SUPRANATIONAL STATENESS: INTERNATIONAL COURTS AND THE GLOBALIZATION OF POLITICAL POWER

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The institution of sovereignty has transformed significantly since Max Weber offered his seminal definition of states as monopolies of legitimate violence. This article develops stateness as an analytical tool for assessing the transformations of sovereignty associated with global governance in general and the juridification of international affairs (the increase in treaty-based law, international legal institutions, and third-party disputes between state and nonstate actors) in particular.

Stateness refers to superordinate authority and capacities for coercion. In other words, it refers to the degree to which an entity has the final say, either due to its perceived legitimacy or its capacity to enact its will. Stateness is a parsimonious framework for empirically identifying the state-like qualities of political institutions, including global-governance actors. This framework is grounded in several propositions derived from the study of the state: (1) there is no logically necessary institutional or territorial form of state power; (2) states deploy various means of rule, including nonmartial forms of coercion; and (3) excommunication from vital resources is the ascendant modality of power in international affairs. Applied to the cases of the European Union and the World Trade Organization, two of the most elaborated international legal systems, stateness highlights their state-like qualities while also permitting that novel state formations may break radically with modern notions of territorial sovereignty.

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INTRODUCTION

Voters in the United Kingdom stunned the world when they decided to leave the European Union (EU) in 2016. Widely perceived as a resurgence of nationalist politics, British exit (Brexit) highlighted the state-like powers of the EU and the Council of Europe's human rights court as a leading cause of British discontent. The tensions revealed by Brexit are one manifestation of a general mismatch between the geographic scale of economic processes and the scale of political institutions associated with sovereignty in a globalized world.[1] In past decades, this mismatch fostered the structural transformation of states, a proliferation of international organizations—including courts—and, as a result, new relationships between territory, jurisdiction, and sovereignty.[2] Scholars of global governance have highlighted how various kinds of international institutions perform functions similar to those of nation-states. But precisely how to theorize the reordering of political power under conditions of globalization, and what this means for how we understand sovereignty, remains controversial.

This paper develops the idea of *stateness* as a construct for empirically identifying the operation of state power at the supranational scale.[3] Referencing the Appellate Body of the World Trade Organization (WTO) and the Court of Justice of the European Union (CJEU)—two very different but advanced cases of juridified international affairs—this article conceptualizes stateness as superordinate decisionmaking that varies along two di-

1. *See generally* FOLKER FRÖBEL, JÜRGEN HEINRICHS & OTTO KREYE, THE NEW INTERNATIONAL DIVISION OF LABOUR (Pete Burgress trans., 1981) (arguing traditional forms of production are undergoing profound structural change as a result of cheap labor abroad, increased technological and logistical efficiencies, and the division of production into smaller units).

2. SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (updated ed. 2006); John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139 (1993); Stephen J. Kobrin, *Back to the Future: Neomedievalism and the Postmodern Digital World Economy*, 51 J. INT'L AFFS. 361 (1998); Neil Brenner, *Beyond State-Centrism? Space, Territoriality, and Geographical Scale in Globalization Studies,* 28 THEORY & SOC'Y 39 (1999).

3. Other scholars have worked with this term but conceive of it differently. *See, e.g.,* Peter Evans, *The Eclipse of the State? Reflections on Stateness in an Era of Globalization*, 50 WORLD POL. 62 (1997); J.P. Nettl, *The State as a Conceptual Variable*, 20 WORLD POL. 559 (1968).

mensions: (1) superordinate authority, which refers to variation in the symbolic and normative character of legitimate domination; and (2) bureaucratic administration and material means of politics, including the capacity for violence and other coercive governance techniques. A high degree of stateness exists when *superordinate authority* coincides with *superordinate coercive capacity*. A lower degree of stateness exists when these dimensions are absent or underdeveloped, as in the case of failed states, where weak coercive capacity receives limited obedience. The dimensions of stateness may also diverge, as when governments fail to secure legitimacy through robust coercive capacity or when superordinate authority exists absent an elaborated capacity for material coercion, as suggested by the global authority of the Vatican.

Despite major transformations in states and the interstate system, most scholarship retains the classic Weberian conception of states as bounded territorial jurisdictions of legitimate violence existing in an anarchic ecology of other sovereign states.[4] This is clearest in the dominance of principal-agent theories, which explain the power of international organizations as deriving solely from member-states. This conception precludes international organizations from the possibility of stateness. Even where various state transformations have been identified and effectively theorized, scholars tend to pay most attention to state power, while neglecting the changing form and function of already recognized states, and they continue to presume that membership in the category of entities called 'states' retains the same significance as when Weber first formulated his definition of statehood.[5]

The concept of stateness responds to the emergence of supranational organizations with real capabilities. It can be used to identify new forms and loci of political power, which may or may not be completely institutionalized, centralized, or coherent, but also cannot be fully accounted for through conventional legal categories of sovereignty or theories of delegated

4. The Weberian conception of statehood derives from Max Weber's 1918 lecture *Politics as a Vocation*, where Weber defines a state as a "human community that (successfully) claims the *monopoly of the legitimate use of physical force within a given territory*." MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (emphasis in original). For an expanded exploration of Weber's conception of statehood see Section II.A (Superordinate Authority) of this Article.

5. Whether we call them welfare states, competition states, regulatory states, or developmental states, we are generally referring to, and acknowledging variation within, the same set of entities.

authority. The need for a more robust concept of stateness reflects the growing importance of nonmartial and often deterritorialized forms of coercion that are now the more routine expression of state power in addition to the expansion of global governance entities exercising real power.

The location and form of superordinate decisionmaking is the cardinal issue that justifies invoking the state in theories of supranational authority. Superordinacy means having the final say. It is what ultimately defines all types of state formations, despite the great historical variety in their organization, institutionalization, and territorialization, including both federal systems and unitary systems. The connection between superordinate power and territory and the institutional form of such power is an empirical, not a definitional, matter. Stateness offers criteria for identifying state power unencumbered by assumptions about the relationship between territory and jurisdiction or the modes through which power is exercised and obedience achieved.

Stateness can be used to inquire about the state-like powers of *any* entity. Of course, most entities, including most intergovernmental and nongovernmental organizations, clearly do not exercise state power in any way. But at the same time, the category of entities exercising state-like powers is broader than the formal territorial jurisdictions of existing states. This is difficult to see when starting from the inherited categories of states. But it is necessary for recognizing that some international organizations wield considerable power—at times superordinate to that of some states. The WTO and CJEU, as shown below, offer two such cases, but others readily come to mind, including the role of the World Bank and the International Monetary Fund in implementing structural adjustment policies in Latin America during the 1980s and 1990s. That these organizations exercise some degree of stateness, even if only a little or only at times, is nonetheless a major difference from the classical and historical understanding of states and the interstate system.

Stateness provides a highly parsimonious tool for knowing when to invoke the concept of the state in the first place, particularly when dealing with entities not conventionally categorized as states. Using this tool will lead to a much broader category of entities asserting state power than conventionally construed. This will create theoretical and methodological opportunities for developing new theories of the emergence, institutionaliza-

tion, and expression of state power by comparing levels of stateness among supranational entities and states. At the same time, the concept of stateness can complement the use of other theories of states to empirically define and theorize the specific contexts, competencies, and uses of state power. Other frameworks may better account for how particular manifestations of stateness are shaped by specific historical contexts, networks of power resources, and the arrays of actors seeking to create, reproduce, resist, or mobilize state power.

By developing stateness, this Article extends recent scholarship on power and hierarchy in global governance[6] and highlights the superordinate character of select international courts. International courts are particularly significant sites for the study of state power and global governance because many engage in varying degrees of judicial review of state action. The CJEU and WTO Appellate Body were chosen as cases because they are prominent and familiar examples of international third-party dispute resolution that have rendered decisions against powerful member governments and received compliance. Both hold compulsory jurisdiction to have final say over the legality of certain national state policies and actions, though their formal jurisdiction perhaps matters less than the historical and institutional dynamics that enabled their partially autonomous and superordinate decisionmaking. If there is anything to the stateness idea as applied to international actors, then it should be here. This is not to say that no other court systems assert some form of stateness. Many institutional design features that enable the juridical power of the CJEU have been exported to other international legal systems, such as the Andean Justice Tribunal, the Common Market for East African States, or the Economic Community of West African States.[7] This suggests that elements of stateness may also be found elsewhere and that the stateness of the CJEU or WTO may indicate a broader transformation of sovereignty associated with the juridification of international affairs.[8]

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6. *See generally* POWER IN GLOBAL GOVERNANCE (Michael Barnett & Raymond Duvall eds., 2005).

7. Karen J. Alter, *The Global Spread of European Style International Courts*, 35 W. EUR. POL. 135 (2012).

8. The "juridification of international affairs" refers to an increase in the number of international legal institutions, treaty-based positive international law, and international third-party disputes between states and between states and other actors. This entails not only *more* law and procedure in international

The EU[9] is the most advanced example of law-driven supranational stateness, because it exerts superordinate authority over member states in critical areas of sovereign authority, such as monetary policy, immigration policy, and interpreting national laws. The CJEU is the highest court of the European legal system. It interprets, applies, and enforces EU law. First established as the Court of Justice of the European Coal and Steel Community, it became the European Court of Justice through the Treaty of Rome in 1957.[10] It is now composed of a General Court of first instance, consisting of a standing bench of two jurists from each EU country, and an appeals court bearing the title 'Court of Justice,' which is composed of a standing bench of a single jurist from each member country.[11] Enforcement occurs through infringement proceedings, initiated at the discretion of the European Commission, which can result in financial penalties against a violating member-state. If such measures fail to resolve a "serious and persistent breach" of the values on which the EU was founded—as detailed in Article 2 or the Treaty of the European Union (TEU)—then under Article 7 of the TEU the matter can move to the European Council, which is composed of high-level representatives of member governments.[12] With the consent of Parliament, the Council can suspend the rights of the member state, including voting rights in the Council. While infringement cases are increasingly common, the Article 7 procedure has only twice been triggered and those matters have yet to result in implementing sanctions.[13]

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affairs, but also qualitative changes in the nature of international law, which entities have standing and thus rights, the responsibility of states to international society (e.g., norms *erga omnes*), and in the location of important decisionmaking from individual state judiciaries to new forums with extra-territorial jurisdictions.

9. I will refer to the 'European Union' even when matters discussed are technically related to the European Community prior to the Maastricht Treaty of 1992. Similarly, I will refer to EU governance institutions by their current names.

10. *The First Treaties*, EUR. PARLIAMENT, https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.1.pdf [https://perma.cc/PL6P-EXXS].

11. *Court of Justice of the European Union (CJEU)*, EUR. UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en [https://perma.cc/UB9K-FYNL].

12. Consolidated Version of the Treaty on European Union art. 7, ¶ 2, 2012 O.J. (C326).

13. The first invocation of Article 7 of the TEU was against Poland, in 2017. The second invocation was against Hungary, in 2018. Both procedures remain ongoing, and the sanctions provided in Article 7 remain unimplemented, pending review by the Council. Martin Michelot, *The "Article 7" Proceedings Against Poland and Hungary: What Concrete Effects?*, JACQUES DELORS INST. (June 5, 2019), https://institutdelors.eu/en/publications/__trashed/ [https://perma.cc/4GMS-AKKT].

The constitutionalization of the EU through the rulings of the CJEU has been well-documented.[14] The CJEU has developed doctrine supporting European integration through specific institutional design features, such as the preliminary reference procedure and the activism of "Euro-lawyers." This shifted the location of superordinate decisionmaking about certain critical matters away from national governments and transformed Europe into a quasi-federal system with state-like characteristics.[15]

The CJEU's judgments have fostered a "vertical" dimension of European integration by defining the allocation of powers between member states and EU governance institutions. This vertical dimension most clearly demonstrates the stateness of the EU and has occurred through: (1) the embedding of European law in national legal orders; (2) doctrinal advances supporting the primacy of EU law over national law;[16] and, (3) the CJEU's pivotal role in managing the allocation of power among the Commission, the Council of the European Union, the European Council, and Parliament. These aspects constitute 'Juridical Europe' and provide evidence of the court-led character of European federalism.

The WTO is an international-treaty organization that administers rules for the international trading system. It is most noted for the comprehensiveness of its membership, accounting for nearly all of the world's gross domestic product,[17] and for the juridification of its dispute settlement mechanism. The WTO replaced the diplomatically oriented dispute settlement process of the General Agreement on Trade and Tariffs (GATT) in 1995 with a more formal, juridical model of third-party dispute resolution. A dispute can be initiated by one or more member countries against another. Then, an *ad hoc* panel of experts is selected to review and render a

14. *See, e.g.*, Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution;* 75 AM. J. INT'L L. 1 (1981); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); Alec Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance*, LIVING REVS. IN EUR. GOVERNANCE, 2010, at 5.

15. Weiler, *supra* note 14.

16. Alec Stone Sweet, *European Integration and the Legal System*, *in* 6 THE STATE OF THE EUROPEAN UNION: LAW, POLITICS, AND SOCIETY, 18, 24 (Tanja A. Börzel & Rachel A. Cichowski, eds., 2003).

17. *WTO in Brief*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm [https://perma.cc/A3EL-AST7].

judgment on the complaint.[18] Any party may appeal the panel's decision to the WTO Appellate Body, composed of a standing bench of jurists appointed by the organization's membership for four-year, renewable terms. Appellate Body decisions are enforced by formally authorizing the complaining country to unilaterally impose higher tariffs on imports from the offending country.[19]

Through its membership requirements, extensive trade-practice monitoring, and judicial rulemaking processes, the WTO has, at times, gone beyond the 'ordinary meaning' of the treaty text to redefine member-state obligations,[20] shape the political and legal meaning of territorial borders, shift boundaries between state and market,[21] drive new specializations and practices in the legal profession,[22] author new normative frames and standards for legitimacy,[23] and alter the institutional architecture of national states.[24] As a result, the WTO has changed the balance of power within national governments toward those actors and agencies favoring international trade.[25]

The dispute settlement systems of both the WTO and CJEU have faced steep challenges recently, including Brexit and the suspension of Ap-

18. *See The Process — Stages in a Typical WTO Dispute Settlement Case*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm#:~:text=There%20are%20three%20main%20stages,by%20the%20losing%20party%20to [https://perma.cc/S6N8-CYNU].

19. *See Appellate Procedures*, WORLD. TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm, [https://perma.cc/YEL7-GX5X].

20. *See* Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39 (2001); Sungjoon Cho, *Global Constitutional Lawmaking*, 31 U. PA. J. INT'L L. 621 (2010).

21. Gregory Shaffer, *How the World Trade Organization Shapes Regulatory Governance*, 9 REGUL. & GOVERNANCE 1 (2015); *e.g.*, GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN W.T.O. LITIGATION (2003).

22. Yves Dezalay & Bryant G. Garth. *Law, Lawyers, and Empire*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920–), 718, 719 (Michael Grossberg & Christopher Tomlins eds., 2008).

23. MATTHEW EAGLETON-PIERCE, SYMBOLIC POWER IN THE WORLD TRADE ORGANIZATION (2013).

24. NITSAN CHOREV, REMAKING U.S. TRADE POLICY: FROM PROTECTIONISM TO GLOBALIZATION (2007); Gregory Shaffer, Michelle Ratton Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008); Gregory Shaffer, James Nedumpara & Aseema Sinha, *State Transformation and the Role of Lawyers: The WTO, India, and Transnational Legal Ordering*, 49 LAW & SOC'Y REV. 595 (2015).

25. *See* CHOREV, *supra* note 24; SHAFFER, *supra* note 21; John H. Jackson, Robert E. Hudec & Donald Davis, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, BROOKINGS TRADE F., 2000, at 179; Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate: Effects of WTO Judicial Delegation on U.S. Trade Politics*, LAW & CONTEMP. PROBS., Winter 2008, at 257.

pellate Body operations under political pressure from the United States. Both will be discussed in detail below, but each episode reveals the stateness of these entities in ways that are not well-accounted for in the conventional Weberian framework. The next Section revisits the most prominent theory utilizing the Weberian framework: principal-agent theory, which is ultimately found wanting because of its reliance on deeply embedded presumptions about the location of state power and its relationship to territory and force that fail to account for the capacities of international organizations. Part II returns to the issue of superordinate decisionmaking as it is treated in state theory to establish that there are no logically necessary institutional or territorial forms of state power. States deploy various means of rule, including nonmartial forms of coercion; and the ascendant modality of state power in international affairs is social closure—excommunication from vital resources. Parts III and IV return to the courts to examine their means of generating compliance and demonstrate in detail the character of their stateness. This Article concludes by considering broader implications of the emergence of stateness in international affairs.

I. DELEGATED AUTHORITY AND JUDICIAL AUTONOMY

The most common way of theorizing the power of international organizations is through "delegation" or principal-agent theory, with states acting as principals and international organizations acting as agents. In this approach, states conserve their sovereignty and realize their strategic preferences by delegating authority to international organizations.[26] Doing so enhances the credibility of decisions,[27] helps overcome information asymmetries,[28] and shifts blame for politically unpopular policies.[29] For instance, when states self-bind through WTO agreements, they enhance their

26. CLIFFORD J. CARRUBBA & MATTHEW J. GABEL, INTERNATIONAL COURTS AND THE PERFORMANCE OF INTERNATIONAL AGREEMENTS: A GENERAL THEORY WITH EVIDENCE FROM THE EUROPEAN UNION 38 (2015); *see* Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 INT'L ORG. 533, 535 (1992).

27. Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103 (2001).

28. *See, e.g.*, CARRUBBA & GABEL, *supra* note 26.

29. Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes*, 1 J. L. & CTS. 61, 64 (2013).

ability to pursue trade liberalization by providing information about trading partners' practices while allowing states to choose whether to follow the rules.[30] As such, the WTO is ultimately subservient to states' interests. Similarly, the CJEU acts as a "fire alarm"[31] and "information clearinghouse"[32] by evaluating member states' practices, while the ultimate decision to follow the court's ruling remains with each state.

But delegation theory presumes that states retain both the capacity to and an interest in controlling their agents. Under this framework, the ability of states to control international courts depends, in part, on the court's functions and institutional design. If states want enforcement of treaty rules, courts provide a legitimate means of doing so. But to serve that function, a court must also be empowered to review, interpret, make judgments about rule implementation, and provide means for enforcement.[33] The indeterminacy of formal legal texts, particularly significant in internationally negotiated agreements, often surfaces in disputes and creates the potential for judicial lawmaking outside the purview of principal states.

Judicial rulemaking potential depends on states' political oversight of the court. In some cases, the delegation of power is open-ended, which creates autonomy for judicial discretion. Stone Sweet defines a "trustee court" as holding compulsory jurisdiction to review state actions, determine their legality, and annul those found illegal while enjoying substantial insulation from state efforts to alter, ignore, or reverse its decisions.[34] The CJEU has, and the WTO used to have, expansive scope for autonomous decisionmaking. The costs of exiting their jurisdictions are high. And political oversight generally requires a high level of agreement if not unanimity among the principals, a burden difficult to meet in practice. Delegation theory does not anticipate these features of trustee courts.

Beyond delegation theory, recent global-governance scholarship has acknowledged how the rules, capacities, and practices of international or-

30. Manfred Elsig, *Principal–Agent Theory and the World Trade Organization: Complex Agency and 'Missing Delegation'*, 17 EUR. J. INT'L REL. 495 (2010).

31. CARRUBBA & GABEL, *supra* note 26, at 24.

32. Garrett, *supra* note 26.

33. *See* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).

34. Alec Stone Sweet, *The European Court of Justice*, *in* THE EVOLUTION OF EU LAW, 121, 127-28 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011); Sweet, *supra* note 14, at 15.

ganizations can legitimate their authority.[35] Scholarship on the regulatory state has shown how some international courts have restructured state agencies and the boundaries between state and market.[36] From the vantage point of these two lines of scholarship, international organizations are not just passive state agents but may instead be endowed with certain capacities, resources, and authority that can serve as the basis for autonomous decisionmaking and agenda setting.[37] This has shifted the forms and functions of states.

For instance, Cerny's idea of the "competition state" usefully tracks the transformation of welfare states as they reorient toward global economic competition.[38] Acting not as containers but as "strainers," states are "transnationalized from within and from without."[39] A "strainer" is compelling imagery for national borders under conditions of globalization. Still, as Weiss and others argue, focusing only on how states have changed tends to mistakenly retain the Westphalian interstate system as the primary framework, even if highlighting the capacities and resources of nonstate global-governance actors at the same time.[40] This critique also extends to related frameworks, such as those of regulatory [41] or developmental states, [42] which still presume the Westphalian "map" of the international. These fail to ade-

35. *See* David A. Lake, *Rightful Rules: Authority, Order, and the Foundations of Global Governance*, 54 INT'L STUD. Q. 587 (2010); Michael Zürn, Martin Binder & Matthias Ecker-Ehrhardt, *International Authority and Its Politicization,* 4 INT'L THEORY 69 (2012); *see generally* POWER IN GLOBAL GOVERNANCE, *supra* note 6.

36. *See* CHOREV, *supra* note 24; SHAFFER, *supra* note 21.

37. MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 156 (2004); *see* SHAFFER, *supra* note 21; Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS. 1, 35 (2016).

38. *See* Philip G. Cerny, *The Competition State Today: From* Raison d'État *to* Raison du Monde, 31 POL'Y STUD. 4-5 (2009).

39. Philip G. Cerny, *Functional Differentiation, Globalization and the New Transnational Neopluralism*, *in* BRINGING SOCIOLOGY TO INTERNATIONAL RELATIONS: WORLD POLITICS AS DIFFERENTIATION THEORY 205, 224 (Mathias Albert, Barry Buzan & Michael Zürn eds., 2013).

40. *See* Thomas G. Weiss, *What Happened to the Idea of World Government?*, 53 INT'L STUD. Q. 253 (2009); Thomas G. Weiss & Rorden Wilkinson, *Rethinking Global Governance? Complexity, Authority, Power, Change*, 58 INT'L STUD. Q. 207 (2014); BOB JESSOP, THE STATE: PAST, PRESENT, FUTURE 29-33 (2016).

41. The idea of a regulatory state emphasizes how states rearticulate their modes of social and economic control under the influence of privatization and deregulation. *See e.g.*, Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77 (1994).

42. The literature on the developmental state identifies other state types based on the relationship between those that hold state power and social formations. *See e.g.*, PETER EVANS, EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION 4 (1995).

quately consider the expansion of international organizations, global governance, and the juridification of international affairs.

The concept of stateness focuses attention on the locus of superordinate decisionmaking without presuming a relationship between superordinate decisionmaking and territory or means of violence. As will be examined in greater detail in the next Section, the relationships between a territory, violence, and superordinacy are empirical and historical questions. Treating them as such extends the global governance literature's concern for international hierarchy by highlighting the superordinate character of some international actors, including courts, even though they do not take the form of conventional Weberian statehood.

II. SUPERORDINACY AND STATENESS

Superordinacy is the pivotal issue that justifies invoking the concept of the state for understanding the authority of international courts. The concept is common in state theory. States are "summating concepts,"[43] possessing "clear priority"[44] and "supreme" jurisdiction[45] to organize other organizations.[46] Also invoking superordinacy, Weber describes the emergence of the modern state as concentrating the "total means of political organization, which actually come together under a single head,"[47] which "stands in the top place."[48]

Superordinate power exists over a jurisdiction, which may or may not be discretely territorialized and varies in the mix of authority and coercive capacity mobilized to acquire obedience. Liberal states, for instance, are superordinate lawmakers, decisionmakers, and rule enforcers.[49] But the scope of their jurisdiction is restricted to the "public" domain while "private" authority is generally excluded from the state's jurisdiction even as the distinction between the two is repeatedly reworked. Enforcement of a liberal

43. Nettl, *supra* note 3, at 562.

44. CHARLES TILLY, COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1992, at 1 (1992).

45. STATES AND SOCIETIES 1 (David Held et al. eds., 1983).

46. John Joseph Wallis, *Institutions, Organizations, Impersonality, and Interests: The Dynamics of Institutions*, 79 J. ECON. BEHAV. & ORG. 48, 51 (2011).

47. WEBER, *supra* note 4, at 82.

48. *Id.*

49. *See* GÖRAN THERBORN, WHAT DOES THE RULING CLASS DO WHEN IT RULES? (1978).

state's laws is accomplished through the monopoly on legitimate violence, and also, and more commonly, through the cultural legitimation of hierarchy and institutionalized control over access to vital resources, both material and symbolic. The means of stateness are composed of two dimensions: (1) superordinate authority, which refers to variation in the symbolic and normative dimensions of legitimate domination; and (2) variation in bureaucratic administration and material means of politics, including the capacity for violence and other coercive techniques.

A. *Superordinate Authority*

Institutional approaches to the state begin with Weber's definition: "a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory."[50] Conventional interpretations often gloss over the importance of legitimacy and ignore the more general definition that follows in the text, which highlights not force but the routine production of legitimate domination: "[T]he modern state is a compulsory association which organizes domination."[51] Weber then continues to examine not the martial capacities of modern states but the production of authority: "If the state is to exist, the dominated must obey the authority claimed by the powers that be," and then asks: "When and why do men obey?"[52] Weber answers with three justifications for obedience (legal-rational, traditional, and charismatic), none of which directly relate to coercion.[53] Violence is one strategy for securing the right to rule that predominated in the emergence of the state system: state power was established over society through acquisition of territory by force, and legitimacy gradually followed over time.[54] Violence, however, became increasingly difficult to wield, because it must be legitimated, and today it generally operates in the background of state regulation, coming to the fore only in circumstances

50. WEBER, *supra* note 4, at 78 (emphasis in original).
51. *Id.* at 82.
52. *Id.* at 78.
53. *Id.* at 78-79.
54. *See, e.g.*, TILLY, *supra* note 44, at 70; NORBERT ELIAS, THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS (Eric Dunning, Johan Goudsblom & Stephen Mennel eds., Edmund Jephcott trans., rev. ed. 2000).

where legitimization fails.[55] An appropriate conception of superordinate authority should not define away historical variation in the techniques, violent or not, deployed to secure superordinate authority by insisting on "the monopoly of the legitimate use of physical force" as alone defining modern states or state power.[56]

Superordinate, legitimate domination without the institutionalization of coercive capacity resembles Weber's notion of charisma. Superordinate coercive capacity without superordinate authority is despotic power. Neither dimension of stateness is generally stable in isolation. Authority almost always accompanies institutionalized coercive power. But it is possible for these to diverge in degree, as they do with the CJEU and WTO, which assert strong authoritative claims over the meaning of legal obligations (particularly in the case of the WTO, which relies on a highly limited repertoire of coercive techniques).

B. *Superordinate Coercive Capacity*

The material means of political power involve the administration of property, tools, money, and instruments of warfare. Although seizing political power from private holders "has occurred with varying success in all countries on earth,"[57] there is historical variation in (1) the functions performed by states, (2) the centralization and coherence of the state apparatus, (3) the relationship between territory and physical force, and (4) the scope and character of coercive resources beyond physical violence.

1. Variable Functions

Historically, most states had very few functions and unelaborated administrative structures. Early-modern states largely engaged in just extrac-

55. *See generally* BOB JESSOP, STATE THEORY: PUTTING THE CAPITALIST STATE IN ITS PLACE (1990).

56. Schmittian conceptions of the sovereign as the actor that decides on the exceptional use of force similarly rely on a thinly juristic conception of legitimacy derived from sovereign discretion. "Like every other order, the legal order rests on a decision and not on a norm." CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., 2005), at 10 (1922).

57. WEBER, *supra* note 4, at 83.

tion and protection but accomplished this in different ways. Tilly, for instance, identifies two basic historical paths to early-modern statehood, one that is organized around merchant capital and reliant on mercenaries for military power ("capital-intensive"), and the other that is characterized by armed landed elites placing in-kind resources in service to the state through direct extraction and coercion ("coercive-intensive").[58] Over time, states acquired additional functions, but they still exhibited considerable variation. The Vatican, for instance, relinquished key apparatuses common in most other states—namely, the material means for violence.[59] States have also developed different institutional forms of social safety nets and economic intervention, such that state functions are highly variable.[60]

2. Variable Centralization and Coherence

The rise of European welfare states exemplifies a common pattern of political centralization, where the state's specialized bureaucratic institutions form a distinctive institutional domain differentiated from the rest of society.[61] In contrast, the United States has a long history of decentralized governmental apparatuses, a common-law tradition that diffuses judicial authority, and opaque boundaries between public and private. The early American state exhibited such a slight and decentralized bureaucratic apparatus that it appeared stateless to some observers. Tocqueville described American society in the 1830s as one that "acts by and for itself,"[62] emphasizing the "absence of what we would call government or administration."[63] This suggests a parallel to Meyer's characterization of world society as "stateless."[64] Both cases incorrectly take the absence of an elaborated and

58. TILLY, *supra* note 44.

59. During the Risorgimento, the Vatican lost capacity to maintain standing armies, which it formally relinquished in 1970. THOMAS J. REESE, INSIDE THE VATICAN: THE POLITICS AND ORGANIZATION OF THE CATHOLIC CHURCH 18 (1996).

60. *E.g.*, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David W. Soskice eds., 2001).

61. TILLY, *supra* note 44, at 31; Nettl, *supra* note 3, at 576; *see* BERTRAND BADIE & PIERRE BIRNBAUM, THE SOCIOLOGY OF THE STATE (Arthur Goldhammer trans., 1983).

62. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 60 (J.P. Mayer ed., George Laurence trans., HarperCollins 2000) (1835).

63. *Id.* at 72.

64. "[T]he world society is a stateless polity. It has no central, controlling political organizations in it - no state organization with legitimate sovereignty over or responsibility for the whole." John W.

centralized bureaucratic structure as evidence of statelessness. The early American state relied on the coordinating capacities of political parties and the authority of courts,[65] while the stateness of world society is emerging out of globalizing governmental functions, including third-party dispute resolution, international bureaucracies, and deterritorialized modes of coercion.

The general point, however, is that states' institutional forms, degree of centralization, and functions are highly variable such that superordinate domination does not have a logically necessary institutional form.

3. Variable Territorializations

Institutionalized coercive capacity also varies in its relationship to territory. Processes of state formation have produced a variety of sociopolitical territorializations, including city-states, empires, parceled medieval sovereignties, and absolutism, as well as nomadic and stateless persons. The emergence of European states out of feudalism was a process of "containerization," in which authority was "bundled" with territorial jurisdiction through physical control over geographically proximate persons. Yet, globalization scholars have challenged the "territorial trap" that assumes: (1) states possess exclusive, sovereign control over territory; (2) a binary distinction between domestic and foreign, or internal and external sovereignty, is an inherent feature of the interstate system; and (3) states are containers for discrete economic, social, and political processes.[66] By contrast, globalization is associated with the unbundling of territory and sovereignty,[67] processes of de- and reterritorialization,[68] internationalization of the state,[69] the "dis-assembling" and reassembly of state capabilities within "global organiz-

Meyer, *Globalization: Sources and Effects on National States and Societies*, 15 INT'L SOCIO. 233, 236 (2000).

65. *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982).

66. John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 REV. INT'L POL. ECON. 53 (1994).

67. Ruggie, *supra* note 2.

68. Brenner, *supra* note 2.

69. 1 ROBERT W. COX, PRODUCTION, POWER, AND WORLD ORDER: SOCIAL FORCES IN THE MAKING OF HISTORY (1987).

ing logics,"[70] and the emergence of "multi-scalar"[71] "spatial practices"[72] to mobilize resources where "control over territory no longer provides a viable basis for control over an economy or economic actors."[73] This, in turn, reconfigures hierarchies of institutions, laws, and conventions central to superordinate legitimate domination.[74]

4. Varieties of Coercion

The destabilization of the nation-state is also linked to coercive capacity. State-building in the Seventeenth Century meant deploying military power to secure centralized administration over discrete territory. The decline of interstate wars in the post-WWII period[75] and elaboration of coercive techniques beyond violence have contributed to deinstitutionalizing the link between territory and state power. For instance, there is the routine global assertion of American military might far beyond its territorial jurisdictions, as well as a variety of deterritorialized sanctions at states' disposal that are not dependent on physical force but instead rely on legitimated authority relations embedded in overlapping institutions defining the state-society relationship.[76] The means of sustained, organized interstate violence are increasingly concentrated in only a few states. And, with globalization, nonmartial coercive capacities have proliferated. Today, the more common coercive techniques are that of social closure or excommunication: the abil-

70. SASSEN, *supra* note 2, at 10, 17.

71. Brenner, *supra* note 2, at 42.

72. *Id.* at 68.

73. Kobrin, *supra* note 2, at 384.

74. *See* Henri Lefebvre, *Space and the State*, *in* STATE/SPACE: A READER 84 (Neil Brenner, Bob Jessop, Martin Jones & Gordon Macleod eds., 2003).

75. *See, e.g.*, Bethany Lacina & Nils Petter Gleditsch, *Monitoring Trends in Global Combat: A New Dataset of Battle Deaths*, 21 EUR. J. POPULATION 145 (2005); Bethany Lacina & Neils Petter Gleditsch, *The Waning of War Is Real: A Response to Gohdes and Price*, 57 J. CONFLICT RESOL. 1109 (2013).

76. The idea that the institutional patterning of a society generates non-martial forms of coercion has been developed in number of different theoretical traditions, from Durkheim's notion of social facts as external and coercive of the individual, EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD AND SELECTED TEXTS ON SOCIOLOGY AND ITS METHODS ch. 1 (Steven Lukes ed., W.D. Halls trans., MacMillan Press 1982) (1895); to Foucault's "Disciplinary Society," MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., NY Vintage Books 1977) (1975); to Karl Marx's observations about the exploitative and alienating character of capitalist modes of production. KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 (Martin Milligan ed. & trans., Dover Publ'ns, Inc. 2007) (1844).

ity to close institutional access to vital resources. The IMF's ability to leverage credit access into implementing structural adjustment policies is one example and regulating the global financial system as an instrument in the global war on terrorism is another. The WTO's system of retaliation and access to Europe's internal market are other instantiations of this form of coercion. The following Parts examine the authority and coercive capacity of the WTO and CJEU and their ability to secure compliance.

III. STATENESS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The clearest case for the stateness of the CJEU is its role in fostering the integration of sovereign states into a common market and constitutional legal order, which has resulted in the shifting of superordinate decisionmaking to EU institutions. Over a period of decades, the CJEU developed a close relationship with national judiciaries through a preliminary ruling process enabling national judiciaries to apply EU law.[77] When a question concerning treaty interpretation is raised before a national court, that court can (and if a court of last instance, must) request a preliminary ruling from the CJEU. Once made, the national court will base its ruling on the interpretation of relevant European law by the CJEU, thus directly applying and enforcing EU law in national legal systems.[78] This mechanism, seized upon and advanced by pro-European integration "Euro-lawyers"[79] and combined with the pro-integrationist ethos of CJEU jurisprudence,[80] produced doctrinal advances that subordinated national politi-

77. *See* Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, art. 267, 2016 O.J. (C 202) 1, 164.

78. J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMPAR. POL. STUD. 510, 515 (1994); *see* Karen J. Alter & Jeannette Vargas, *Explaining Variation in the Use of the European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 COMPAR. POL. STUD. 452, 453 (2000).

79. *See, e.g.*, ANTOINE VAUCHEZ, BROKERING EUROPE: EURO-LAWYERS AND THE MAKING OF A TRANSNATIONAL POLITY (2015); Tommaso Pavone & R. Daniel Kelemen, *The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited*, 25 EUR. L.J. 352 (2019).

80. Debate continues about whether it is accurate to characterize the CJEU's reasoning style as teleological. The case for purposive or teleological judicial reasoning is much stronger and more explicit for the CJEU than the WTO Appellate Body, which tends to describe its own reasoning style as consistent with the Vienna Convention in following the "ordinary meaning" of the text. See Conway for a discussion of differences between the CJEU and WTO on this point. GERARD CONWAY, THE LIMITS OF LEGAL REASONING AND THE EUROPEAN COURT OF JUSTICE 22-23 (2012). Nonetheless, analysts

cal and legal decisionmaking to the EU's jurisdiction. It also empowered national courts to adjudicate and implement EU law and private litigants—seeking deeper European integration—direct access to the CJEU.[81]

The CJEU's doctrinal advances include the principles of "direct effect" and "EU primacy." The "direct effect" principle asserts that EU law and regulations have the same status as laws enacted by national parliaments, and that they may be directly invoked by individuals before European and national judiciaries. The "EU primacy" principle—that EU law prevails when there is a conflict between it and member-state law—was established by the CJEU in the 1964 case *Costa v. ENEL.* In *Costa*, the court cited the open-ended delegation of authority by member states to European institutions as the basis of these institutions' "real powers."[82] As a result, membership in the European Union limits sovereign rights and shifts the locus of superordinate decisionmaking on matters of European law away from national governments.

These doctrines subsumed national judiciaries into a European constitutional system and limited the abilities of national governments to ignore EU law.[83] Where, in 1957, enforcement of European law required action by national legislatures, after the CJEU's "juridical revolution," EU citizens and the European Commission can directly mobilize the CJEU to nullify national legislation and, through the preliminary-reference mechanism, provide authoritative interpretations of EU law directly to national courts, which then must decide cases consistently with the CJEU's interpretation. As a result, not only has the CJEU become the final arbiter of EU law in national jurisdictions, but enforcement of European law also occurs in national judiciaries. This has occurred through the CJEU and its supporters'

have highlighted that while "the Appellate Body often self-consciously eschews teleological reasoning in order to ground its legitimacy in the text, it is also true that in other cases it adopts teleological reasoning to achieve a different effect." Andrew Lang, *The Judicial Sensibility of the WTO Appellate Body*, 27 EUR. J. INT'L L. 1095, 1101 (2017); *see also* SUNGJOON CHO, THE SOCIAL FOUNDATIONS OF WORLD TRADE: NORMS, COMMUNITY, AND CONSTITUTION (2014).

81. Sweet, *supra* note 34, at 132; *see* Weiler, *supra* note 78; *see also* ANDREAS J. OBERMAIER, THE END OF TERRITORIALITY?: THE IMPACT OF ECJ RULINGS ON BRITISH, GERMAN AND FRENCH SOCIAL POLICY 27, 42 (Routledge 2016) (2009).

82. Case 6/64, Costa v. Ente Nazionale Energia Elettrica, 1964 E.C.R. 585, 593-594. The 2007 Treaty of Lisbon formally declared the primacy of EU law, but it was by then already settled law.

83. *See* Weiler, *supra* note 78; Burley & Mattli, *supra* note 14; Alter & Helfer, *supra* note 37; Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 56 INT'L ORG. 609 (2002).

intentional cultivation of social and professional networks across European judiciaries.[84] National courts are well-positioned to enforce EU law, which helps explain the high rate of compliance with cases involving preliminary references, estimated at over ninety-five percent.[85] Member states could have drafted new treaty agreements to constrain the court and limit its pro-integrationist doctrine. But efforts to do so have failed due to the inability of member states to reach unanimity.[86] Instead, member governments have effectively adapted to the EU's transformation into a quasi-federal constitutional system led by the CJEU.[87]

The CJEU is also the final arbiter of the legal validity of EU statutes and directives, and it is the key arbiter of the inter-institutional balance of competencies among EU institutions.[88] A defining feature of EU governance is the different procedures, or legal basis, for decisionmaking and how different governance institutions are activated depending on the area of law in question. An EU legal provision (treaty law or existing directive) forms the "legal basis" of EU legislation by dictating the specific roles undertaken by the Council of the European Union (Council), Parliament, and the Commission in proposing, modifying, adopting, and implementing its provisions.[89] Legislation's validity depends on its legal basis; inter-institutional disputes arise because a piece of legislation may have multiple legal bases with different corollary decisionmaking procedures. Failure to establish an appropriate legal basis upsets the balance of power between EU governance institutions.

The Commission, Council, and Parliament have different preferences about the use of legal bases. In broad terms, these can be conceived as a tension between the intergovernmental orientation of the Council—composed

84. Burley & Mattli, *supra* note 14, at 60; *see* Antoine Vauchez, *Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, 4 EUR. POL. SCI. REV. 51 (2012).

85. *Infringements: Frequently Asked Questions*, EUR. COMM'N (Jan. 17, 2012), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_12 [https://perma.cc/EX2F-HKLX].

86. Sweet, *supra* note 14, at 128-32; *see* Paul Pierson, *The Path to European Integration: A Historical Institutionalist Analysis*, 29 COMPAR. POL. STUD. 123 (1996); Martin Shapiro, *The European Court of Justice*, *in* THE EVOLUTION OF EU LAW, *supra* note 34, at 321.

87. *See* Weiler, *supra* note 14.

88. *See, e.g.*, Margaret McCown, *The European Parliament Before the Bench: ECJ Precedent and EP Litigation Strategies*, 10 J. EUR. PUB. POL'Y 974 (2003).

89. Kieran St Clair Bradley, *Powers and Procedures in the EU Constitution: Legal Bases and the Court*, *in* THE EVOLUTION OF EU LAW, *supra* note 34, at 86.

of high-level representatives of member states—and the supranational orientation of the Commission—which authors EU law and regulation and monitors infringements of EU law. This difference is likely overstated. Hooghe finds that Commission personnel's preferences are more diverse and complex than simply "pro-integrationist." Nonetheless, the Commission has supported legal bases that maximize Commission discretion.[90]

Where the Council generally prefers a limited, "consultative" role for Parliament and unanimous voting on new legislation, the Commission favors a qualified majority voting, which eases the passage of legislation. The CJEU has been repeatedly asked to adjudicate legal-basis cases and has not only allocated political power among EU governance institutions but has also fostered supranationalism by favoring qualified majority voting and enlarging the Parliament's decisionmaking role relative to the Council. The net result is that no single EU governance institution, including member states, can act unilaterally to create or modify EU law.[91] But this only makes the CJEU's decisionmaking even more significant. Legal-basis disputes invoke constitutional questions about the allocation of political power among EU governance institutions; the CJEU has thereby become the final arbiter of the balance of power among EU governance institutions.

The argument for stateness rests on the capacity of the CJEU, in the context of other European governance institutions, to render final decisions over member-state policies and have those decisions met with compliance. The EU has "developed features of internal hierarchy" such that "those who once claimed to possess sovereignty in their respective legal systems—national lawmakers and states—now govern with judges, in the shadow of constitutional review."[92] Through law and regulation rather than martial violence, the CJEU established a legal hierarchy for EU governance, integrating the national into the supranational, and reterritorializing sovereign politics on a regional scale. These developments are not well-explained by the preferences of member states alone, who have nonetheless largely ac-

90. LIESBET HOOGHE, THE EUROPEAN COMMISSION AND THE INTEGRATION OF EUROPE: IMAGES OF GOVERNANCE (2002); *see generally* ERNST B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES 1950–1957 (2004 ed.) (1958); WAYNE SANDHOLTZ & ALEC STONE SWEET, EUROPEAN INTEGRATION AND *SUPRA*NATIONAL GOVERNANCE (1998).

91. HOOGHE, *supra* note 90, at 24.

92. Sweet, *supra* note 34, at 122.

commodated the law-led transformation of Europe into a quasi-federal constitutional system.[93]

This transformation has not been fully complete or uniform, as is evident in Brexit and the ongoing threats to the rule of law posed by Polish and Hungarian governments. While the tensions between these two countries and the EU remain unresolved, Brexit revealed the deep interpenetration of EU governance structures into British markets and politics and the sunk costs of reconstructing its relationship to Europe's internal market. While many interpreted Brexit as a sign of nation-state durability, it also shows how European states have changed, especially in terms of sovereign powers. Brexit revealed just how much stateness has shifted from member states to European governance institutions. The U.K. was forced to rebuild its capacity for foreign relations and to redefine its national market at significant cost and political difficulty. At the time of the referendum, the U.K. lacked capacity and a coherent plan for negotiating Brexit, so the withdrawal process was delayed while the British government restructured. A new cabinet post and department for international trade were created to build that capacity. Britain had not had a standing team of trade negotiators since 1973.[94] At the time of the referendum, it was estimated that Britain employed twenty negotiators for international agreements of any sort, compared to over 600 at the European Commission.[95] Building capacity for foreign relations is a state-building process. That it was necessary for the U.K. to de-internationalize provides evidence of EU stateness and the court-led transformation of Europe into a state-like constitutional order.

Brexit did not involve martial violence. In the history of modern states, such dissolution of sovereign authority was commonly achieved through warfare. That the pacific character of this shift in stateness has been largely unremarkable in popular discourse is a testament to the profound success of

93. *See* Pierson, *supra* note 86; ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

94. *Britain to Hire Foreign Trade Negotiators After Brexit, Says Hammond*, REUTERS (July 4, 2016, 4:02 AM), http://uk.reuters.com/article/uk-britain-eu-trade-idUKKCN0ZK0L6 [https://perma.cc/6HQ2-ZZZN].

95. Patrick Wintour, *UK Lacks Expertise for Trade Talks with Europe, Says Top Civil Servant*, GUARDIAN (June 28, 2016, 4:12 PM), https://www.theguardian.com/politics/2016/jun/28/uk-lacks-expertise-for-trade-talks-with-europe-says-top-civil-servant [https://perma.cc/H99F-QQC4].

European integration and its goal to suppress war.[96] Finally, while the U.K. exercised its sovereign discretion to leave after failing to control its agent in Brussels, it still did not control the terms of that exit. Europe maintains leverage over a tremendous resource: access to its internal market. This will continue to condition many aspects of the British economy, because Europe remains the U.K.'s largest trading partner.[97] Leaving required reconstructing the British state and market. It required the good will of trading partners that allowed it to rollover trade deals negotiated in Brussels. And it required accepting that exports to Europe would continue to meet European standards.

As a "trustee"[98] or "constitutional" court,[99] the CJEU holds compulsory jurisdiction to review and possibly annul national legislation or regulation that conflicts with EU law.[100] Member states' capacity to punish the court, revise its jurisdiction, or reverse its decisions is highly limited and potentially nonexistent. The net result is that "the Court has arrogated to itself the ultimate authority to draw the line between Community law and national law."[101] By implication, Europe's "'operating system' is no longer governed by general principles of public international law," which emphasize state consent, "but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles."[102] The EU's stateness is rooted in the CJEU's acquisition of superordinate authority to hold final say over the consistency of national policy with European law.

96. Notwithstanding the Russian invasion of Ukraine in February 2022. The international response to Russia's invasion supports this Article's argument that excommunication is now the costliest form of coercion in international affairs. Going further than the United Nation's sanctions during the 1990's that induced "systematic impoverishment" in Iraq, Russia's partial banning from the SWIFT global financial messaging system, the mass exodus of Western companies from Russian soil, and Russia's new title as the world's most-sanctioned nation have combined to drastically shrink Russia's economy. This in turn is making the war costlier and harder to justify. JOY GORDON, INVISIBLE WAR: THE UNITED STATES AND THE IRAQ SANCTIONS 2 (2010); *see, e.g.*, Harry Robertson, *Putin's War in Ukraine is Devastating Russia's Economy, Wiping out 15 Years of Growth and Sending Inflation Skyrocketing*, BUS. INSIDER (Apr. 2, 2022), https://www.businessinsider.com/russia-economy-gdp-crash-ukraine-war-inflation-sanctions-energy-putin-2022-3 [https://perma.cc/2FNG-F3FS].

97. *United Kingdom Trade*, WORLD INTEGRATED TRADE SOL., https://wits.worldbank.org/CountrySnapshot/en/GBR [https://perma.cc/MSR2-S7DG].

98. Sweet, *supra* note 34, at 127.

99. *See* Stein, *supra* note 14; Weiler, *supra* note 78; Weiler, *supra* note 14.

100. *See* Sweet, *supra* note 34.

101. Stein, *supra* note 14, at 1.

102. Weiler, *supra* note 14, at 2407.

IV. STATENESS OF THE WTO

The General Agreement on Tariffs and Trade (GATT) was created after WWII to encourage reduced trade barriers between countries. It was designed as a system for negotiating and ensuring reciprocal trade. Early in GATT's history, norms against legalism took hold, which cemented the GATT's function as essentially diplomatic in character.[103] Its dispute settlement process reflects this. It was developed over time and in response to practical needs, and it remained ultimately governed by state consent. The use of *ad hoc* panels of experts was among the GATT's innovations that carried over into the WTO. During the GATT, forming such a panel, to review trade grievances or adopting a panel's decision, required member state unanimity.[104] This made it easy for a state that was subject to a complaint to block the creation of a panel or the adoption of an unfavorable dispute finding. Even when panel reports were adopted, there was no real enforcement mechanism. Although GATT was largely viewed as successful in lowering tariff barriers, by the end of the 1970s, as trade politics became more concerned with regulatory and other nontariff barriers to trade and as developing countries increasingly made demands on the system, the dispute resolution process proved inadequate for resolving complex and sensitive trade issues. This, and a host of other dissatisfactions with the GATT, led to the negotiation of the WTO Agreements.

After six years of multilateral negotiations, the WTO began operations in 1995. One of the critical innovations of the WTO compared to GATT was the judicialization of its dispute settlement system and the formalization of its procedures. The Dispute Settlement Body (DSB) of the WTO transformed GATT procedure in critical ways: the WTO relies on a consensus rule for *blocking* the formation of review panels and adopting decisions, eliminating the ability of any single country to block the review of a

103. JOSEPH A. CONTI, BETWEEN LAW AND DIPLOMACY: THE SOCIAL CONTEXTS OF DISPUTING AT THE WORLD TRADE ORGANIZATION 35 (2011).

104. Under the GATT, member countries were referred to as "Contracting Parties," reflecting the centrality of state consent. *Id.* at 28. Unadopted decisions did not carry the endorsement of the membership and did not have a legally binding status. This remains true under WTO rules but the reasoning contained in such judgments may still inform subsequent rulings. *Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm [https://perma.cc/W9D9-WMNF].

dispute or unfavorable rulings.[105] The reforms also introduced an Appellate Body composed of a standing bench of jurists and a more powerful enforcement mechanism.[106]

The Appellate Body was only empowered to "clarify" the meaning of WTO rules without adding to or diminishing the rights and obligations established in the treaty text.[107] Yet, the WTO Agreements were the product of diplomatic negotiations, which at times embraced ambiguous language to secure support without precisely defining its meaning, leaving it to later negotiations and the dispute-settlement system to establish precision in the rights and obligations afforded. Serving as interpreter, the Appellate Body acquired a "persuasive authority" to clarify obligations, and their decisions developed the character of nonbinding precedent, deviations from which were not taken lightly.[108]

The WTO Agreements provide members the right to address undesirable interpretations by the Appellate Body. The members can vote against adopting a panel or Appellate Body report. They can negotiate and adopt an amendment to the WTO agreements. They can also adopt "authoritative interpretations" of the Agreements rather than leave this task to the Appellate Body. In practice, however, none of this has ever happened. Members have never blocked the adoption of a decision, produced an authoritative interpretation, or deployed the amendment procedure provided in the WTO agreements.[109] This is due to the general weakness of the WTO's intergovernmental political structure, which is most evident in the failures of the Doha Round of negotiations that began in 2001 to advance

105. *A Unique Contribution*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [https://perma.cc/D4F9-RWZ7].

106. *See* CONTI, *supra* note 103.

107. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, para. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

108. *See* David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 402 (1998).

109. Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, 8 J. INT'L ECON. L. 51, 63-65 (2005); Ernst-Ulrich Petersmann, *Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement*, 21 J. INT'L ECON. L. 103, 117 (2018) ("The lack of such authoritative interpretations sought by the USA reveals the fact that WTO members always disagreed on the interpretation of these deliberately ambiguous treaty provisions and supported their judicial interpretation and related WTO dispute settlement rulings adopted by the WTO membership.").

new trade rules. The core difficulty is that any change in the agreement, including deciding on interpretations of ambiguous passages, requires unanimity among the 164 member-state governments. This is a very difficult standard[110] and one complicated by a set of increasingly assertive emerging economies that have invested in legal and diplomatic capacity for effective action inside the WTO. They have used this capacity to repeatedly block U.S. proposals for deepening trade commitments.[111] As a result, in the first twenty-five years of its existence, there was almost no operable legislative oversight of the Appellate Body's legal interpretations. Its decisions were effectively final. That the Appellate Body interpreted WTO Agreements and international law largely unconstrained by effective political oversight endowed it with an autonomous authority over its members. Appellate Body rulings were argued to be "tantamount to 'constitutional lawmaking'" developed "under the subterfuge of the textual ambiguity of the relevant WTO norms."[112]

Member states made it intentionally difficult to withdraw from the WTO, and none have ever done so.[113] Unlike the EU, there is no denunciation clause in the treaty texts, a provision often used in international treaties to reflect the principle of state consent. But states are unlikely to withdraw from the WTO anyway due to the immediate economic repercussions of surrendering WTO tariff reductions and other trade liberalizing commitments. Cho describes leaving the WTO system as "self-excommunicat[ion]," because it relinquishes access to vital resources, namely privileged market access for exporters.[114] Exiting the WTO also means abandoning the various tools it offers for challenging trading partners on their trade policy and practice.

The WTO dispute system employs a range of coercive tools, including labeling of scofflaws and the ultimate authorization to suspend concessions (retaliation). With retaliation, the WTO legitimates raising tariffs against a

110. It is a difficult but not impossible standard. Prior to the Doha round, member state governments had found unanimity on numerous agreements.

111. *See* KRISTEN HOPEWELL, BREAKING THE WTO: HOW EMERGING POWERS DISRUPTED THE NEOLIBERAL PROJECT (J.P. Singh ed., 2016)

112. Cho, *supra* note 20, at 624.

113. Strong commitments to global trade rules limit the influence of domestic protectionist forces and foster "asymmetric" political coalitions favoring exporting industries. *See* Goldstein & Steinberg, *supra* note 25, at 280; Cho, *supra* note 20.

114. Cho, *supra* note 20, at 669.

noncompliant member state, denying them access to lower trade barriers—the primary resource created by the WTO. This mechanism gave the WTO agreements "teeth," and it was unparalleled among international organizations at the time. It was widely regarded as a major turning point in international economic law.[115] Still, member governments can opt not to comply and "pay their bill" by facing punitive tariffs, but the threat of these punitive actions constrains compliance decisionmaking.[116]

The WTO's capacity to generate obedience has been considered "reasonably good."[117] Davey calculated that the first ten years of WTO disputes produced an eighty-three percent compliance rate.[118] Even more than twenty years later, "the near perfect record of WTO member country compliance with the DSU framework" is a major source of WTO influence in the world economy.[119] Most disputes result in early settlement prior to a legal decision.[120] There have been no cases of explicit defiance of a WTO ruling, though there is ample debate about the adequacy of member compliance with various rulings.

The most coercive capacity of the WTO—granting the authority to impose retaliatory tariffs for violations—has rarely been used. At the end of 2020, a year after the Appellate Body ceased to function, of 598 disputes initiated since 1995, thirty-eight (six percent of) cases resulted in a subsequent panel review of the compliance measures taken. Thirty-eight disputes advanced to arbitration over the level of retaliation, resulting in nineteen decisions authorizing the suspension of concessions—three percent of all

115. Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001).

116. The ability to absorb the costs of non-compliance varies widely and so does the ability to use the enforcement mechanism. Small and trade dependent countries are unlikely to be successful in coercing their more powerful trading partners through higher tariffs on imports. CONTI, *supra* note 103, at 82-83.

117. Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT'L ECON. L. 397, 398 (2007); *see also* Jackson, Hudec & Davis, *supra* note 25, at 221.

118. William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT'L L.J. 119 (2009).

119. Rachel Brewster, *WTO Dispute Settlement: Can We Go Back Again?*, *in* CAN INTERNATIONAL TRADE LAW RECOVER?, 113 AM. J. INT'L L. UNBOUND 62 (2019); *see generally* LEGAL AFFS. DIV. & RULES DIV. OF WTO SECRETARIAT, WTO, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (2d ed. 2017).

120. Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000); CONTI, *supra* note 103.

disputes initiated.[121] Thus, only a very small share of WTO disputes result in retaliation. While this is usually taken as evidence that the WTO is effective in resolving grievances, the retaliatory mechanisms can be self-defeating for small, trade-dependent members.[122] Nonetheless, there are relatively high levels of specific compliance, low levels of noncompliance, and no explicit defiance of judgments, which demonstrates the WTO's ability to secure conformity to its rulings.

A series of disputes over "zeroing" demonstrates that even powerful countries have changed national policy to conform to WTO rules. Zeroing was a method for calculating when imports were sold at less than fair market value, which was regularly used by the U.S. Department of Commerce, among other governments. Zeroing disputes were initiated in U.S. federal courts, the CJEU, and North American Free Trade Association (NAFTA) tribunals. But it was the WTO rulings across eighteen zeroing disputes—comprising a fifth of its caseload between 1998 and 2011—that asserted final say over the consistency of zeroing with WTO rules.[123] These were "hard cases" for compliance. They involved the United States, which has the most flexibility for unilateral trade policies among WTO members, and relied on judicial constructions that were criticized by the U.S. government and that some WTO legal scholars called judicial activism. Nonetheless, the United States complied and ended most uses of zeroing, which made it more difficult to protect domestic industries. But these disputes, combined with the weakness of the WTO in reigning in Chinese anticompetitive practices, finally triggered a forceful political response from the United States that took advantage of the consensus norm in WTO decisionmaking.

Beginning under the Obama administration and intensified by the Trump administration, the U.S. government began refusing to confirm new members of the Appellate Body, even to the point of removing an

121. Article 21.5 of the WTO Agreements governs panel reviews of compliance. Article 22.6 initiates an arbitral process to establish the level of retaliation and can result in authorization to "suspend concessions." *See Dispute Settlement Activity —Some Figures*, WORLD TRADE ORG. chart 1 (2022), https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm [https://perma.cc/JTU4-XRWZ]; NUMBER OF DISPUTES BY STAGE, WTO tbl.1 (2022), https://www.wto.org/english/tratop_e/dispu_e/numbers_of_disputes_by_stage_e.xlsx [https://perma.cc/Y7BZ-T3MQ].

122. *See* CONTI, *supra* note 103, at 133–34.

123. *See generally* Joseph A. Conti, *Legitimacy Chains: Legitimation of Compliance with International Courts Across Social Fields*, 50 LAW & SOC'Y REV. 154 (2016).

American from the bench, thus ensuring that when each jurist's term expired the seat would remain empty. By December 2019, the Appellate Body ceased functioning because only a single member remained. Cases are still filed and panel reviews continue, but cases can only be "appealed into the void," because the appellate function, including the capacity to assess compliance and authorize retaliatory tariffs, has ceased operating. The WTO has lost its teeth. Negotiations about how to revive the Appellate Body are ongoing.

Nonetheless, and like Brexit, the U.S. effort to undermine the Appellate Body reveals the degree to which stateness has arisen in the world trading system, centered on the judicial rulemaking of the Appellate Body. In both cases, the transformation was significant enough that governments (and voters in the United Kingdom) were willing to take substantial economic and political risks to challenge the growing stateness of a supranational order.

The ability of the United States to bring the WTO Appellate Body to a halt would seem to support the core insight of delegation theory. The United States, a prominent supporter of binding dispute settlement during the Uruguay Round negotiations that created the WTO, was able to shape its agent's performance by undermining its capacity to act while signaling its interests to other members. This is not, however, fully satisfying, because while the United States was able to influence "its" agent, the WTO is a multilateral treaty organization, and U.S. actions simultaneously undermined the influence of the other members on their agent, suggesting a reciprocal loss of control for them. Whether this is a successful demonstration of delegation theory depends on which principal's interests we wish to consider. It certainly can be viewed as an episode of the WTO operating as an "information clearinghouse," enabling the more or less clear transmission of American interests to other members and triggering ongoing negotiations about how to resuscitate the Appellate Body and other WTO reforms.[124] More than that, however, decapitating the Appellate Body is a blunt action, one not easily modulated or sufficiently nuanced to respond to the Appellate Body on an ongoing basis. It simultaneously rendered the WTO legal

124. I say "more or less clear," because while signaling its dissatisfaction with the Appellate Body, the United States has been less than clear on what it prefers as an alternative dispute settlement process.

system useless to the United States, which had been the system's single most prolific complainant. The Ministerial Conference, the political body empowered to address and correct Appellate Body rulings, remains structurally handicapped due to the practice of consensus voting, and it continues to be unable to perform this role.

The WTO's stateness rested on its authority to interpret the WTO agreements combined with the incapacity of the organization's political organ to exert effective oversight. This allowed the Appellate Body to construct constitutional norms that "authoritatively reconfigure[d] the distribution of regulatory competence between the WTO and its members"[125] and to establish "a *general rule* which other WTO members, not just parties concerned, will also observe in the future."[126]

Prior to the demise of the Appellate Body, and certainly after, the WTO might be viewed as possessing a low level of stateness, because it has no recourse to force, the scope of its authority is limited, and the process of ensuring compliance can take a very long time. In other respects, however, the WTO's stateness was more robust. It was generally successful in securing obedience, there had been little defiance of the Appellate Body's decisionmaking, and it effectively asserted "final say" over the legitimacy of state trading practices such that member nations, even powerful ones like the United States, complied with its decisions. Similarly, the CJEU's capacity for mediating the relationship between EU governance institutions and its member states is indicative of its stateness. In this regard, it is a more advanced degree of stateness than the WTO because it has penetrated national judiciaries, enabling relatively effective enforcement that does not require action by policymakers.

CONCLUSION

The dispute-settlement systems of both the WTO and the CJEU were created by states delegating their authority in a treaty instrument. But the open-ended character of that delegation, combined with effectively weak institutional constraints on their decisionmaking and teleological frame-

125. Cho, *supra* note 20, at 627; *see also* Cass, *supra* note 20.
126. Cho, *supra* note 20, at 642 (emphasis added).

works for judicial reasoning, have fostered a law-led transformation of national states and the institutionalization of supranational governance structures with state-like functions and powers.

Some may object to theorizing such courts through the lens of the state because they lack many of the functions and institutional forms associated with modern states, such as legislative or executive organs. The WTO's stateness is evidently incomplete if the relevant model is the high modern state with fully elaborated and relatively centralized legislative, executive, and judicial apparatuses. The EU comes closer to that model but remains relatively decentralized. It relies on member states to administer martial force even as the power of the European Commission has grown concomitantly with that of the CJEU. Discounting the stateness of either the EU or the WTO in these terms treats high modern Western states as a general model rather than a historically specific manifestation of stateness. Doing so limits perspectives on the future trajectory of national, international, and supranational political and legal ordering. That the idea of the state should be restricted only to its most elaborated forms forecloses the possibility of empirically identifying the state-like power of other actors and transformations in what high modern states do and the powers they actually (rather than in theory) exercise. Actual modern states also vary in terms of capacities for superordinate authority and coercion, and the manner of exercise also changes over time. Static conceptions of states fail to account for these differences.

Some may also object to the application of stateness to international institutions because they define states as Weber did, as territorial organizations holding monopolies of violence within supreme jurisdictions defined by concrete geographic borders. Yet, if states *by definition* conform jurisdiction to territory, then it is difficult to assess the actual territorial scope of state power, including extraterritorial modes of jurisdiction and failed states. There are many examples of states that fail to exercise jurisdiction over their formal territorial claims, and there are prominent historical examples of universal and extraterritorial jurisdiction, including that of the Holy Roman Empire or the Papacy. More currently, examples include var-

ious unilateral economic sanctions, the "effects doctrine"[127] of American and European competition law, or the universal criminal jurisdictions claimed by many countries and international tribunals. If states are *by definition* territorial monopolies of legitimate violence, as is generally the case in sociology and in international legal thought, then these phenomena always appear as troublesome, if increasingly common, exceptions. As a matter of analytical operationalization, the Weberian definition of the state constrains—to the point of distortion—historical variation in the ordering of political power and its relation to territory.

The concept of stateness responds to this shortcoming. It is designed to identify transformations of political power associated with globalization and the juridification of international affairs. It is a parsimonious framework for determining when and to what degree the concept of the state—including debates about its nature, form, and functions—should be invoked for understanding institutionalized political power.

To be clear, this Article does not argue that national states are going away, that a world-state exists or is coming into being, or that the WTO and EU are conventional modern states. Instead, their state-like qualities reflect a fragmentation of national sovereignty and a highly partial, uneven reinstitutionalization of political power on a supranational scale over a set of matters that had formerly been lodged exclusively in governments and subject to sovereign discretion. The territorial "containers" of modern state power, compared to what they were at the beginning of the twentieth century, have become increasingly porous and plastic strainers, becoming embedded into supranational political structures that are rearranging how final decisions are rendered, what the reference points for decisionmakers are, and the geographic formations of governed polities. This is a betwixt and between world: traditional institutionalizations of sovereignty have mutated, pierced by new jurisdictions of legal decisionmaking and new forms of legal and political standing for individuals and nongovernmental actors to

127. Considered by international lawyers to be an exception to the territorial principle of international law that arises in the case of competition law, the effects doctrine allows a state to enforce its law against foreigners when business practices taking place completely abroad have substantial effect on its territory. Thanh Phan, *The Legality of Extraterritorial Application of Competition Law and the Need to Adopt a Unified Approach*, 77 LA. L. REV. 425, 433, 436 (2016).

press claims against states. They do so without yet consolidating a fully stable and legible alternative global political structure.

These developments raise questions about the trajectory of juridico-political power on a global scale. Is legal legitimacy, rather than violence, the leading edge of state formation in the contemporary world? Are the CJEU and WTO anomalies or harbingers of broader arrays of superordinate global institutions? The concept of stateness opens analytical space to consider historically novel forms of apex political power, including those led by international law and courts.

Control over territorial borders was the exclusive function of central governments. It remains a state function, but one now *also* regulated by international courts. Economic and political ties, particularly regarding trade between states, are increasingly routinized through legal contestation rather than interstate violence. This is a corollary to what Robert Cox referred to as the "internationalization of states," in which national states are unevenly joined into a larger, more complex, and hierarchical world political structure.[128] That concept, however, diminishes how internationalization is associated with the fragmentation of national sovereignty and the emergence of new sites of superordinate authority whose jurisdictions cut across territorial borders. This does not imply that either the EU or the WTO are states in the same manner as modern national states or that national states are withering away. But it suggests important changes in form, function, and modality of state power and its relationship to territory. The stateness framework highlights the fragmentation and reallocation of sovereign powers within an increasingly polycentric world in ways that other perspectives that rely on conventional conceptions of states as discrete containers of superordinate power do not.

Late-twentieth-century experiments with juridification constitute a major difference from how the interstate system operated prior to WWII. But it may be the case that this era of juridification is ending with resurgent nationalism in the West, British exit from the European Union, and the rise of China to challenge U.S. global leadership. Brexit shows how projects to-

128. Robert Cox defines the "internationalization of the state" as a process "whereby national policies and practices have been adjusted to the exigencies of the world economy of international production." This is premised on a process of "interstate consensus formation" within a "common ideological framework." COX, *supra* note 69, at 253–54.

ward greater political and economic integration can be reversed even as it simultaneously demonstrates how the juridification of European stateness has pioneered new, weaker models of national sovereignty. Similarly, the renegotiation of the North American Free Trade Agreement to limit investor claims against states and the undermining of the WTO Appellate Body are efforts to reassert sovereign control.[129] Perhaps Brexit and the demise of the Appellate Body represent the end of a historical "bubble," analogous in some senses to a speculative financial bubble, that has begun to deflate as the exuberance of the post-Cold War liberal world order fades and hegemonic challengers rise.

There are also reasons why international law and courts may be resilient. The stateness of global governance institutions fosters their politicization. Fights over what they do and how they affect states are only likely to increase.[130] Those fights will likely generate more international law and deeper investments in global legal orders. As various forms of globalization continue, it will be increasingly difficult to disentangle one set of issues from another, except through legal ordering of some sort. Spillovers from increasingly dense and interrelated issues have defined the histories of both European integration and the world trading system. Globalization multiplies the number of pressing collective action problems requiring interstate cooperation. This will amplify rather than undermine the importance of legal legitimacy.

Political struggles over global governance occur in the context of already existing institutional orders. Certain institutional design elements of international courts create very high barriers for reform, including the need for unanimous state consent to revise a treaty or reject the interpretation of a court. There are also tremendous sunk costs and increasingly deep investments in international law and courts by states, other governance organizations, firms, and activists that may make it difficult for even powerful states to avoid legal entanglements. Exit from these court-centered suprana-

129. *See, e.g.*, Manfred Elsig, Mark Pollack & Gregory Shaffer, *Trump Is Fighting an Open War on Trade. His Stealth War on Trade May Be Even More Important.*, WASH. POST (Sept. 27, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/ [https://perma.cc/65FX-X9JJ].

130. "There is considerable evidence that the acquisition of enforcement authority by international institutions has led to a very high level of politicization." Zürn, Binder & Ecker-Ehrhardt, *supra* note 35, at 94.

tional political systems, while certainly not impossible, is increasingly costly, reflecting the most common form of coercion in international affairs today—excommunication. It is this mode of power that is the primary mechanism by which the WTO backs its claims to authority and the leverage that the EU retains over post-Brexit Britain: controlling access to the single market. The costs of excommunication bias political choices in favor of more, rather than less, international law. This remains true, Brexit notwithstanding.

Contemporary supranational stateness, with new and emerging territorializations, deepening reliance on legal legitimacy, and excommunication as its primary mode of governance, marks a new development in historical processes of state formation. It involves a different mix of authority and coercive capacity than that associated with the high modern state. Where in the seventeenth century the leading edge of state power was control of territorial space through physical force, in the twentieth century it was the bureaucratic interventions of the welfare state. The leading edge of supranational stateness in the modern, postindustrial, digital twenty-first century is legal legitimacy, operating through binding legal distinctions and adjudication backed by authority and a range of coercive, but nonmartial, control techniques. Increasing supranational stateness is far from inevitable, and it may be reversed. The concept of stateness, however, allows early detection of such developments, because it draws attention to the incompleteness and partiality of state formations, the delinking of coercion and territorial control, and emergent forms of hierarchy in global affairs.