor does it occur in a vacuum; there are many interests and actors that shape relations among states and work to determine international order. The European Union results from efforts to bring stability to Europe and to preserve state sovereignty in the face of global economic trends. It is the latter objective that is of interest here. European Union law results as states agreed to merge their legal jurisdictions in certain areas into one transnational level of state action – a transnational jurisdiction for state law.

3. Principles in European Union Law: Overview

In the European Union, a formal, conscious effort is being made to cast state sovereignty into the transnational realm of the so-called "global economy." State law is central in this process, not just as sanction and source of a new European legal order, but also as the determinant of a new division of institutional powers between the transnational legal order of the European Union and the territorial domain of Member State sovereignty. State law and its transnational European form intervene in the European process of globalization, adjusting the sovereignty of states to the norms of a global economy, an economy that can no longer be meaningfully contained within state borders. The Europeans, of course, have chosen to use law as one means to further economic integration. The point is that globalization has legal implications, most often through its imposition of new norms for behaviour (both corporate and state), but also through its challenge to assumptions about state legal authority.

The Treaty of Rome[32] that founded the institutions of the present day European Union in 1956 established European Union Law, also known as European Community

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[31] *Ibid.,* at 2.

[32] The Treaty of Rome established the European Economic Community and is referred to historically as the EEC Treaty. *Treaty Establishing the European Economic Community,* Rome, 25 March 1957 [hereinafter *The Treaty of*

law and referred to here as "European law." In that Treaty, the Member States pledged to pool sovereignty in certain areas to be governed at the transnational level by the institutions of the European Economic Community and a new, European legal order. Membership in the European Union has expanded, growing from the initial 12 founding members in 1956 to 15 members as of 2001, with further enlargement pending. It is not clear, however, whether one can rightly argue that the willingness of the Member States to share or pool their sovereignty has produced the "de-territorialization" of state law in either its national or European form. In fact, the *EITO* case illustrates the important role that notions of territorial sovereignty now play in the delineation of European versus Member State jurisdiction. It is questionable whether state legal authority can be unbundled from the concept of a territorially sovereign state.

Arguably, the scope of European Union law has broadened and deepened as the Member States have adopted measures to implement the aims of the Treaty. A body of European Company law has emerged on this basis. As for all European law, the founding Treaties are the primary sources of a European company law and are binding on all Member States and their subjects.

The Member States did not negotiate explicitly to develop a common industrial policy or a common European company law under the Treaty of Rome. The Commission, however, has justified legislative initiatives for the harmonization of Member State company laws as being implied in the general mandate under the Treaty of Rome to ensure the right of establishment (Articles 52 - 58).[33] In addition, it has relied on the Community's residual power to make European law (Article 235),[34] and the principle of mutual recognition (Article 220)[35] to support its legislative initiatives. While there is no consensus about the scope for a European level of company law and

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Rome]. The Treaty of Rome was subsequently amended by the Single European Act, which established the "European Community" or "EC." The amended treaty is referred to as the "SEA" or the "EC" Treaty. *The Single European Act,* 17 February 1986 (entered into force 1 July 1987), [1987] O.J. L. 169/1. Finally, the *Treaty on European Union* (TEU), commonly called the "Maastricht Treaty" after the Dutch town in which it was signed, amended the SEA to establish the "European Union," also called the "EU." *Treaty on European Union* Maastricht, 7 February 1992, [1992] O.J. C. 191/1. A consolidated text of the EC Treaty as amended by the TEU is available: [1992] O.J. C. 224/6. For the purposes of clarity and simplicity, this article refers generally to the amended Treaty as the "EC Treaty" except in those instances where historic or specific reference is made to the articles of the Treaty of Rome (EEC Treaty) or the Treaty on European Union (TEU). The Amsterdam Treaty amending the Treaty on European Union, signed in Amsterdam, 2 October 1997 and entered into force 1 May 1999, revised numbering of the Treaty. A consolidated text of the Amsterdam Treaty is available [1997] O.J. C. 340/145. For the purposes of historical clarity, this article uses the numbering system under in the TEU and prior treaties. It will, however, provide the equivalent section under the new Amsterdam Treaty in the footnotes.

[33] Articles 43 - 48, *Amsterdam Treaty*; Article 53, Treaty of Rome repealed.

[34] Article 308, *Amsterdam Treaty*.

[35] Article 293, *Amsterdam Treaty*.

regulation, these articles of the Treaty have provided the legal justification for proposing Directives and Regulations.[36] Directives and Regulations are known as the "secondary sources" of European law and they are also binding on Member States and their subjects. In signing the Treaty of Rome, the Member States agreed that all sources of European law prevail where European law has jurisdiction, even if these measures override Member State laws and practices. The European Court of Justice has affirmed and further clarified the supremacy of European law in decisions such as *ERTA*[37] and *Costa* vs. *Enel*.[38]

3. *a) European Company Law*

The Member States of the European Union have attempted to develop a company law among them that functions at the same transnational level as those business practices that states seek to regulate. European company law initiatives have forced debate about what is necessary to make a common market function effectively, and what is unwarranted encroachment onto matters of state sovereignty and domestic policy. Moreover, European company law initiatives emphasize the extent to which the subject of company law impinges upon other areas of law and policy, such as labour and tax, areas in which the Member States have not agreed to pool sovereignty to the same extent.[39] Although the Treaty includes some areas of labour and tax law, such as free movement of workers (Articles 48 - 51, TEU), as well as matters of indirect taxation (Article 95 - 99, TEU),[40] key areas of Member State jurisdiction lie beyond the scope of the Treaty (such as worker participation laws and direct taxation of persons and companies). Nevertheless, because Europeans try to assemble a transnational level of company laws, they tackle and debate significant issues posed by the process of globalization.

The problem is that globalization, and especially the globalization of business practices that the process engenders, has made it increasingly difficult to delineate the

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[36] Directives set out aims and objectives that Member States must achieve, whereas Regulations implement the measures agreed to in the Treaty immediately. Member States achieve the aims of Directives by adopting the appropriate measures under national law. Regulations, on the other hand, are directly applicable and require no further implementation under national law (except in rare circumstances, such as the *Council's Regulation for a European Economic Interest Grouping*, which required the Member States to make certain legislative changes to accommodate the legal characteristics of the Euro-Grouping).

[37] *E.R.T.A.,* C-22/70, [1971] E.C.R. I-263.

[38] *Costa* v. *ENEL,* C-6/64, [1964] E.C.R. I-585, [1964] C.M.L. Rev. 425.

[39] See *e.g.* D. Sugarman & G. Teubner, eds., *Regulating Corporate Groups in Europe* vol. 1 & 2 (Baden-Baden: NomosVerlagsgesellschaft, 1990).

[40]Article 39 - 42 and Articles 90 - 93 respectively of the *Amsterdam Treaty*; Article 97 (TEU) repealed.

jurisdiction of the European Union from that of its Member States. For example, one of the practical implications of a European legal right of establishment is the right to transfer a business from one jurisdiction to another. The ability to exercise this right freely, without impediments such as punitive taxation, requires changes to national income tax policies, even though domestic income tax policy is not yet an area of European legislative competence. (The recent adoption of the "Euro" has pushed income tax issues to the centre of attention, and the matter is now on the Council's agenda for discussion).[41] Similarly, the ability of firms to structure business operations across national borders and to partner with other European companies—one of the purposes of creating a Single Market—remains problematic in practice. Transnational business collaboration and the idea of transfrontier firms raise difficult questions about how to tax cross-border income and how to deal with conflicting national definitions of tax residency, and even, how different legal corporate forms are taxed. Even more difficult are the different laws and customs regarding corporate governance, especially where worker participation on the management and supervisory boards of companies is concerned.

These are examples of the difficult problems to solve. The Member States are neither willing to cede the right of direct taxation to European institutions, nor to give up nationally held views on the governance of companies and the company's role in society at large. Michael Gordon is right in his observation that: "[t]he need for and inevitability of a European company law has come into direct conflict with the substantial variation of attitudes toward the context of a company law in the various EU Member States."[42] Not surprisingly, efforts to eliminate national differences among Member State company laws have foundered on the issues of taxation and labour. Harmonization for a European company law remains incomplete. Consequently, the failure to resolve differences among the Member States has further limited the scope of what might be achieved by the proposed European corporate forms for transnational business collaboration.

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[41] While there are "no real plans" to harmonize tax rates on companies or individuals, the subject of harmonizing indirect tax measures, (especially when combined with the freedom of establishment objectives (Article 54 TEU/ Article 44 *Amsterdam Treaty*)) are measures which do fall under European legislative competence, and are pushing the Europeans ever closer to the discussion of direct taxation measures at a European level. In particular, income interest on savings is not taxed in 13 of the EU countries. Britain fears that the whole market for Eurobonds could move outside the EU ("taking city of London jobs with it") if interest on Eurobonds were taxed at source. The Commission argues that withholding tax would not affect institutional investors and the problem envisioned affects only a sliver of the total market for Eurobonds, many an overseas market. "European Tax Harmonisation: Free but Dutiful" 352:8127 *The Economist* (3 July 1999) at 41.

[42] M.W. Gordon, "European Union Company Law" in R.H. Folsom, R.B. Lake & V.P. Nanda, eds., *European Union Law after Maastricht: A Practical Guide for Lawyers Outside the Common Market,* (The Hague: Kluwer Law International, 1996) 523 at 548.

It is not difficult to understand why states are reluctant to cede legislative control over certain regulatory and legal practices, practices which directly influence how work gets done, who taxes it, and how ownership and control of work are maintained. Once a European Directive or Regulation exists, legislative objectives are no longer set and determined at the national level. Local reform may well be difficult to effect when legislative competence is transferred to the European sphere. This view is not only what sceptics of a European company law fear, but in fact what the jurisprudence of the European Court of Justice bears out.

To address these difficulties, European company law has proceeded on two tracks. The first track pursues the harmonization of Member State laws. The policy of harmonization seeks to eliminate national legal differences and establish a European standard in the areas provided for in the Treaty. In the context of company law, competing views about the policy of "harmonization" have particular implications. On the one hand, the Member States fear that especially on matters of company law, harmonization which simply legitimates and recognizes legal differences between them will encourage corporations to shop for the legal system which best suits the corporate agenda.[43] On the other hand, harmonization that strives for uniformity in law or, at the very least, the establishment of a European minimum standard, has proven difficult to produce among sovereign states with divergent legal traditions. Questions of sovereignty have thwarted the efforts to eliminate legal differences, often resulting in stalemate and deadlock, or perhaps worse, ineffective and token legislative achievements. Yet, even as Member States routinely block the development of a comprehensive body of European company law,[44] they remain committed to its premise. In the case of Euro-Groupings studied here, it is the disjunction between the Member States' efforts to pool sovereignty on the one hand, and their refusal to cede jurisdiction to a European level of legal authority on certain matters on the other, that was the source of difficulty in the *EITO* case, to be discussed later.

The second track concentrates on the development and implementation of state-sponsored, European corporate forms for transnational business practices. This track was initiated after the Member States adopted a European industrial policy formally in 1971. That policy established a clear policy context to guide the Community's efforts to

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[43] See C.M. Schmitthoff, "The Future of the European Company Law Scene" in C.M. Schmitthoff, ed., *The Harmonisation of European Company Law* (UKNCCL, 1973).

[44] Such as: EC, *Amended Proposal for a Thirteenth Council Directive on Company Law concerning Takeover and Other General Bids* [1990] O.J. C. 240/7; COM/90/416 FINAL - SYN 186, (10 September 1990) and EC, *Proposal for a Fifth Council Directive concerning the structure of public limited companies and the powers and obligations of their organs*. COM/90/629 FINAL, December 13, 1990.

promote the consolidation and restructuring of European industry,[45] and reaffirmed the Member States' commitment to develop a European company law. The second track proposed an alternative to the failing and increasingly contentious policy of harmonization. The new corporate forms were never intended to replace the harmonization programme, however. They were meant to complement the efforts to harmonize national laws and provide alternative choices for incorporation under European law. Certainly, the second track put forward an interesting means for European law to influence corporate behaviour and choices.[46] Thus far, the Euro-Grouping is the only European corporate form to have been implemented.

The two tracks for European company law are indicative of how seriously the Member States debate the state's role in the global economy. The degree to which national law needs to be harmonized in order to realize the right of establishment for businesses operating in the Community, what kind of transnational legal framework is required to effect that right,[47] and finally, the implications of the proposed harmonizing measures for state sovereignty are all essential questions. Added to these challenges is, of course, the debate about how much regulation is necessary and whether the state should be involved at this level at all. There are simply no straight answers available. Arguably, the real question remains not only unanswered, but also unasked: at what level must formal state laws operate so that sovereign states might achieve effective regulation of economic activity in a global economy? Any attempt to answer that question will require a better understanding of the relationship between new practices of state sovereignty on the one hand, and the jurisdiction of state legal authority on the other. In fact, it is the peculiarity of the legal circumstances facing the Euro-Grouping in the *EITO* case that lends insight into the stresses placed on the new relationship between ideas about sovereignty and jurisdiction. The following section describes in more detail the initiatives for new corporate forms under the second track of European

[45] EC, Commission, *Memorandum on European Industrial Policy* (publication number: 4984/2/1970/5). The Memorandum sent to the Council did not appear in the Official Journal. (Hereinafter *1971 Memorandum*).

[46] There are scholars who have attempted to offer some answers to these questions, see *e.g.* J. Dine, "The Community Company Law Harmonisation Programme" (1989) 14 Y.B. Eur. L. 322 [hereinafter *Harmonization Programme*] at 328 - 332; R.M. Buxbaum & K.J. Hopt, "Legal Harmonization and the Business Enterprise: Corporate and Capital Market Law Harmonization Policy and the U.S.A.," in M. Cappelletti, M. Seccombe & J. Weiler, eds., *Integration Through Law: European and the American Federal Experience*, vol. 4 (New York: Walter de Gruyter, 1988) 167; and Sugarman & Teubner, *supra* note 40.

[47] See "Company Law in the Single EU Market" (1990) B.Y.U.L. Rev. 1413 at 1526 - 38 for discussion of desirable characteristics for a transnational European company law. The article finds that "[o]nce the necessity of legislation on company law at the level of the European Community is accepted, the question of the nature of that law inescapably arises. Should that law be protective, or should it be facilitative? Should it impose uniformity or should it set a broad framework within which the Member States can have some measure of flexibility; to what extent should there be emphasis on mutual recognition of what is the nature of the corporation?" at 1529.

Company law, and outlines the legal characteristics of the Council Regulation that established the Euro-Grouping.

3. *b) The New European Corporate Forms*

European company law facilitates certain cross-border and collaborative corporate forms and inter-corporate business practices now recognized as the norm for doing business in the new economy.[48] Several new transnational corporate forms are being proposed,[49] but the *Council's Regulation for a European Economic Interest Grouping* is the only one in operation. Of the other initiatives, the proposal for a European limited liability company is the most ambitious and also the most contentious. National legal differences concerning worker participation on the management boards of companies, and the requirement of a minimum capital guarantee are but some of the issues that have made the adoption of the European Company Statute difficult.[50] The Member States are concerned that in the area of company law, the preservation of national legal differences defends a critical measure of state sovereignty.

In light of the failure to adopt a European Company Statute, Euro-Groupings are interesting for several reasons. First, their legal characteristics are derived from European Union law, a transnational legal order that results from the pooling of Member

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[48] Firms seeking to compete effectively in the new economy have come to accept joint ventures, strategic alliances, partnerships, networks, and other forms of collaboration as essential organizational structures. A greatly increased rate of corporate consolidations, mergers and acquisitions has led to new concentrations of capital. For example, as recently as July 1999, American mergers and acquisitions deals totaled $570 billion for the first half of 1999, up from $528 billion for the same period in 1998. European deals were worth $346 billion for the same period, well on the way to surpassing the value of total deals for the 1998 year, $541 billion. "Business this Week" 352:8127 *The Economist* (10 July 1999) 7. Such forms of joint venturing and corporate consolidation have been criticized as being anti-competitive. The circumstances that have allowed an intense rate of corporate consolidation to happen are often blamed for having facilitated new corporate forms of market dominance. See *e.g.* M.J. Piore & C.F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books Inc., 1984). at c. 8; W. Ruigrok & R. van Tulder, *The Logic of International Restructuring* (London & New York: Routledge, 1995).

[49] *See e.g.:* EC, Commission, *Proposal for a Council Directive complementing the Statute for a European Company with regard to the involvement of employers* 5270/93 Restreint (10 March 1993) [unpublished]; EC, *Amended Proposal for a Council Directive supplementing the Statute for a European mutual society with regard to the involvement of employees,* COM (93) 252 final - SYN 39, [1993] O.J. C. 236/06; EC, *Amended Proposal for a Council Directive supplementing the Statute for a European association with regard to the involvement of employees* COM (93) 252 Final SYN 387, [1993] O.J. C. 236/02. The initiative for a European Company, or European Private Company has been the subject of debate since the idea's inception in 1950 and its first iteration as European legislative proposal in 1970. Recently, a group of Company law scholars has endeavored to revitalize the initiative, submitting Regulation to the European Commission for its attention. Copies of the draft Regulation are obtainable from R. Drury at R.R.Drury@exeter.ac.uk or by post via Exeter University School of Law, UK.

[50] R. Drury & A. Hicks, "The Proposal for a European Private Company" [1999] J.B.L. September issue, 429; J. Dine, "The European Company Statute" *The Company Lawyer* 11:11 (November 1990) 208; J Dine, "The Harmonization of Company Law in the European Community" (1990) 10 Y.B. Eur. L. 93; Symposium proceedings. "The Context for Company Law in the European Community" (1990) 729 B. Y. U. L. Rev. 1413.

State sovereignty. As such, the legal characteristics of Euro-Groupings encapsulate both the scope and the limits of European law, illustrating those matters over which ideas about shared sovereignty are implemented and those where territorially defined ideas about state sovereignty continue to prevail. Second, Euro-Groupings are useful in so far as they provide business with a legal means to implement a particular kind of business strategy, one in which cross-border collaboration among firms from two or more Member States is adopted as the strategy for competitiveness in the European and global markets. As such, Euro-Groupings in operation are indicative of certain norms for business practices in the global economy, practices that are not easily constrained by the territoriality of sovereign states. Finally, Euro-Groupings illustrate the problems that arise because state legal norms cannot always be made to function at the same transnational level as business norms, and because certain matters of state sovereignty, when expressed in legal form, cannot always be "shared" across state borders, in spite of policy intentions. A brief outline of the legal characteristics of the Euro-Grouping is provided below.

3. *c) The Council's Regulation on Euro-Groupings*

A significant achievement of the Council's Regulation is that it provides regulatory uniformity for a truly transnational, multi-jurisdictional corporate form. Of course, transnational business alliances and multinational corporations already exist in various corporate forms, but none other than the Euro-Grouping operates according to statutory guidelines, guidelines that are uniformly applicable across the multiple jurisdictions of sovereign states.

Under the Council's Regulation, two or more businesses registered in different Member States of the European Union may incorporate a co-operative, cross-border business initiative. Members of a Euro-Grouping have unlimited liability for the collaborative grouping. They participate in a hybrid corporate partnership that enjoys full "legal capacity."[51] However, "legal capacity" allows the Euro-Grouping to conclude contracts on behalf of its members. In addition, as a corporate body, a Euro-Grouping can sue and be sued on behalf of its members. In this regard, the grouping functions like a traditional company. Unlike the limited liability company, however, there are restrictions on Euro-Groupings, especially on how they can be used and the number of employees each may have. Euro-Groupings may not employ more than 500 employees, a number which keeps Euro-Groupings well below the thresholds of applicable national

[51] In European law, "legal capacity" has the effect of "legal personality." Thus, Euro-Groupings are corporate entities. This means they are eligible to bid on contracts that might otherwise exclude partnerships and informal collaborative corporate arrangements from the bidding process.

worker participation laws,[52] and more than likely below the threshold that triggers a review under European Competition law.[53] Moreover, the collaborative corporate entity does not exist for tax purposes. As in the case of more conventional partnership agreements, any profits arising from the grouping's activities are taxed in the hands of the individual corporate members of the grouping. For this reason, Euro-Groupings are described as having "fiscal transparency." Finally, because European Regulations are directly applicable in all the Member States, Euro-Groupings may transfer their head offices anywhere in the European Union, presumably without legal ramification or impediment.

Both fiscal transparency and the cap on the number of employees removed the potential for debate and legislative stalemate as Member States reviewed the proposed Regulation. In fact, the Member States continue to refuse any European initiative that would lead to a uniform European law in either of these areas. They fear that such a step would not only eliminate differences among their legal systems, but also diminish significantly state sovereignty over fiscal and labour policy.

Euro-Groupings are mainly used by small and medium-sized firms;[54] however major banks, multinational corporations, and even public sector entities are participating members of Euro-Groupings. In total, there are more than 800 Euro-Groupings in operation.[55] The Commission's "Network for European Economic Interest Groupings," known as "REGIE," monitors and collects information on the use of Euro-Groupings. REGIE also works under the Commission Directorate General XXIII for Enterprise Policy, Distributive Trades, Tourism and Co-operatives, and with Directorate General XV for the Internal Market and Financial Services (also responsible for company law, multinational enterprises and the European Company) to promote the grouping's advantages and to market the new corporate form.

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[52] Italy also makes this distinction, for example.

[53] In *Völk* v. *Vervaecke,* the European Court of Justice made an important distinction regarding the application of Article 85(1), finding that Article 85(1) would not apply to agreements that are likely to have insignificant economic impact. *Völk* v. *Vervaecke* C- 5/69, [1969] E.C.R. I-295, [1969] C.M.L. Rev. 273 [hereinafter *Völk* cited E.C.R.]. The ruling prompted the Commission to issue its *Notice September 12, 1986 on Agreements of Minor Importance which do not fall under article 85(1) of the Treaty establishing the European Economic Community,* [1986] O.J.C. 231/2. This Notice has been replaced subsequently and the thresholds are currently under review. The aggregate turnover of 200 million has risen from its prior level set at 50 million ECU in 1977. (See O.J. C. 313, 29 December 1977) See "New Rules for Merger" (May 1996), (1996) 40:5 Institution of Management Services, online: LEXIS (EURCOM, European News) at 24. Note: Article 85(1) was amended by Article 81(1) of the *Amsterdam Treaty*.

[54] EC, Commission, *EEIG. The Emergence of a new form of European Cooperation: Review of three years' experience* (Luxembourg: EC, 1993) [hereinafter *Reviewing Three Years' Experience*] at 27.

[55] EC, Commission, *Communication from the Commission: Participation of European Economic Interest Groupings (EEIGs) in public contracts and programmes financed by public funds,* [1997] O.J. C. 285/10.

The transnational business collaboration promoted by the Euro-Grouping constitutes more than a formalization of import-export relationships among firms. Euro-Groupings establish a project, a venture or a business initiative in which all members participate, but the Euro-Grouping develops and manages. That said, nothing about the establishment of a Euro-Grouping infers a significant change, if any at all, in national business practices. Indeed, the transnational collaboration fostered by the Council's Regulation does little to impose change on national business practices. The Regulation rests between Member States laws, offering nothing that would harmonize legal differences or infringe upon the sovereign jurisdiction of a Member State. That said, Euro-Groupings in operation mirror a new geography of regions, one in which alliances and goals are shared among like interests rather than divided along state borders. The Commission has even identified eight European regions[56] according to a geography defined by common needs and interests, rather than principles of state sovereignty and territoriality. European regions are neither restricted nor proscribed by national borders.

At first glance, Euro-Groupings would appear to provide an ideal legal framework for doing business in these new regions of the European Union. But Member State concerns about losing sovereignty in core areas of domestic policy such as tax and labour law has been the source of trouble for Euro-Groupings. Examples of some of the practical problems encountered are outlined in the section that follows. In this sense, the Euro-Grouping initiative is evidence of how states participate in the de-territorialization of sovereignty.

3. b. ***i) Euro-Groupings in Operation: Legal Aspects***

The Council's Regulation stipulated that for tax purposes, the Member States should treat Euro-Groupings as any corporate form under national laws that most resembles the Euro-Grouping Regulation. With the exception of France, this discretion has caused more confusion than it has alleviated precisely because there is no close resemblance between the Euro-Grouping and any other national corporate form. In fact, the Euro-Grouping's advantage is that it is a hybrid between a more traditional understanding of a partnership and a company. In most instances, however, the Member States have categorized the Euro-Grouping as a partnership for tax purposes. Many Member States amended their national laws on partnerships so that a Euro-Grouping would fit into the national legal definition.[57]

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[56] The eight regions are: the centre capitals; the Alpine Arc; the continental diagonal; the new German laender; the Mediterranean (Latin rim); the Atlantic region; the North Sea Regions; the ultra-periphery regions. EC, *Opinion of the Economic and Social Committee on Integration and Development of Alpine Arc,* [1996] O.J. C. 204/106 at para. 1.4.

[57] Many Member States adopted tax rulings, statements or introduced special changes into national tax legislation in order to deal with the specific characteristics of this new form of cross-border partnership. See Appendix B; and D.

Classification as a partnership has placed some restrictions on how a Euro-Grouping may be used in some countries and how it will be taxed in others. In 1989, Denmark introduced legislation to prevent individuals and businesses from using partnerships as a tax advantage through which to invest money at a more favourable tax rate, rather than for carrying on a legitimate business.[58] Euro-Groupings used legitimately to raise or pool capital would come under scrutiny in this instance.

In Germany, a Euro-Grouping must fulfill certain criteria in order to be characterized and taxed as a partnership. In addition to being "qualified entrepreneurs who run a business together in order to reach a common goal and who also assume the risks associated with the business,"[59] Euro-Groupings operating under German law must be profit oriented if the income is to qualify as partnership income.[60] The profit-making criteria pose an interesting problem for Euro-Groupings. According to Article 3 of the Council's Regulation, Euro-Groupings may not have profit making as their primary business objective. A special German tax ruling on Euro-Groupings addresses this problem. The ruling provides a broad definition of what constitutes "operating for profit" and what counts as business income among Euro-Grouping members. Should the Euro-Grouping fail to meet these criteria, its income will be taxed under another appropriate section of the German Income Tax Law.

Given the number of similar special tax rulings adopted by all the Member States to facilitate the taxation of Euro-Groupings, it is reasonable to conclude that neither the Commission nor the Member States anticipated that the treatment of Euro-Groupings as partnerships for tax purposes would impose restrictions on the corporate names chosen by Euro-Groupings. What makes the *EITO* case interesting is that when this problem arises, the legal question is about which law applies, European or Member State and

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Van Gerven & C.A.V. Aalders, eds., *European Economic Interest Groupings: The EEC Regulation and its application in the Member States of the European Community*, (Boston: Kluwer Law and Taxation Publishers, 1990). Mainly, Member States adjusted the language of national tax laws in order to classify the Euro-Grouping under an existing category for taxation. For example, the German Ministry of Finance issued the Ruling of 15 November 1988, published in *Der Betrieb*, No. 7 of 17 February 1989 at 354 - 355. The ruling supplemented national implementing legislation for the Euro-Grouping Regulation that did not contain detailed provisions for its taxation. Section 29 of the *Finance Act 1990* (UK) was revised to set out provisions to deal with the taxation of Euro-Groupings in Ireland. Schedule 11 of the *Finance Act 1990* (UK) deals with the taxation of Euro-Groupings in the United Kingdom. In The Netherlands, Resolution No. WBD 90/63 of (1 March 1990), *Vakstudie Nieuws* (1990), at 817 expressed the opinion of the "Under Ministry of Finances" on the taxation of Euro-Groupings. Such Resolutions are not equivalent to legislation *per se*, but they are generally considered to be binding on the tax administrations.

[58] B.P. Dik, "Denmark" in IBFD staff & J.F. Blouet, "The Taxation of the European Economic Interest Grouping (EEIG)" (1991) (January - February) Eur. Taxation at 2 – 45 at 16.

[59] C. Daiber, "Germany" in IBFD staff & Blouet, *ibid* at 22.

[60] *Ibid.*

not the corporate name. Moreover, framing the legal question leaves little room for pragmatic solution.

One final point about the Euro-Grouping's legal characteristics must be made. As a consequence of the European principle of subsidiary law,[61] aspects of the Euro-Grouping are regulated differently according to the various legal and economic conditions throughout the Community. There are substantial differences in the way members of the Grouping will be taxed, the way that Euro-Groupings will be wound up, and even the way they will be managed because European law has failed to eliminate differences between Member States in key areas such as fiscal and social policy, for example. In the same vein, differences among Member State labour, environmental, and social laws may still determine where Euro-Groupings are physically located, in spite of the efforts to identify a corporate form which would not place Member State laws into competition with each other. These are key areas where state law continues to be the vehicle for what can only be understood as an exertion of state sovereignty on territorial terms. A state's jurisdiction defines the scope of its authority as against other states and legal institutions. Interested in defending that authority, states are reluctant to cede jurisdiction, even over matters as seemingly unimportant as company names.

4. EITO: Defining Sovereign Territory or Prescribing a Suitable Corporate Name?

The German Court ruled that, according to German law, the Euro-Grouping "EITO" could not use its descriptive corporate name *European Information Technology Observatory, Europaische Wirtschaftliche Interessenvereinigung (EITO).* Classified as a partnership, albeit for tax purposes, the Euro-Grouping in question was held to German rules on partnership names that stipulate that the names of all the member partners must appear in the partnership name.

German partnership laws are not unique in their insistence upon the names of the partners appearing in the partnership name. The purpose of naming the partners is to protect the interests of third parties by identifying the persons who are liable for the actions of the partnership. Under the provisions of the Council's Regulation, however, the names of Euro-Grouping members must be published in the *Official Journal.* The *Official Journal* is a public document, readily available on-line, libraries and company registries. The Council's Regulation addresses the same concerns as the German law, in a manner that is equally transparent and accessible to the public at large. But when

[61] "Subsidiary law" refers to the principle of subsidiarity, enshrined in Article 3b TEU. Article 3b confirms that the Community will act within the limits of the powers conferred upon it by the Treaty; that it will not take action beyond what is necessary to achieve the objectives of the Treaty; that in areas that fall outside the exclusive jurisdiction of the Community, it will act only "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." Article 3b, TEU/Article 5, *Amsterdam Treaty*.

EITO submitted its commercial registration to the Amtsgericht (Local Court), Frankfurt am Main, the Amtsgericht refused to allow the Euro-Grouping to register under the descriptive name *"European Information Technology Observatory, Europaische Wirtschaftliche Interessenvereinigung (EITO)."* The Court noted that with regard to the naming of Euro-Groupings, Article 5 (a) of the Council's Regulation stipulated only that the name of the grouping must be "preceded or followed either by the words "European Economic Interest Grouping" or by the initials "EEIG," unless those words or initials already form part of the name." But for this stipulation, the Court held that the national law applicable to business names of general partnerships governed the matter of business names (offene Handelsgesellschaften). That law states that a partnership name must be derived from personal names or from personal names with further additions, and not from a name that is purely descriptive of the object of the undertaking.

On appeal, the Landgericht (Regional Court), Frankfurt am Main upheld the lower court's decision to refuse registration of the descriptive corporate name. *EITO* appealed further to the Oberlandesgericht Frankfurt am Main. The Oberlandesgericht held that the grounds for EITO's appeal were not well founded. Nevertheless, that Court referred the matter to the European Court under Article 177 for a preliminary ruling on the interpretation of Article 5 of the *Council's Regulation for a European Economic Interest Grouping*.

EITO based its appeal on the argument that the lower court's decision contravened Article 5 of the Council's Regulation. It maintained that because the purpose of the Council's Regulation was to encourage cross-border collaboration, the Regulation had accorded the members of Euro-Groupings considerable freedom in their contractual relations to achieve these ends, including the freedom to choose a descriptive business name. *EITO* argued that because members of Euro-Groupings must be treated equally under the Council's Regulation, the German court's decision would mean that possibly, the names of all the members of a Euro-Grouping would have to appear in the corporate name. The number of members in a Euro-Grouping could make the name impossible to use for practical purposes. Worse, such a business name would give no indication of the business activity undertaken. "The result of refusing names descriptive of the object of the undertaking," *EITO* argued, "would therefore be to prevent EEIGs from achieving their objective of promoting cooperation within the Community."[62] *EITO* submitted that more than 80% of Euro-Groupings in operation use a descriptive business name as evidence of the importance of descriptive business names to cross-border cooperative initiatives. *EITO's* position was that

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[62] *EITO, supra* note 1 at para 11.

German law should cede to European law so that a pragmatic solution might be found to the technical, legal problem. But the European Court of Justice ruled in favour of the German Courts, finding that all that the interpretation of Article 5 (a) put forward by *EITO* was without legal merit. The ECJ noted further that Article 2 (1) of the Council Regulation states that but for the provisions expressly set out in the Regulation, laws of the Member State in which they are registered shall govern Euro-Groupings.

5. Lessons from *EITO*: The Importance of Mapping Legal Territory

There are several obvious remarks to be made about the *EITO* decision. First, that the application of partnership laws to a Euro-Grouping showed little regard for the Euro-Grouping's hybrid status, both in the corporate and in the jurisdictional sense. Moreover, applied to Euro-Groupings, the German laws on partnership names posed practical problems for Euro-Groupings, problems that might not have arose for other types of partnerships. The membership of some Euro-Groupings may be composed of several partnerships. For example, the membership of *Eurojuris International* includes more than 600 individual law firms from twelve different EU countries.[63] Typically, each of the member law firms bears the name of at least three partners. Under the German law, the obligatory corporate name for *Eurojuris* would be ludicrous. Second, that even though transnational or cross-border partnerships were being encouraged under the framework of European industrial policy, Member State laws on partnership had not been harmonized fully to deal with the needs of such partnerships.[64] Third, the necessary balance between Member State sovereignty and transnational, European legal order compelled the European Court of Justice to uphold the German Court's decision regardless of the more pragmatic solution at hand. Notwithstanding the practicality of *EITO*'s submissions, the European Court did not have the authority to interpret a special exemption for the Euro-Grouping under German law. A tenet of legal methodology is that a court cannot rule *ultra vires* its jurisdiction. Fourth, the European Court's decision is typical of the significant role state sovereignty plays in the determination of European legal order. In the *EITO* case (as in the negotiations around the various characteristics for Euro-Groupings themselves), the sovereign jurisdiction of the Member State court was upheld on principle, rather than overruled by practicality. The result respected Germany's jurisdiction but was completely out of touch with the business issues in question.

Political awareness of the importance of respecting legal jurisdiction galvanized the Court in its decision to uphold national law over any solution that might appear to

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[63] F. Mahoux, "Les Maîtres de L'Europe" *Tendance* (24 December 1992) at 30.

[64] See *e.g.:* 1971 Memorandum, *supra* note 46.

cede legal authority to the European Union. In truth, the ECJ could be expected to do nothing else. The concept of jurisdiction—the authority to rule on a certain matter and to apply one body of law over another—is essential to the legal methodology of dispute resolution pursued in the court system. Fought out in the courtroom, the defence of German sovereignty is cast in both legal and territorial terms. In effect, the courtroom battle was over "legal turf" and had little to do with the corporate name at all. By contrast, the business activity of the company in question can be characterized as "non-territorial." Its members pursue cross-border collaboration as a strategy for competitiveness in the global economy. Unlike some manufacturing firms, this research consortium's business has little connection to territorial space. The value of the business lies in the knowledge and expertise the consortium generates. The firm's competitive advantage resides in its capacity to build and to take advantage of knowledge networks. Such networks can be established among people and institutions, regardless of geographic location. The strictures of state law can do little to accommodate the characteristics of these business practices.

Finally, the underlying issue must not be forgotten. Notwithstanding the "global" influence acting on the firm's business activities, the state's need to classify business activity for tax purposes (among others) demonstrates the significant connection between a territorial notion of state sovereignty and the jurisdiction of state laws.[65] *EITO* suggests that even as the globalization of business practices contributes to the transformation of the territorial sovereignty of states, state law remains a territorial concept. Failure to account for the legal ramifications of de-territorialization ignores the significant changes taking place.

The *EITO* case does have a silver lining. Even while the European Court of Justice found that it had no authority to rule on this matter, the fact that the European Court heard the case seemed to have desirable consequences elsewhere. Mainly, it drew other Member States' attention to the practical problem of naming Euro-Groupings in accordance with rules meant to govern more conventional partnerships. When they recognized the potential for similar difficulties to arise under their own laws, the Member States took measures to allow Euro-Groupings, unlike other forms of partnership, to be incorporated under a corporate name.

The *EITO* case must not stand as an example of the ineffectiveness of state law in the global economy, but rather, further indication that even in the European Union, state law does not yet function effectively in the transnational legal field:[66] matters of

[65] For similar reasons, state law also has difficulty in regulating business transactions on the Internet. See: A. Mefford, "Lex Informatica: Foundations of Law on the Internet" [1997] Global Leg. Stud. J. 211.

[66] The territorial limitations of state law have also proved problematic for merchants. In medieval times, the "Law Merchant" or *lex mercatoria* was established by traveling trade merchants who found that the territorial preoccupations of state law made it of little practical use in the resolution of their trade disputes. They developed

territorial sovereignty intervene. Even as Member States pool sovereignty to establish a transnational, "shared" European legal order, the understanding of a state's legal authority remains closely linked to concepts of a sovereign state, a state that is defensible on jurisdictional (territorial) terms.

The German Court's decision in *EITO*[67] is a compelling example of the awkward confrontation that occurs as Member States erode the institutions of territorial sovereignty to achieve a Single Market on the one hand, but struggle to maintain sovereignty over particular spheres of legal jurisdiction on the other. To the extent that "territoriality" implies the delimitation of a state's power, it is "territoriality," and not pragmatism, which underlies the technical legal issues raised in this case. To appreciate this point, it is helpful to recall briefly how the territoriality principle can be applied under international law in an analogous case. In their examination of the international law of expropriation, Kegel and Seidl-Hohenveldern examined case law in the United States and Western European countries. They found, for example, that the West German court relied on the principle of territoriality to avoid the application of foreign public law in conflict of laws situations that concern domestic legal relations.[68] Here again, the court's approach illustrates how closely the various concepts of absolute state sovereignty, state legal authority, and state borders are bundled together into an understanding of territoriality.

The *EITO* case illustrates in a general way how, when business strategies are implemented across state legal jurisdictions, the jurisdiction of state law is a territorial concept, regardless of whether the state's jurisdiction is defined by prescriptive means or enforcement, in terms of "territory" or its effects. In the case of European company law, divergences between state laws impede the implementation of a uniform and transnational regulatory strategy for European corporate forms. Arguably, the stumbling

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instead special merchant courts to preside over the application of commercial customs and rules used by merchants in the resolution of commercial and trade disputes. Over time, certain practices became accepted as the standard. Some rules of *lex mercatoria* came to have international character. Trakman maintains that state policy and national interests motivated the eventual codification of *lex mercatoria* during the 18th and 19th centuries. The result was that nation-state law temporarily replaced an independent *lex mercatoria*. As a result, when international commercial transactions involve conflicts among state laws, such conflicts are negotiated through rules governing international relations among states in a system of conflict of laws rules rather than a private code of norms among law merchants. See ***e.g.*** J.-G. Castel, *Introduction to Conflict of Laws*, 2nd ed., (Toronto: Butterworths, 1986). For historical background of the development of *lex mercatoria* see for example: L.E. Trakman, "The Evolution of the Law Merchant (1980-81) 12 Marit. L. & Comp. 1; H.J. Bermann & C. Kaufmann, "The Law of International Commercial Transactions" (1978) Har. Int. L. J. 221; and C. Schmitthoff, "International business law: A new Law Merchant" (1961) Curr. Law & Soc. Prob. 129; and C.O. Stoecker, "The Lex Mercatoria: To What Extent does it Exist" (1990) 7 J. Int'l Arb. 101.

[67] *EITO, supra* note 1.

[68] See G. Kegel & I. Seidl-Hohenverdern, "On the Territoriality Principle in Public International Law" trans. J.J. Darby (1981 - 82) 5 Hastings Int'l & Comp. L. Rev. 246 at 265.

blocks to a European body of company law signal where global business practices conflict with sovereign state interests. Persistent differences among Member State laws are an indication that nation-state law no longer offers an adequate basis for regulatory control. Removing the state from the regulatory process is no solution either. The research here finds that such resistance arises from the difficulty that the Member States have had in overcoming the notion of territorial state sovereignty. The constraints placed on the negotiation of the Euro-Grouping Regulation are poignant reminders that sovereignty over socio-economic choices is by nature, not a flexible concept.

The experiences of Euro-Groupings suggest that the concept of "non-territorial " or "de-territorialized" sovereignty, advanced in the international relations literature, is pertinent to the transformation of state legal authority in the global economy. The *EITO* case illustrates how the need to define the jurisdiction of a Member State's laws imposes limits on the scope of European authority, an important point as Member States continue to debate how much sovereignty they will pool at the European level on various political, social and economic matters.

The construction of an integrated market among the European Member States is a means to ensure that the state and its institutional structure function at a level relevant to the globalized experiences of the market's constituents. As the Member States seek to mitigate the extent to which these forces compromise sovereignty, the collective and transnational expression of state sovereignty through European law broadens and deepens. International relations scholars rightly point out that the erosion of territorial sovereignty is, in part, a state-generated phenomenon.

Even so, the *EITO* case demonstrates that some territorial notion of sovereignty remains -- even in the European Union, where states tear down their borders and negotiate the terms of state sovereignty to forge a new, transnational, state legal order. Europeans understand only too well that certain state laws perpetuate differences, differences that constitute important borders and distinguish one country from another. Moreover, it is apparent that the European law created also operates on the premise of "borders and jurisdiction," a premise which holds European law, like the laws of individual Member States, to a territorial principle. Arguably, the intention in the European Union was never to de-territorialize state law, but rather, to allow state law to function in the transnational field. If concepts of "non-territorial sovereignty" are indeed descriptive of the transformation of the state in the new economy (and the evidence to that effect is persuasive), then more analytical work is needed to understand how state law will function in the transnational legal field.

Territoriality principles operate on the fundamental assumption that sovereignty is measurable in terms of the jurisdictional scope of state law. Indeed, a system of international order among states relies on the notion that both state sovereignty and state law are bounded by some measure of jurisdictionally defined interest. The

argument here is that even when expressed in conceptual and jurisdictional terms, a map of the state necessarily appears. The sphere of a state's powers is delimited, and borders are inevitable.

The confusion surrounding various features of Euro-Groupings such as the determination of suitable corporate names discloses the extent to which concepts of territorial sovereignty remain central to the application of state law and legal authority. The territoriality of state law presents certain challenges to the assertion of state legal authority in the global economy. It is argued that in the global economy, corporations have greater freedom to pick and choose the state laws by which they shall be ruled. Trade liberalization, for example, gives corporations a selection of states in which to register. Such circumstances place states into regulatory competition with each other as each strives to attract tax revenues and jobs. The metaphors "race to the bottom," "race to laxity," "forum shopping," and "Delaware Syndrome" describe the undesirable consequences arising from legal and regulatory competition among states when the objectives of state law are subjected to bargaining options. In the context of the global economy and new corporate forms for doing business across borders, any such race poses political, as well as regulatory consequences. The obvious point is worthy of note: the corporation doing the "shopping" has a degree of mobility and flexibility about its location that state law clearly does not have. In this sense, the jurisdiction of state law is location dependent. Robé observes:

> With the internationalization of the economy, the de-territorialized enterprises can play a certain game by making various state systems compete, and this gives them a considerable advantage in making sure that positive norms and institutions are adopted in a manner conforming with their own interests, because there is no political structure of representation of the common interest challenged at the global level.[69]

The problem is that institutions of globalization, both private and public, can permeate and transcend state legal regimes, whereas state legal regimes, by virtue of their reliance on jurisdictional concepts, cannot trump the globalization process to the same extent. European law attempts to reverse this relationship. Arguably, European law results from a conscious decision to establish a collective, transnational forum in which a new form of state sovereignty and legal authority can be made to operate on the same transnational level as the globalization process. European law does not arise from the extra-territorial assertion of Member State law. Rather, Member States negotiate and reconstruct aspects of their sovereignty in order to construct a

[69] J.P. Robé, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order" in G. Teubner, ed., *Global Law without a State* (Dartmouth: Aldershot, 1997) at 70 - 71.

transnational, state legal order. European law represents state efforts to expand the jurisdiction of state law into the global dimensions of the world economy. In this way, the principles of European law are substantially different from international public law.[70] Principles of international public law deal with only those norms and rules regulating inter-state behaviour to establish a law among nations. European law attempts to regulate the relationship between the state and the global economy. It remains to be seen, however, whether the transnational level of European law amounts to a "de-territorialization" of state law.

Under such circumstances, the idea that "the legislative competence of every State ends at its borders"[71] may no longer provide the basis for adequate representation of the sovereign interests of states or the legal order among them. The observations made in international relations scholarship which find that globalization has "de-territorialized" state sovereignty support this argument. Yet, the notion that sovereignty can be expressed in non-territorial terms fails to account for the territorial assumptions underlying state legal authority. In part, the failure to account for the legal implications of de-territorialized sovereignty stems from the exclusion of law and legal theory from the purview of international relations discourse, and vice-versa.

Conclusion

The international relations discourse has not taken into account what is happening to state sovereignty in the legal field. It has yet to deal with "the implications of the change in significance of national boundaries and of territoriality for a theory of justice" that legal scholars such as Twining argue are now so necessary.[72] The contention made in international relations studies must be taken seriously. But in this instance, it is not enough to leave law to the lawyers, and politics to the political scientists.

In summary, the idea that space-adjusting technologies establish a single global space[73] discounts the lessons of European company law. It discounts the role that state law continues to play in dividing that space along territorial lines. It is significant that, in the European Union, where the Member States have taken seriously the task of re-drawing those lines, the territorial basis of state legal jurisdiction not only persists, but also plays an important role in shaping the legal order of the European Union,

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[70] D. Wyatt & A. Dashwood, *Wyatt and Dashwood's European Community Law*, 3rd ed. (London: Sweet and Maxwell, 1993) at 54 - 55.

[71] Kegel & Seidl-Hohenverdern, *supra* note 69 at 271.

[72] W. Twinning, "Globalization and Legal Theory" (1996) 49 Curr. Leg. Probs. 1 at 27 n. 73 and accompanying text.

[73] Brunn & Leinbach, *supra* note 10.

distinguishing the collective and transnational European jurisdiction from that of the Member States. While it is true that the writers within the discipline of international relations studies differ on the degree to which the globalization process diminishes the state, there is, at least, general agreement that the state has been transformed. Contrary to Ohmae's assertion that globalization has made the nation-state a dysfunctional unit in a borderless world,[74] international relations discourse focuses attention on the facts. The state has not disappeared. It continues to be relevant. International relations scholars more properly consider how "the global trading system is redefining state norms and practices everywhere and represents a threat to the way national economies are constructed."[75] They focus on understanding how the state is being transformed as a result and how it emerges in a new institutional form. The insight offered into the emergence of non-territorial sovereignty must be taken further to account for the kind of legal principles required to allow the state to operate effectively in the new de-territorialized domain described. The examples of Euro-Groupings—even the ludicrous dispute over a suitable corporate name—attest to the significance of what is being left unsaid, and the relevance of more thorough discussion to routine business practices. After all, both the German Court and *EITO* had the obvious case to make: names matter. In this case, the matter of a corporate name stood for more than a corporate interest. It became the issue over which a legal boundary between European and German legal authority was drawn. In the *EITO* case, the resolution of the problem required the courts to stake out legal territories. As the stakes were put down, the German stakes were protected and Germany was seen to retain sovereignty in the face of the European Union.

[74] R. Boyer & D. Drache, eds., *States Against Markets: The Limits of Globalization* (London & New York: Routledge, 1996) at 31.

[75] *Ibid.* at 36.