

# A New Model of Sovereignty in the Contemporary Era of Integrated Global Commerce: What Anthropology Contributes to the Shortcomings of Legal Scholarship

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## ABSTRACT

*Existing legal scholarship does not offer an effective or comprehensive definition of sovereignty. Sovereignty, however, matters. Indeed, many have lived and died for it; the term likewise appears with remarkable frequency in both academic and popular discourse. But, sovereignty is not what it used to be. The evolution of globalization generally, and transformations in global commerce specifically, have sutured together the peoples of the world—conventional nation-states and Indigenous groups alike—permanently altering the sovereignty of each. These developments make it that much more imperative to incorporate a functional definition of sovereignty into legal scholarship. But, given the complexities of sovereignty, the tools of law alone are insufficient to generate such a definition. Here anthropology provides a unique and powerful insight to supplement those shortcomings. An evidence-based model through the collaborative lenses of law and anthropology shows that sovereignty and culture have become fused in a mechanism driven by the regulation of cross-border capital. This model empowers the policy makers of conventional states and Indigenous groups to more explicitly, efficiently, and effectively integrate different forms of value—both economic and social.*

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## I. INTRODUCTION

Sovereignty matters. One need only flip through a contemporary publication to see the prevalence of the term within popular and scholarly discourses alike. Issues of nation-state sovereignty permeate debates on topics that are as far-ranging as they are contradictory, including independence movements, the European Union, trade agreements, the Internet, Indian casinos, and U.S. military drone strikes. So the importance of sovereignty is doubly evident, demonstrated by both the frequency of its use and the significance of the issues that inspire that use. More importantly, sovereignty matters because it is *meaningful* to people—indeed, countless many have died for it and many more continue to.

Sovereignty, however, is not what it used to be. Changes in the global political economy are currently transforming the nature and the role of sovereignty into a novel phenomenon, distinct from previous forms and philosophies. In short, two-thirds of all transnational trade is now conducted by multi-national corporations.<sup>1</sup> This global commerce is systemically binding the peoples of the world together in unprecedented ways. Gone are the days when the majority of cross-border commerce was comprised of arms-length, country-to-country transactions involving a simple exchange of money for finished products. Instead, what characterizes global commerce today is the increasingly systemic nature of the collaboration among companies in a supply chain. This systemic nature weaves together bodies of law—ranging from contractual components to regulatory and enforcement mechanisms—from multiple jurisdictions.<sup>2</sup>

A relevant and functional definition of sovereignty is therefore central to the study of law. By its very nature, the concept of sovereignty invokes relationships between two or more groups. Today, when global trade exceeds \$23 trillion annually,<sup>3</sup> these relationships are grounded in the commerce of the global market. Law—typically, state law—is the framework through which this integrative commerce takes place: each of the constitutive cross-border transactions implicates the national legal frameworks of at least two states. At the same time, every such transaction necessarily diminishes the authority of one—and usually both—of the states by placing some of

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1. WORLD TRADE ORGANIZATION (WTO), WORLD TRADE REPORT (2014) [http://wto.org/english/res\\_e/booksp\\_e/world\\_trade\\_report14\\_e.pdf](http://wto.org/english/res_e/booksp_e/world_trade_report14_e.pdf) (last visited Jan. 18, 2016) [<https://perma.cc/9V35-LQ9Q>] (archived Sept. 3, 2016).

2. Effective global commerce therefore requires two simultaneous processes: the integration of multiple legal regimes by the *parties*—by means of contract or corporate agreement—as well as the structuring of those legal regimes by the relevant *states* in such a way as to make that integration possible.

3. See WTO, *supra* note 1.

the legal control over the transaction in the other, or largely outside of the two altogether.

Existing legal scholarship, however, offers neither an effective nor a comprehensive definition of sovereignty. This omission, of course, has consequences for conventional nation-states. Moreover, given that goods and money are continuously passing back and forth across all borders, Indigenous peoples around the world are equally implicated in these changing global dynamics. Indeed, this Article suggests that conventional sovereignty and Indigenous sovereignty are, for the first time in history, the same thing; stated differently, any usable model of sovereignty today must encompass both Indigenous and conventional notions of “sovereignty” equally.<sup>4</sup>

Furthermore, because of these dramatic shifts in the global political economy, legal scholarship cannot simply turn to the traditional definitions of sovereignty found in other disciplines; those definitions are now also outdated and insufficient. Many existing definitions from other disciplines likewise suffer from the limiting deficiency of an overly quantitative methodology.<sup>5</sup> Sovereignty is more complex than quantitative means can measure. We are, after all, human; sovereignty, like the globalization that has given rise to it, is a system that affects people just as much as it is a system that was created by people. And here the field of anthropology is essential: the ability of anthropology to reach the human element in these regards makes it both unique and powerful. In particular, anthropology is able to fill in the gaps on sovereignty that legal scholarship cannot reach on its own.

My own work on these matters—as a legal scholar, former business-defense litigator, and anthropologist—has provided me with a point of view that is multifaceted and distinct from any single discipline. Building on extensive fieldwork in several countries, I bring a broader methodology to the question of sovereignty and a novel spectrum of tools on its exposition and modeling. In an evidence-based analysis, this Article lays out my conclusions of that methodology and modeling. For reasons to be explained, I use the small nation-state of the Cook Islands as a detailed example of the concepts discussed. That I rely on this young, vibrant polity is no accident. Rather, the country serves as a productive subject of analysis: as both an independent

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4. Therefore, for the remainder of this Article, unless stated otherwise, where I use “nation-state” and “state” I likewise refer to Indigenous groups and their governing bodies.

5. See Jeffrey Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 910 (2011) (“The point of evidence-based law is not to produce a set of empirical papers that we academics can present to each other at conferences. The point is to create better law—law informed by reality.”).

nation-state and an Indigenous former colony, it is firmly representational of the model here proposed.

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The Article proceeds as follows. Part II discusses why sovereignty today is different from all previous forms. It explains the background forces that have transformed global commerce, focusing first on globalization, which is the *sine qua non* of contemporary sovereignty. It then examines the ongoing shift from global supply chains into so-called global value chains, a process that is suturing together the states of the world. Part III describes the Cook Islands, placing the country in the context of these changing global conditions. On this foundation, Part IV then lays out a new model of sovereignty, with an aim both to reflect the current condition and to shed light on a vast array of actions, ranging from local decisions to global alliances. Throughout, examples from the Cook Islands provide supporting evidence. Part V follows up with a discussion of ways that this model integrates conventional and Indigenous notions of sovereignty, including responses to anticipated critiques. Part VI is a brief conclusion.

It should be noted that stepping into the flood of literature on the concept of “sovereignty” is not without resistance or risk. The frequency with which the word is used is remarkable. Nevertheless, in spite of the abundant invocation of the term, most existing usage is subject to one of two serious flaws. On the one hand, some authors begin with an ideal definition of “sovereignty” as essentially “full control without any outside influence whatsoever.”<sup>6</sup> But, when applied to the contemporary situation where all states are subject to at least some outside influence or incursion, the only conclusion that can follow for such authors is that sovereignty has been “abrogated,” “eroded,” or even “lost.”<sup>7</sup> These

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6. See Daniel Philpott, *Sovereignty: An Introduction and Brief History*, 48 J. INT’L AFF. 353, 358 (1995) (discussing, among others, the theories of Jean Bodin and Thomas Hobbes).

7. E.g., C. Raj Kumar: *Corruption, Human Rights, and Development: Sovereignty and State Capacity to Promote Good Governance*, 99 AM. SOC’Y INT’L L. PROC. 416, 417–18 (2005) (“Sovereignty is further eroded when the internal governance structures in a society get gradually influenced by laws, policies, and practices of other states as officials attempt to justify a certain conduct in such comparative terms.”); Martin Flaherty, *Rights, Reality, and Utopia*, FORDHAM L. REV. 1789, 1800 (2004) (“As scholars such as Peter Spiro have argued, national sovereignty has eroded not just in the fact of transnational organization, but also because local units of self-government have attained renewed importance both domestically and internationally.” (citing Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 667–71, 717–25 (2002)); Edmund L. Andrews, *U.S. Rebuked: Slapping the Hand That Fed Free Trade*, N.Y. TIMES (Sept. 1, 2002), <http://www.nytimes.com/2002/09/01/world/us-rebuked-slapping-the-hand-that-fed-free-trade.html> (subscription required) [<https://perma.cc/7858-JRVT>] (archived Sept. 6, 2016) (“But perhaps the most startling

truisms are of little value. Other commentators, on the other hand, dilute the term by invoking it in any narrow instance where state power is concerned, such as the suggestion that the practice of the U.S. military to fly unpiloted drones “violates” the “sovereignty” of, say, Pakistan.<sup>8</sup> Here, of course, the flying of unpiloted drones—when flown without the permission of the Pakistani state—represents a violation of *something* (more generally, Pakistan’s rules regarding the conditions for machines to operate in its airspace, and, more specifically, Pakistan’s agreements with the United States regarding permissible activity within its borders). But it is entirely unclear why that something would be “sovereignty,” especially since Pakistan allows U.S. military operatives to perform at least some other actions within its territory.<sup>9</sup>

In short, the concept of sovereignty has been abused. The term has been misunderstood, mistreated, and often rendered meaningless. Some have even suggested eliminating it altogether.<sup>10</sup> This Article aims to save both the term and the concept, for three reasons. First, the bare word is important to many; indeed, many have died for it. As

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twist in a tangled relationship came on Friday, when the World Trade Organization in Geneva ruled that the European Union can impose up to \$4 billion in penalties on the United States because its tax break for exporters amounts to an illegal subsidy under international law. . . . Conservative critics charged that the panel had eroded American sovereignty and had stepped far outside its authority.”).

8. E.g., Dawood Ahmed, *Rethinking Anti-Drone Legal Strategies: Questioning Pakistani and Yemeni “Consent”*, 8 YALE J. INT’L AFF. 1, 3 (2013) (“The use of drones in Pakistan remains particularly contentious . . . Ben Emmerson QC, the United Nations Special Rapporteur on Human Rights and Counter-Terrorism, argued that U.S. drone strikes did indeed violate Pakistan’s sovereignty because he could not find any record of the Pakistan government having given consent.”); Salman Masood & Ismail Khan, *Pakistan Says U.S. Drone Strike Kills 4*, N.Y. TIMES (Mar. 22, 2013), <http://www.nytimes.com/2013/03/23/world/asia/pakistan-says-us-drone-strike-kills-4.html> (subscription required) [<https://perma.cc/5MWW-5PAV>] (last visited June 6, 2016) (“Drone strikes by the United States are deeply resented in the country and seen as a breach of Pakistani sovereignty.”).

9. See Kurt Larson & Zachary Malamud, *The United States, Pakistan, the Law of War and the Legality of the Drone Attacks*, INT’L J. BUS. & L. 10, 13 (2011) (“So close are the ties between the [countries], the U.S. and Pakistan have established ‘fusion centers’ in Pakistan to aid in sharing information regarding the drone strikes. The United States and Pakistan continue to foster this ‘partnership,’ in terms of aid as well as strategy against common enemies.”); Mehran Gul, *U.S. National Security Strategy: Managing Strategic Partnership in South Asia*, 4 YALE J. INT’L AFF. 72, 83 (2009) (“In the run up to the war, Pakistan provided the United States with blanket flyover and landing rights, access to naval and air bases, fuel supplies, logistical support, and access to Pakistan’s ports to supply troops to landlocked Afghanistan. All this material support was provided without any formal agreements or fees normally required for such privileges. During the war, Pakistan made two-third of its air space available for coalition operations, suspending its own civilian and military usage of the airspace.”).

10. See generally Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999); Louis Henkin, *Human Rights and State “Sovereignty”*, 25 GA. J. INT’L & COMP. L. 31 (1995/1996).

such, it is a rallying cry, an ideal, a hope, and a goal, in ways that no neologism could capture. That alone should be reason enough to push us to make better sense of the concept, however elusive, that the term encapsulates. Second, as noted, the term is, in both academia and popular media, seemingly ubiquitous. Given the noteworthy frequency of usage, and in spite of any potential linguistic inventions by academics, the term is not about to disappear from discourse. It should consequently be retained, but with clarity and purpose. Third, and perhaps most importantly, especially given this common usage, it is imperative to be aware that, each time it is invoked, the term “sovereignty” obscures the real issues in question, which are in part issues of function, but, most significantly, are issues of power. In other words, any invocation of “sovereignty” necessarily entails relationships between two or more groups of people; by misunderstanding “sovereignty” one misunderstands the relationships of power between those particular groups and therefore can be misled into discussing—and fighting for—the wrong (in various senses of the word) matters.

## II. SOVEREIGNTY TODAY IS DIFFERENT FROM WHAT IT HAS EVER BEEN BEFORE

Existing theories of sovereignty vary widely. In a Hobbesian vein, early absolutist articulations of sovereignty proclaim that “either a state is sovereign, in which case it cannot be bound by any law higher than its own, or it is bound by law, in which case it ceases to be sovereign.”<sup>11</sup> Max Weber likewise described the sovereignty of the state as “that agency within society which possesses the monopoly of legitimate violence.”<sup>12</sup>

Sovereignty, however, is an *ad hoc* solution to a particular set of historically and contextually emerging dilemmas. Thus, as the dilemmas have continued to change, so too have the solutions. More recent commentators have therefore updated those earlier definitions, often referring to sovereignty as a form of “constitutional or legal

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11. Philip M. Nichols, Integrated Sovereignty 10 (Apr. 23, 2008) (unpublished manuscript) ([https://works.bepress.com/philip\\_nichols/3/download/](https://works.bepress.com/philip_nichols/3/download/) [<https://perma.cc/7AC6-K9VY>] (archived Sept. 27, 2016)).

12. ERNEST GELLNER, NATIONS AND NATIONALISM: NEW PERSPECTIVES ON THE PAST 3 (2d ed. 2006). Weber’s central focus on violence may now be outdated too, but this general idea continues in other guises, such as for Perry, for whom “Such power to define and punish crime is centrally constitutive of the meaning of sovereignty.” Richard Warren Perry, *Native American Tribal Gaming as Crime Against Nature: Environment, Sovereignty, Globalization*, POL. & LEGAL ANTHROPOLOGY REV. 110, 110 (2006). See also CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (1st ed. 1985); GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (1998).

independence.”<sup>13</sup> Indeed, in these terms sovereignty was, following the Treaty of Westphalia, “the cornerstone of the international legal order for at least three-and-one-half centuries.”<sup>14</sup>

At the same time, there has been articulate post-colonial critique of these theories. Antony Anghie, for instance, explains that colonialism “was not an example of the application of sovereignty; rather sovereignty was constructed through colonialism.”<sup>15</sup> Other commentators have gone so far as to argue that “sovereignty” is in fact a Western concept ill-suited to Indigenous realities:<sup>16</sup> “Sovereignty itself implies a set of values and objectives that put it in direct opposition to the values and objectives found in most traditional indigenous philosophies.”<sup>17</sup>

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These theories, of which there are myriad variations, are inconsistent.<sup>18</sup> More importantly, none adequately captures the reality of the contemporary era. So, with these outdated yet lingering lessons as a launching pad, this Article starts with three basic premises that I take to be widely acceptable. First, the concept of sovereignty in isolation is meaningless. That is to say, sovereignty is only meaningful in relation to other sovereignties. Second, no state today is independent. The dependence of states can be of many forms and scopes, but such interdependence is always and inevitably a constituent element of contemporary statehood. And third, economic rationality is always refracted. By this I mean that any tendency that human beings have to maximize wealth is invariably influenced by the

13. Hurst Hannum, *Sovereignty and Its Relevance to Native Americans in the Twenty-First Century*, 23 AM. INDIAN L. REV. 487, 487 (1999).

14. *Id.* Hannum makes the interesting point that the Treaty of Westphalia replaced a *hierarchical* structure (based on the Pope and Roman Empire) with a horizontal one.

15. Antony Anghie, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 38 (2004).

16. Michael F. Brown, *Sovereignty's Betrayals*, in *INDIGENOUS EXPERIENCE TODAY* 171, 178 (Marisol de la Cadena & Orin Starn eds., 2007) (building on the ideas of Vine Deloria Jr. and Mohawk political scientist Taiaiake Alfred).

17. *Id.* (quoting Taiaiake Alfred).

18. As just one example, compare Philpott, *supra* note 6, at 357 (recognizing “internal,” “external,” “absolute,” and “non-absolute” aspects of sovereignty) with Robert Lansing, *Notes on Sovereignty in a State*, 1 AM. J. OF INT’L L. 105, 107 (1907) (defining “sovereignty in its broadest sense as the power to do all things without accountability. So extensive a power, which eliminates the elements of time and space, of motion and inertia, of mind and matter, can only find a counterpart in a super-mundane and super-human sovereignty which is coextensive with the limitless universe and which can only be possessed by an Omnipotent and Eternal Being. Sovereignty in the abstract is, therefore, coincident with *Divine Sovereignty*.”) (emphasis in original).



cultural lens through which they view that wealth, which includes the ways that members of that group can compete for wealth and the different kinds of power that that wealth represents for them.

Several consequences follow from the constructive combination of the above three premises. First, because sovereignty cannot exist in isolation but only in relation to other sovereignties, the concepts of “sovereignty” and “globalization,” even when subject to debates about definitional nuance, must be mutually constitutive. Second, because economic rationality is always inflected by non-economic interpretations and interests (even though there is decidedly argument about the degree), the economic policies taken by states must also always be subject to at least some variation. Thus, regardless of one’s theory of global interaction, the many states of the world cannot be reduced to one economic model; instead, the key for understanding any state must be the *interface* between that state and the global market. And third, because no state is today fully independent, whether economically or culturally, and because the global market is, to a great extent, the structural link between states’ dependences, the concept called “sovereignty” must be each state’s strategic management of its interface with the global market. Further, this strategic management must necessarily be driven by efforts to balance the compromises that are necessary for participation in the global market with the protection of certain, locally meaningful, and often non-economically rational, interests.<sup>19</sup> Contemporary state sovereignty then must be made up of both (1) uniform elements that allow the sovereignty in the form of the state to interface, that is, to do business with other sovereignties, and (2) subjective elements, related to local interests (some might say “culture”), that are largely unique to each state.

These factors will be discussed in detail below, but some background is necessary. The remainder of this Part will lay out the factors that have caused contemporary sovereignty to become what it is today: first, in a broader, deeper sense is globalization itself; second, within that framework are the specific changes to the form and function of global commerce that are triggered by so-called global value chains.

### A. Globalization

Globalization and sovereignty are mutually constitutive—they create each other. To understand sovereignty, therefore, one must first

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19. As should become clear, law and sovereignty are consequently inseparable concepts. In the contemporary world, however, it is not sovereignty that makes law possible, but instead law that makes sovereignty possible.

make sense of the network of sovereignties that is the essence of our contemporary moment: globalization.

The term “globalization” itself is powerful, almost magical. Bubbling forth from within its linguistic composition are both the expansive brilliance of the “globe-” and the tool, the function, the perennial action of the “-ization.” It is a word whose treasured syllables roll off the tongue—or from the scholar’s quick keystrokes—often with no context, a floating signifier inspiring far-ranging images of modernity, technology, and disparate places. Indeed, the word is so filled with meaning that its meaning is frequently lost; it is overdetermined, evoking a connectedness that, in some moments, like in the smiles of the transnational tourists’ photographs, is as subtle as it is beautiful, and, in others, as in the forlorn faces of desperate migrants, is a sheer horror. But whatever the case, whatever its contours, one thing is clear: globalization *is*.

As I write these very phrases, I take stock, and after just a few seconds note to myself that I am sitting in the United States while mechanics attend to my aging Swedish car. I am drinking coffee from Indonesia from a cup purchased in New Zealand while I listen to music recorded in Australia, but downloaded in the United States, through Japanese headphones made in China. I could go on, but what’s the point? None of this is surprising: globalization is everywhere.

On the one hand, this everywhere-ness is a crucial descriptor of globalization; but on the other hand, such a description is incomplete and misleading. Indeed, human beings are surrounded by, and form intimate relationships with, products from the global marketplace, from cell phones to clothes to wedding rings to teddy bears. But global things are not only *around* us: given that we eat and drink foodstuffs that are grown and processed globally, global things are also *in* us, consumed into our physical being. More important even than this around-ness and this in-ness is the fact that, just as we are a part of globalization, globalization has become a part of *us*; globalization is now an integral part of our view of the world, it is a fundamental, intrinsic, and inextricable element of our formation as subjects, of our *sense of self*.

Globalization tends to be associated with modernity, or perhaps, post-modernity. Both terms, however, reflect that globalization is here now; it is the era of today. But, as Eric Wolf and others have made clear, the current network of international connectedness is only the latest of many globalizations that have linked distanced and disparate human cultures together for millennia.<sup>20</sup>

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20. See, e.g., ERIC R. WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* (1997); ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* (1996); Anna Tsing, *The Global Situation*, 15 *CULTURAL ANTHROPOLOGY* 327 (2000).

The difference is that contemporary globalization is not simply the mass movement of people and goods, just as it is more than the mutual dependence of international economies or the connections of distant peoples via media and communications technologies. Instead, “globalization,” as a descriptor of our contemporary world, is a dynamic and *sui generis* combination of these factors. So while other eras of globalization have come and gone, in various forms, the present form is unique and can only be understood by recognizing any moment or event as a confluence of these factors.<sup>21</sup>

More precisely, contemporary globalization is divisible into four related and inter-connected elements. First, globalization is about nation-states and the relationships between them. Nation-states, of course, interface with the global community and the global marketplace in different ways.<sup>22</sup> An examination of globalization must accordingly interrogate the range of these ways of interfacing.

Second, globalization is not simply the connections among states but is also a matter of the movement of each state’s citizens, and so is likewise about people (whether as laborers or as consumers of labor’s production, or both). As such, one must investigate the ways in which the movement of individuals, both out of states and into states, links states and sub-state groups, from regions to families.

Third, capital, as well as goods (produced objects), plays an integral role in globalization. Sometimes globalization is thought of as the movement of goods across borders, but that is inadequate; in reality, globalization is about the *co-production* of goods—the fact that materials and labor from multiple global locations are required for the

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21. See MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 8 (2000) (“Many contemporary theorists are reluctant to recognize the globalization of capitalist production and its world market as a fundamentally new situation and a significant historical shift.”).

22. Not only is the state itself an essential component of globalization, but the functions of the state are also of course driven by humans who reproduce their relationship with globalization in their management of the state.

production and transportation of essentially every produced object on the planet.<sup>23</sup> Global flows of capital underpin this co-production.<sup>24</sup>

Fourth, globalization is about the individual. Globalization in the contemporary world is linked to the individual in several ways: (1) Given the globalization of foodstuffs, some part of most people's diet is imported. The human body itself thereby becomes part of globalization in its most physical form, inseparable from it.<sup>25</sup> (2) Given that essentially all products are co-produced through globalization, humans' use of just about every *thing* connects an individual to globalization and the global networks of relationships. Even a chair carved from local wood will likely have been, even if nothing else, at least transported by some mechanized means, in which case tires, engines, fuel, *et cetera*, link the vehicle, and thereby the chair, to globalization. (3) Not only is nearly every individual aware of the global community, as well as of the global market (even if not in such terms), but every individual is also affected by the processes of international movement, interdependent economies, and planet-wide communication technologies. Globalization is therefore more than the mappable infrastructure and quantifiable processes themselves; globalization is equally so the ways that the patterns of this infrastructure and the reverberations of these processes become reproduced in individual subject formation, in the understandings of self. As a result, globalization is not merely a set of circumstances,

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23. More precisely, by *co-production* I mean that *every* nation-state is implicated in the production of nearly *every* manufactured product. In short, any given product—whether sofa or microwave or light bulb—will usually require raw materials from the lands of multiple nation-states. Even if not, the tools necessary to extract whatever raw materials are needed to make the product will likely come from different locations around the globe. And in any event, the factory and machinery used to assemble/paint/package the goods will be made of materials from across the world. And in each of these instances, labor in multiple countries—and/or laborers from multiple countries—will almost surely have been involved. And then, any mechanized transportation of the goods themselves will have been in vehicles—whether trucks and/or trains and/or ships—each of which will be comprised of hundreds if not thousands of component parts, *each* of which will be made up of raw materials that could be from any number of countries and each of which, to be extracted, will have required labor in any number of countries and each of which will have been touched by tools from any number of countries, all transported on vehicles using fuel from any number of countries, which may itself have been transported on a ship that has a crew from any number of countries . . . the list goes on and on and on, implicating more and more and more nation-states at each point along the way, until *all* have been included. Every manufactured good is from everywhere.

24. Note that in Peircean terms globalization has an indexical relationship to all produced objects and to all individuals.

25. Here too, if a given food stuff is from a foreign location, then foreign labor is also implicated, as well as the elements of globalization present in the transportation of such stuff, whether vehicles, component parts, fuel, oil, and all the labor and transportation that went into *those*.

conditions, and relationships, but is, like “modernity,” a way of being and a means of engaging with and experiencing the world.

### B. *The Role of Global Commerce*

As recognized recently by an array of institutions—including the World Bank, the World Trade Organization, and the Organization for Economic Co-operation and Development<sup>26</sup>—global value chains are transforming the way that international business operates.<sup>27</sup> Recall that two-thirds of the \$23 trillion in global trade is conducted by multinational corporations.<sup>28</sup> But it is no longer the case that multinational corporations—whether individually or through one-to-one supplier relationships—create, manufacture, and sell a given product on their own.<sup>29</sup> Instead, the research, design, production, and retail of most products are now performed through coordinated chain components that stretch systemically across multiple firms—ranging from a few to a few thousand.<sup>30</sup> It is not only these newly systemic chains themselves that are designated by the term “global value chain,” but also the shifts in the global political economy that they represent. Indeed, these transformed business practices are demanding that law take a novel role in structuring international business and the relationships that

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26. *E.g.*, OECD, WTO, AND WORLD BANK GROUP, GLOBAL VALUE CHAINS: CHALLENGES, OPPORTUNITIES, AND IMPLICATIONS FOR POLICY 12–20 (2014), [http://www.oecd.org/tad/gvc\\_report\\_g20\\_july\\_2014.pdf](http://www.oecd.org/tad/gvc_report_g20_july_2014.pdf) [https://perma.cc/XVJ8-MTU8] (archived Sept. 6, 2016); *see also* Gary Gereffi, *A Global Value Chain Perspective On Industrial Policy And Development In Emerging Markets*, 24 DUKE J. COMP. & INTL L. 433, 434 (2014) (“The global value chain (GVC) framework has evolved from its academic origins to become a major paradigm used by a wide range of international organizations, such as the World Bank, the World Trade Organization (WTO), the International Labor Organization (ILO), and the U.S. Agency for International Development (USAID).”).

27. *E.g.*, John Humphrey & Hubert Schmitz, *Inter-Firm Relationships in Global Value Chains: Trends in Chain Governance and Their Policy Implications*, 1 INT’L. J. TECH. LEARNING, INNOVATION & DEV. 258 (2008); Gary Gereffi et al., *The Governance of Global Value Chains*, 12 REV. OF INT’L POL. ECON. 78, 92–94 (2005); Raphael Kaplinsky, *Spreading the Gains from Globalization: What Can Be Learned from Value-Chain Analysis?*, 47 PROBS. OF ECON. TRANSITION 74 (2004).

28. WTO, *supra* note 1.

29. *E.g.*, GARY GEREFFI & KARINA FERNANDEZ-STARK, GLOBAL VALUE CHAIN ANALYSIS: A PRIMER 2, 8 (2011), [http://www.cggc.duke.edu/pdfs/2011-05-31\\_GVC\\_analysis\\_a\\_primer.pdf](http://www.cggc.duke.edu/pdfs/2011-05-31_GVC_analysis_a_primer.pdf) [https://perma.cc/8MY9-C8HA] (archived Sept. 27, 2016).

30. *E.g.*, Cattaneo et al., *Joining, Upgrading and Being Competitive in Global Value Chains: A Strategic Framework* 3–5 (The World Bank, Working Paper No. 6406, 2013).

sustain it. As I have argued elsewhere,<sup>31</sup> legal scholarship has been slow to adapt to these evolving changes.<sup>32</sup>

The symbiotic connections between law and international business—in the form of these global value chains—are likewise essential to understanding contemporary sovereignty. As previously stated, the phenomenon of globalization is not new.<sup>33</sup> Rather, human groups have for millennia moved and interacted across vast distances. This interaction has been stimulated by various catalysts, ranging from trade and religion to war and hunger.<sup>34</sup> Even in relatively recent times there have been periods of great social and economic interaction across vast swaths of the planet, including the years prior to World War I, which were characterized by elaborate and well-functioning networks of international commerce.<sup>35</sup>

The present era, however, is both quantitatively and qualitatively distinct from those that have come before it. For one, the sheer volume of current global commerce is unprecedented. More important than the simple volume of trade, however, is the extent of the integration of that trade: the economies of the nation-states of the world are now interdependent; the same is true of their sovereignties.

The idiosyncrasies of global commerce in the contemporary era have their roots in a series of significant technological advances. First among these was the industrial innovation in the early decades of the twentieth century that allowed a handful of corporations to maximize both efficiency and economies of scale. Anchored in manufacturing, these corporations reached substantial and previously unparalleled sizes by capitalizing on these technological advances to mass-produce goods. These early giant corporations were typically organized on a model of vertical integration. That is to say, the corporation itself tended to own all of the business units necessary to produce the product.

Throughout the 1900s, advances in the transportation industry facilitated the shipment of finished products and made it more feasible to obtain component materials and parts from ever greater distances. Of particular relevance in this regard was the invention and subsequent standardization of the shipping container, which

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31. Kevin Sobel-Read, *Global Value Chains: A Framework for Analysis*, 5 TRANSNAT'L LEGAL THEORY 364 (2014).

32. For an insightful exception, see IGLP LAW AND GLOBAL PRODUCTION WORKING GROUP, *The Role of Law in Global Value Chains: A Research Manifesto*, 4 LONDON REV. INT'L L. 57 (2016).

33. See *infra* Section II.A.

34. E.g., WOLF, *supra* note 20.

35. See Stewart Firth, *The Pacific Islands and the Globalization Agenda*, 12 CONTEMP. PAC. 178, 179 (2000).

drastically lowered the cost of global shipping while increasing efficiency.<sup>36</sup>

In the 1980s, this continuum of technological advances reached a new milestone: innovations in communications technology made it possible, for the first time, to achieve real-time communication between most points on the planet. These developments had profound effects on global commerce by unlocking previously impractical pathways and relationships. Simultaneously, the 1980s saw the rise of ideologies of free trade that took hold in many of the powerful nations around the world. These ideologies caused a range of governments to lower the legal barriers to the transportation of goods across borders.

In sum, by the end of the 1980s, the physical means to cheaply and efficiently ship goods globally were well-established: communication technology had made it possible to manage these shipments—as well as any relevant pre- and/or post-shipment processes—in real time, and governments were continuing to lower trade barriers so that transnational shipments could be made with diminishing legal—and therefore also economic—restraint. These combined factors transformed the landscape on which business could operate. In short, they opened the world's labor markets to foreign companies' production, and, subsequently, service needs.

Developed-country corporations responded through two key processes: outsourcing and offshoring. Outsourcing refers to what is called the *dis*-integration of business units.<sup>37</sup> Recall that, until this time, business units were typically vertically integrated, meaning that a single corporation would usually own the relevant business units necessary for production—the corporation performed most of its work, from research and development to assembly, in-house. In outsourcing, by contrast, the corporation contracts with other, outside firms for the completion of some of the tasks necessary for production, rather than performing them on its own. These tasks can include core production

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36. MARK LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER* (1st ed. 2008); Kevin P. Maney, "Said To Contain": Fear of Incurring Liability Creates a Disincentive for Cargo Carriers To Improve Shipping Container Security by Examining Cargo, 35 TUL. MAR. L.J. 317, 319–20 (2010) ("Developed in the 1950s, the container has not only changed the logistics of the movement of goods, but it has also contributed to the creation of the global economy. The shipping container has dramatically reduced freight costs, spurring the expansion of domestic companies into global companies, and cut transport time to such an extent that businesses have revamped inventory systems. . . . With the fall of the cost of shipping came an increase in the number of companies that began to expand into more markets and develop global supply chains. Not only were companies able to market and ship globally, but also production of goods became horizontal rather than vertical.").

37. Ronald J. Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 436–37 (2009) [hereinafter Gilson et al., *Contracting for Innovation*].

elements, such as the provision of components, or even assembly itself, as well as a range of auxiliary elements, including advertising, accounting, and legal services.<sup>38</sup> In many situations, outsourcing offers significant efficiency benefits: on the one hand, the corporation can contract upward or downward as its needs ebb and flow, rather than maintaining a constant staff; and, on the other hand, firms that specialize—whether in design or legal services—can focus on core strengths, often with greater expertise and innovation.

Offshoring, by extension, is the process by which corporations outsource given tasks to other firms specifically in foreign jurisdictions.<sup>39</sup> The production of goods and components in China is a basic example. The underlying reasons for offshoring tend, of course, to be cost: the production of a given component in a developing country is often much less expensive than production in a developed country, even taking into account transportation and coordination costs. These lower costs derive primarily from cheaper labor. However, wage is not the only factor: looser environmental regulations and harsher working conditions also increase production in relation to cost.

This combination of outsourcing and offshoring gave birth to global supply chains: as Western companies sought cheaper and cheaper sources of labor, they spread farther and farther into the world, often using intermediaries to manage the transactions. At the same time, production itself became ever more fractured, with more components being produced in more locations. In tandem, supply chains grew in length and complexity.<sup>40</sup>

This era was still, however, dominated by one-to-one relationships, that is, global supply chains were largely characterized by many series of arms-length transactions. But from the 1990s and into the 2000s, these global supply chains transformed into a novel phenomenon: global value chains.<sup>41</sup> Unlike the separate link-to-link nature of global supply chains, global value chains are marked by a

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38. Note here that old American dream story of the teenager who starts as a clerk in the mailroom of magnificent and monolith Company X but then climbs the corporate ladder to one day become head of the company. That dream story is only possible in a world where the mailroom clerks are necessarily employees of Company X in the first place. Today, with outsourcing, it is just as likely that such clerks are not employees of Company X but rather of an outside agency with whom Company X contracts to manage its mailroom services. The American dream, in this regard at least, has lost the plot.

39. See GEREFFI & FERNANDEZ-STARK, *supra* note 29, at 18.

40. See, e.g., Radu Mares, *The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments*, 79 NORDIC J. INT'L L. 193, 194 n.7 (2010) (explaining that the number of suppliers for some multi-national corporations can reach the “thousands and even tens of thousands”).

41. E.g., GEREFFI & FERNANDEZ-STARK, *supra* note 29, at 8.



fusion of the links: in form and function, global value chains are increasingly systemic, integrated processes.<sup>42</sup>

There are four main causes of this transformation. The first is efficiency. Regardless of industry, price serves as one possible source of competitive advantage for firms,<sup>43</sup> and, as noted, offshoring and outsourcing can certainly lead to cost savings. But whatever competitive advantage might be gained in these regards can be lost when all competitors similarly offshore and outsource their services, procurement, and production. Moreover, competition among firms in a given sector has escalated in recent years, minimizing the ability of retailers and manufacturers to accept narrower profit margins for the sake of lower selling prices.<sup>44</sup> Thus, as lead firms have become aware, an important and often necessary way to reduce costs further is to improve the efficiency of the entire supply chain.<sup>45</sup> In this process, lead firms often possess knowledge that can assist suppliers in enhancing efficiency, but lead firms are hesitant to share commercially sensitive knowledge without assurances that the supplier will remain loyal. The result implicates two levels of chain integration: on the one hand, lead firms become more involved in the day-to-day activities of their suppliers in order to help those suppliers become more efficient; on the other hand, lead firms are requiring suppliers to commit to longer, more complex relationships.<sup>46</sup>

Second, either instead of or in addition to price-based factors, another competitive advantage can be achieved by means of so-called differentiation.<sup>47</sup> Here the selling point of a given good relates to some

42. See Kaplinsky, *supra* note 27, at 87; Fabrizio Cafaggi et al., *Accessing the Global Value Chain in a Changing Institutional Environment: Comparing Aeronautics and Coffee* 5 (Inter-Am. Dev. Bank, Working Paper No. IDB-WP-370, 2012), <http://www.iadb.org/intal/intaedi/PE/2013/11680.pdf> [<https://perma.cc/353Q-G3R3>] (archived Sept. 3, 2016); Fabrizio Cafaggi, *Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety* 4 (Robert Schuman Centre For Advanced Stud., Working Paper No. RSCAS 2010/10, 2010), <http://ssrn.com/abstract=1554329> [<https://perma.cc/B56R-D5Y8>] (archived Sept. 4, 2016) [hereinafter Cafaggi, *Food Safety*].

43. See Kaplinsky, *supra* note 27.

44. Cafaggi et al., *supra* note 42, at 50; see also Raphael Kaplinsky & Mike Morris, *Value Chain Analysis: A Tool for Enhancing Export Supply Policies*, 1 INT'L J. TECH. LEARNING, INNOVATION & DEV. 283, 288 (2008).

45. Kaplinsky, *supra* note 27, at 87.

46. *Id.*; Cattaneo et al., *supra* note 30, at 4–5; see also Gilson et al., *Contracting for Innovation*, *supra* note 37; Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006). The fact that business is heavily dependent on the parties' relationships has long been reflected in the literature on relational contracts. For the seminal study in that regard, see generally Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). See also Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 484 (1985).

47. See, e.g., Kaplinsky & Morris, *supra* note 44, at 284.

non-price-based factor that sets the good or the brand apart from its competitors, whether it is the status (cool, prestigious, etc.) of the brand itself or some inherent quality of the good in particular (organic ingredients, fair trade certified, etc.). For reasons of quality control and certainty, the maintenance of a successful differentiation strategy typically requires the lead firm to increasingly interject itself into the day-to-day activities of its suppliers.<sup>48</sup>

Third, and related to the previous point, is reputation. As the importance of brands has grown in world commerce, so too has the value of the reputation of those brands.<sup>49</sup> Nike discovered this when it was revealed in the 1990s that Nike was purchasing goods from suppliers that relied on unconscionable working conditions (“sweatshop labor”) in developing countries.<sup>50</sup> Nike’s initial response was that it did not own or control these suppliers, rather it simply bought from them; therefore, it was not responsible.<sup>51</sup> While this assertion is true as a purely legal matter (among other things, because of the lack of privity<sup>52</sup>), public outcry proved to be significant and caused Nike to revise its supply practices.<sup>53</sup> Nike then began—as many Western companies now do—to monitor the day-to-day activities of its suppliers with increased vigilance.<sup>54</sup> What were once arms-length

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48. See, e.g., Cafaggi et al., *supra* note 42, at 69.

49. Humphrey & Schmitz, *supra* note 27, at 271.

50. E.g. Mares, *supra* note 40, at 199–200 n.30 (“The scandals in which Nike became entangled in the 1990s and that propelled CSR on the international agenda had to do with abuses taking place further down in the supply chain, in factories not owned or operated by Nike. As a result, in 1998, Phil Knight, Nike’s chief executive, admitted that ‘[t]he Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse.’”) (citing J. H. Cushman, Jr., *Nike Pledges to End Child Labor and Apply U.S. Rules Abroad*, N.Y. TIMES (May 13, 1998), <http://www.nytimes.com/1998/05/13/business/international-business-nike-pledges-to-end-child-labor-and-apply-us-rules-abroad.html> (subscription required) [<https://perma.cc/FEG4-R9PF>] (archived Sept. 27, 2016)).

51. E.g., Debra Cohen Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397, 404 (2010) (“Nike’s experience during the 1990s illustrates the harmful economic consequences to a corporation that dismisses sweatshop allegations. When CEO Phil Knight first was accused of running sweatshops at Nike’s Indonesian factories, he denied responsibility for the practices of their contractors.”).

52. For an excellent discussion of the role of privity in global value chains, see Jaakko Salminen, *Contract Boundary Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities*, IND. J. GLOBAL LEGAL STUD. 709, 725–26 (2016).

53. E.g., Maryanov, *supra* note 51, at 404 (“[Nike’s] position changed when widespread associations between Nike, child labor, and women’s exploitation caused the company’s capitalized value and brand reputation to plummet, leading Nike to initiate a public relations campaign and adopt a code of conduct in 1992”).

54. See Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT’L L. 41, 48–52 (2010); Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply*

purchases from suppliers have now become parts of a more integrated production strategy. In a similar way, what was once an aspiration of the Corporate Social Responsibility movement,<sup>55</sup> has now become a corporate necessity.<sup>56</sup>

Fourth, government regulation has forced lead firms in certain instances to engage more directly across their chains.<sup>57</sup> In some areas—such as environmental and labor standards—Western governments still impose few obligations on Western corporations in regard to their supply chains.<sup>58</sup> But in other areas, such as foodstuffs, Western governments are enacting more stringent laws. For instance, some domestic laws require traceability, meaning that a lead firm must be able to trace foodstuffs through all suppliers back to the farmer.<sup>59</sup>

*Chains as an Example*, 57 AM. J. COMP. L. 711, 718 (2009); John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 1–2 (2005).

55. See, e.g., Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002); Mares, *supra* note 40, at 195 (“Central to CSR writings is the idea that social and environmental impacts should be integrated into regular business decision-making and that companies should take systematic due diligence steps to prevent and remedy harmful impacts.”).

56. See, e.g., Cafaggi, *Food Safety*, *supra* note 42, at 3 (“Large retailers need to be market responsive to western consumers who have become ever more demanding and self-conscious since the recent food crises.”).

57. See, e.g., Humphrey & Schmitz, *supra* note 27, at 267.

58. For a limited statutory exception, see California Transparency in Supply Chains Act of 2010, S. 657, 2009–2010 Sess. (Cal. 2010). That Act, however, imposes only reporting requirements and is not triggered until a company has over \$100 million in annual worldwide gross receipts. *Id.* at § 3(a)(1) (“Every retail seller and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one hundred million dollars (\$100,000,000) shall disclose, as set forth in subdivision (c), its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.”). In a litigation context, see *Choc v. Huidbay Minerals Inc.*, 2013 ONSC 1414 (Can.). There, a group of Indigenous Mayan Q’eqchi’ from Guatemala alleged gang rape, murder, and other atrocities at the hands of security personnel working for the subsidiary of a Canadian mining company, Huidbay Minerals Inc. In Canada, the Plaintiffs filed, *inter alia*, claims of direct negligence against this Canadian parent. The parent company moved to strike on the grounds that the Plaintiffs stated no cause of action in negligence against them. In a decision that has potential future significance concerning the obligations of Canadian companies in regard to their supply chains, Judge Carole Brown of the Ontario Superior Court of Justice ruled against the parent company, finding that

a novel claim of negligence should only be struck at the pleadings stage where it is clearly unsustainable. In this case, it cannot be said that it is clearly unsustainable or untenable. The plaintiffs have properly pleaded the elements necessary to recognize a novel duty of care. The plaintiffs have also pleaded that the defendants breached the duty of care and that the breach caused the plaintiffs’ losses. Accordingly, I find that it is not plain and obvious that the three Statements of Claim disclose no reasonable cause of action in negligence.

*Id.* at para. 75.

59. Cafaggi, *Food Safety*, *supra* note 42, at 18.

The ability to do so compels the lead firm to have substantial involvement across the entire chain.<sup>60</sup>

In sum, the processes necessary to produce most products and services globally have become more systemic.<sup>61</sup> Further, almost two-thirds of all traded goods today are “intermediate goods,” meaning that they are parts, components, or other unfinished items that are produced or worked on but which are then, after these value-adding activities, destined for incorporation elsewhere into a completed product.<sup>62</sup> Many such goods, by definition, are both imported into and exported out of supplier countries during the course of their transit through the global value chain.<sup>63</sup> These systemic corporate connections therefore bind not only companies but also the nation-states in which the companies operate; this commerce, like the notion of sovereignty with which it is intimately intertwined, does not occur in a vacuum, but rather is intensely integrative.

### III. WHAT THE COOK ISLANDS MAKES POSSIBLE FOR AN ANALYSIS OF SOVEREIGNTY

The Cook Islands was and is an ideal location for researching sovereignty. Although the islands were colonized and remained under colonial rule for nearly a century, the country gained independence in 1965. As such, the formation of the Cook Islands nation-state is a recent, fresh phenomenon, often in the hearts and on the lips of its citizens. This sovereignty is, furthermore, an advancing work-in-progress, as politicians and lay-people alike continue to debate ideas, to test tactics, and to work to strengthen this tiny country they have created. Significantly, however, the story of the Cook Islands sovereignty is not one of unilateral efforts to distance itself from its former colonizers. Instead, the Cook Islands sovereignty is explicitly

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60. Cafaggi explains that “[s]tate regulation of imported food has proven to be difficult to implement without the active involvement of the entire supply chain.” *Id.* at 1.

61. See Sobel-Read, *supra* note 31; Kaplinsky, *supra* note 27, at 84; Humphrey & Schmitz, *supra* note 27, at 274–75; Gereffi et al., *supra* note 27, at 82–83.

62. Cattaneo et al., *supra* note 30, at 4; see also Gereffi et al., *supra* note 27, at 80.

63. Global value chains therefore implicate both export barriers and import barriers. Cattaneo et al., *supra* note 30, at 18. Furthermore, Cattaneo et al. give the following figures: “typically, about one-third of the imported intermediate goods are destined for the export market, with higher ratios in smaller economies (e.g. up to two-thirds for a country like Hungary) and in certain sectors (e.g. the foreign content of electronic goods exports was 40 percent in China and Korea, and up to 60 percent in Mexico).” *Id.* at 4 (citing OECD, OECD-WTO DATABASE ON TRADE IN VALUE-ADDED [http://www.oecd.org/sti/ind/TIVA\\_stats%20flyer\\_ENG.pdf](http://www.oecd.org/sti/ind/TIVA_stats%20flyer_ENG.pdf) [https://perma.cc/E7SH-XE23] (archived Sept. 27, 2016)). By the same token, exports in international trade contain an average import content of approximately 40 percent. See Cattaneo et al., *supra* note 30, at 3.

built—with remarkable strategic savvy—on the close relations that the country maintains with Aotearoa/New Zealand.<sup>64</sup>

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The Cook Islands is a small nation-state made up of fifteen primary islands that are spread across hundreds of thousands of square miles of the South Pacific Ocean. By rough measurement, this island group lies directly below Hawai'i, about as far below the equator as Hawai'i is above it. Geographically and culturally, the country is divided in two, between the seven islands of the smaller Northern Group and the eight islands of the larger Southern Group. The main island of Rarotonga is located in the Southern Group.

Roughly 60,000–75,000 Cook Islanders reside in New Zealand and Australia. Of those who remain in the Cook Islands, most of the population—more than three quarters of the roughly 14,000 residents—live on Rarotonga. Rarotonga also serves as the seat of the national government, as the business hub, and, indeed, as the gateway to the rest of the country. The remaining islands are referred to as the Outer Islands. One of these Outer Islands, Aitutaki, has what is perhaps the most beautiful lagoon in the world and has had some success with tourism. The other Outer Islands, with some exception for pearl farming and a little agriculture and tourism, currently support very little commercial economic activity.

Until the larger-scale arrival of Europeans in the 1800s, all of the islands of the now-Cook Islands were, in large part, independent entities, many of which participated together in regional (especially within the Southern Group and the Northern Group respectively) trade, intermarriage, and fighting. The alliance of these fifteen islands into a single country—indeed, into a single governmental entity of any sort—is solely the result of the arbitrary hand of colonial administration, which has both united and divided the islands of the broader region. The Northern Group island of Pukapuka, for instance, is physically closer to, and has more culturally in common with, Samoa than it does Rarotonga—yet it was made a part of the Cook Islands.

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64. Within its own borders, and across the broader Pacific region, New Zealand is often referred to as Aotearoa (Land of the Long White Cloud) or Aotearoa/New Zealand. And indeed, the different names compete in the vernacular of English-language discourse about the country. Contested ideologies of history and power are of course hidden in this linguistic battle. The name “New Zealand” was coined by early Dutch explorers and later adapted by Captain Cook. There is debate about the origins of the term “Aotearoa,” and indeed, it may be somewhat of a neologism; even so, it is clear that in the fraternity of European colonialism, the British adopted an anglicized version of the Dutch term rather than an Indigenous name. With much hesitation, I have chosen the label New Zealand for these pages.

Conversely, the islands, especially of the Southern Group have traditionally had extremely close relationships with the island of Tahiti and several other of the neighboring islands of French Polynesia, yet there the indiscriminate process of colonization served to sever rather than to join.

Standing on the shores of any of these islands, one cannot help but respect the magnificent feats of the early canoe-sailors who discovered the various dots of land that make up the area we have come to call Polynesia. This area is essentially comprised of all the islands contained within a giant triangle across the South Pacific Ocean, for which New Zealand, Hawai'i, and Easter Island (also known as Rapa Nui) make up the three points. Within this frame, many of the regions have different histories. Tonga and Western Samoa, for example, were settled some 3,000 years ago; Hawai'i and the Cook Islands were reached later, about 1,700 years ago;<sup>65</sup> then, approximately 900 years ago, a group of large sailing canoes that left the Cook Islands carried a small group who found and settled what is now New Zealand.<sup>66</sup>

Given the Polynesians' skills as sailors, they were able to maintain links over remarkably vast spans of ocean. These links were, however, mostly between islands as independent entities—or, given some infighting, between independent villages.<sup>67</sup> Over time, the connections across longer stretches of Polynesia became less frequent if not obsolete.<sup>68</sup> But across shorter distances, such as between what are now the Cook Islands and French Polynesia, the people continued for centuries to intermarry, trade, and fight across the hundreds of miles of ocean that in some senses separated and in other senses connected them.<sup>69</sup>

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65. Guy Powles, *The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia*, 10 U. HAW. L. REV. 105, 115 (1988).

66. There is, however, a difficulty in constructing a history of places like the South Pacific because most written angles are tainted by colonial points of view. *E.g.*, ROBERT NICOLE, *THE WORD, THE PEN, AND THE PISTOL: LITERATURE AND POWER IN TAHITI* 1–2 (2001).

67. See RON CROCOMBE, *PACIFIC NEIGHBOURS: NEW ZEALAND'S RELATIONS WITH OTHER PACIFIC ISLANDS* (1992) [hereinafter, CROCOMBE, *PACIFIC NEIGHBOURS*]; Solomon Mamaloni, *The Road to Independence*, in INDEPENDENCE, DEPENDENCE, INTERDEPENDENCE: THE FIRST 10 YEARS OF SOLOMON ISLANDS INDEPENDENCE 7 (Ron Crocombe & Esau Tuza eds., 1992).

68. CROCOMBE, *PACIFIC NEIGHBOURS*, *supra* note 67, at xviii.

69. Well-known Tongan anthropologist, Epeli Hau'ofa, has described the sea as connecting the islands of the Pacific, rather than separating them. Epeli Hau'ofa, *Our Sea of Islands*, in A NEW OCEANIA: REDISCOVERING OUR SEA OF ISLANDS 1, 8–9 (Vijay Naidu, Eric Waddell, & Epeli Hau'ofa, eds., 1993). See also CROCOMBE, *PACIFIC NEIGHBOURS*, *supra* note 67, at 193 ("Water facilitates good relations. The greatest irritant in international relations elsewhere in the world is land boundaries, which are so often disputed."); Pär Olausson, *AUTONOMY AND ISLANDS: A GLOBAL STUDY OF THE FACTORS THAT DETERMINE ISLAND AUTONOMY* (2007).

During much of the 1800s, most of the islands of Polynesia fell victim to colonization, generally at the hands of the British, the Germans, and the French.<sup>70</sup> In the early years, many island peoples resisted with violence, but eventually the Europeans' more powerful weapons won out, not to mention the devastating effects suffered by Polynesians from the Western diseases introduced into the islands.<sup>71</sup> At the same time, this colonial process served to bind, in different ways, the various islands to Europe, for instance, plugging the Cook Islands into the particular set of global relationships for which Britain was the hub.

Since the mid-1900s, across Polynesia, the post-colonial period has given rise to a number of different political statuses and relationships.<sup>72</sup> Among these, there is New Zealand, which, like the United States, was colonized by the British and then achieved independence at the hands of its European descendants.<sup>73</sup> Other areas, such as Hawai'i and Easter Island, have been absorbed into their settler states (the United States and Chile, respectively). Tonga and Tuvalu are independent. And the famous islands of Tahiti and French Polynesia, like New Caledonia, are now territories of France.<sup>74</sup>

The Cook Islands received independence in 1965—an independence that deserves special discussion. Initially, it was the British who colonized the Cook Islands. In 1901, however, colonial control was handed over to New Zealand. At the time, New Zealand was eager to take on colonies in an effort to mimic the European powers. New Zealanders were very quick to find out, however, that colonies were expensive and, rather than prestigious, had become a “political embarrassment.”<sup>75</sup>

70. Tonga is an interesting example of a domain that was missionized by—and therefore heavily influenced by—the Europeans, but was never formally colonized politically; today it is a constitutional monarchy.

71. See NICOLE, *supra* note 66, at 168.

72. Prominent South Pacific anthropologist Ron Crocombe has noted that “[a]s international political entities, the islands did not exist until the 1960s and 1970s.” He adds: “Independence . . . changed all that. Power came to be located in islands [*sic*] capitals in a way it never had been before – ever . . .” CROCOMBE, *PACIFIC NEIGHBOURS*, *supra* note 67, at 164.

73. New Zealand is home to a large minority of Polynesian people now referred to collectively as the Maori. When the Europeans arrived, there were an estimated 100,000–200,000 Maori; as of the 2006 census, there were 565,329 people “of Māori ethnicity,” who make up roughly 14 percent of New Zealand’s total population of 4,027,947. *QuickStats National Highlights*, STATISTICS NEW ZEALAND, <http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/national-highlights/population-and-dwellings.aspx> (last visited Oct. 15, 2016) [<https://perma.cc/7HR8-KRAD>] (archived Sept. 7, 2016).

74. See CROCOMBE, *PACIFIC NEIGHBOURS*, *supra* note 67.

75. *Id.* at 163.

So New Zealand later sought prestige in other ways. In an effort to gain favor in the United Nations, New Zealand pursued an aggressive plan of decolonization with regard to its island territories.<sup>76</sup> As part of this process, the people of the Cook Islands were offered three UN-driven options: (1) full independence, (2) to become incorporated into New Zealand, or (3) to become what was termed as independent “in free association with” New Zealand.<sup>77</sup> Cook Islanders chose the third option, and, in 1965, the Cook Islands officially became an independent state “in free association with” New Zealand.<sup>78</sup>

The words “in free association with” have been the subject of much inquiry, discussion, and debate. Indeed, the Cook Islands was the first state to enter into free-associated status, so there was no template to follow.<sup>79</sup> In the words of one former prime minister, “you couldn’t just turn to page X in the law books” to see how it all was to work.<sup>80</sup> Several core concepts, however, are clear: free-associated status means that the Cook Islands is an independent state with the constitutional right to full independence. At the same time, and until it chooses otherwise, it allows certain functional aspects of its statehood—primarily, the bulk of its foreign affairs and defense—to be handled by New Zealand.<sup>81</sup> As a theoretical matter note that, even though the Cook Islands, in choosing free-associated status, might arguably have agreed to share some aspects of its statehood, the country was still, in the moment of making that decision, undeniably exercising “full” independence.<sup>82</sup>

The Cook Islands nevertheless can, and does, enter into treaties and other international agreements on its own account. Two examples are the Treaty on Friendship and Delimitation of the Maritime Boundary between the United States and the Cook Islands,<sup>83</sup> and the United Nations Convention on the Rights of the Child.<sup>84</sup> The Cook

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76. New Zealand was in fact the first country to decolonize a UN trust territory—Western Samoa in 1962. *Id.* at 163.

77. See JEFFREY SISSONS, NATION AND DESTINATION: CREATING COOK ISLANDS IDENTITY 11 (1999); CROCOMBE, PACIFIC NEIGHBOURS, *supra* note 67, at 171.

78. *Id.*

79. Niue later entered into a similar relationship with New Zealand in 1974. *Id.* at 171.

80. Conversation with former Prime Minister, Sir Geoffrey Henry (April 20, 2010).

81. *E.g.*, CROCOMBE, PACIFIC NEIGHBOURS, *supra* note 67, at 171. Note also that in the ways of many [former] members of the British Empire, the Queen of England serves as the official head of state of the Cook Islands. See COOK ISLANDS CONST., part 1, art. 2 (Dec. 21, 2004).

82. Conversation with Mike Mitchell, then Cook Islands High Commissioner to New Zealand, June 28, 2010.

83. Treaty Between the United States of America and the Cook Islands on Friendship and Delimitation of the Maritime Boundary Between the United States of America and the Cook Islands, U.S.-Cook Islands, June 11, 1980, 1676 U.N.T.S. 223.

84. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force on Sept. 2, 1990).



Islands is also a member of the World Health Organization.<sup>85</sup> Although not a “member” of the United Nations itself, the Cook Islands is still a member of several of its organizations, such as being a “member state” of the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>86</sup>

Importantly, as part of this arrangement between the Cook Islands and New Zealand, Cook Islanders are automatically citizens of New Zealand. The reverse, however, is not true, and non-Cook Islander New Zealanders are *not* entitled—automatically or otherwise—to become Cook Islands citizens (at most they can receive what is called permanent resident status). And, although the Cook Islands experimented briefly with using its own currency, for most of its history it has used, and continues to use, the New Zealand dollar.

#### IV. A MODEL OF CONTEMPORARY SOVEREIGNTY

Sovereignty is more than jurisdiction and it is more than personal sentiment. Sovereignty is several things together, all of which are essential to understanding the concept as a whole:

- (1) *a functional/instrumental component, comprised of*
  - *an interface mechanism*
  - *a value-maximization mechanism*
- (2) *an emotional component.*

First, sovereignty is comprised of a functional/instrumental component. This component is nearly identical among and across all groups such that, even if some sovereignties operate differently from others, the structure is still roughly the same for all. This component is likewise the machinery that makes sovereignty work. Sovereignty is, after all, not just an idea, concept, or belief, but is also a system that people organize themselves under, that people live by; people are all, whether they like it or not, embedded in a world of nation-states, of so-called sovereignties.<sup>87</sup> This functional/instrumental component of

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85. *See Countries*, WORLD HEALTH ORGANIZATION, <http://www.who.int/countries/en/> (last visited April 8, 2016) [<https://perma.cc/RN3R-EJ4E>] (archived Sept. 7, 2016) (noting that “[t]erritories which are not responsible for the conduct of their international relations may be admitted as Associate Members upon application made on their behalf by the Member or other authority responsible for their international relations”).

86. *Countries*, UNESCO, <http://en.unesco.org/countries/c> (last visited Jan. 13, 2016) [<https://perma.cc/QA3Z-MSAG>] (archived Sept. 7, 2016).

87. Note that sovereignty, even nation-state sovereignty, is different from the *state*. Sovereignty is a concept—but not only a concept but also an enacted reality, a framework, a process. The state, in turn, is a tool, populated by actors, for managing sovereignty.

sovereignty is comprised, in turn, of two elements, one that serves as an interface mechanism with other sovereignties and another that functions to maximize selected local values.

Second, sovereignty is made up of a subjective component that is unique to each group. I call this component emotional sovereignty.<sup>88</sup> A group's emotional attachment to the sovereignty is, of course, related to the values being maximized by the functional element of sovereignty.<sup>89</sup> This relationship illustrates the symbiotic nature of these several components of sovereignty: they impact each other just as they function together.<sup>90</sup>

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88. By using the term "emotional," I am not seeking to link to any existing literatures. On the whole, I use the term in its lay sense, for its common meaning of feelings that are recognizable but not quantifiable, a force that drives us, animates us, subject to influence but never to full conscious control. Certainly, there is a growing body of scholarly work on affective phenomena (e.g., HIROKAZU MIYAZAKI, *THE METHOD OF HOPE: ANTHROPOLOGY, PHILOSOPHY, AND FIJIAN KNOWLEDGE* (2004)), but I am neither attempting to specifically incorporate nor to refute that literature. The seminal work of Catherine Lutz in this area does, however, provide two important insights here. Catherine Lutz, *Emotion, Thought, and Estrangement: Emotion as a Cultural Category*, 1 *CULTURAL ANTHROPOLOGY* 287, 289, 291 (1986). On the one hand, emotion is—in part, at least—culturally constituted. This is consistent with my use of the term "emotion" in relation to sovereignty because I argue that each group's *emotional sovereignty* is qualitatively unique. On the other hand, given that it is culturally constituted, emotion is both an individual *and* a social phenomenon. This duality likewise permeates my use of the term *emotional sovereignty*, in that I am including *individuals'* relationships with a given sovereignty, but always and necessarily within the context of a group and the group's relationships to the sovereignty: these are the ties that bind, the reasons that people often unite in the magic of nation-building, whether because of ethnicity, ancestry, land, or common rights—or even as a result of force—but likewise subject to individual deviation, contestation, and resistance.

89. One might be tempted to describe this phenomenon as "nationalism." And indeed, there may be considerable overlap between the two ideas. But I do not believe that the literatures on sovereignty and nationalism can simply be combined. Nor can I agree with an equation such as: *sovereignty* = *nationalism* + [*something*], no matter what the "something" is.

90. As such, it goes without saying that any one of these components is insufficient on its own to explain contemporary sovereignty in its entirety. Certainly, a collective belief in a group, even a subjective attachment to the nation, does not alone create sovereignty; sovereignty must be something more, sovereignty must *function*. At the same time, sovereignty is not a lifeless machine, devoid of human involvement. To be sure, in many cases the people of a sovereign state feel allegiance, occasionally love, toward that state; sometimes that love and allegiance even rises to the level of fanaticism. But other sovereign states function by force, by the subjugation of some or most of the population who might not share the nationalist visions of the state's leaders. But even here, two points are important. First, those who are unwilling citizens of any state still *live* in the functioning of the state, still have a relationship with the state, no matter how violent; their subjective relationship with the state still affects the functioning of the state, even if that relationship is resistance rather than love and allegiance. And second, regardless of the level of oppression, the sovereignty of the state is still organized, managed, by *people*—it is never wholly automatic or mechanical, but always *human*. In other words, the point is not that sovereignty is in every instance made up of ideal flag-waving, fluff-and-roses allegiance to the sovereignty; no, allegiance

So, contemporary sovereignty is not just subjective and not just functional, it is both. As such, an understanding of all the parts is necessary to understand the whole.

### A. *The Functional/Instrumental Side of Sovereignty*

The concept of sovereignty has traditionally been posited as one that marks borders between political/jurisdictional entities.<sup>91</sup> But today, no land is fully bordered. The pores may vary in shape, size, and permeability, but every border is porous. More importantly perhaps, sovereignty is not something that *is* but is something that *does*. It is not the ethereal fantasy of philosophers, but the day-to-day existence of the nation-state, as managed by the people who populate it and in constant flux due not only to domestic caprice but also to the dynamic influences of other nation-states.

Indeed, trying to understand sovereignty—or the people of a given sovereignty—by only looking inward has always been incomplete. Groups are inevitably structured against and in relation to other people; just as individuals do not exist in isolation, neither do groups, nor have they ever. Even when groups arrive in a new place—such as the Maori in the previously unpopulated New Zealand—they soon divide into subgroups, in existence *vis-à-vis* the others.

So an understanding of any group's sovereignty must account for the ways that that group's sovereignty relates to other groups' sovereignties. This is the functional/instrumental element of sovereignty, and, unlike the emotional element of sovereignty, which is unique and different for all groups, the functional/instrumental element is similar for and among all groups.<sup>92</sup>

This functional/instrumental element of sovereignty is made up of two parts. The first part operates as an *interface mechanism*, that is to say, as the procedural machinery that allows nation-states to communicate, relate to each other, and do business together.<sup>93</sup> The second part serves as a *value-maximization mechanism*. Here, the role

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is often contested—even enforced by violence—but whatever the case, sovereignty is lived, experienced. There is, in short, *always* a subjective relationship between individuals and the state that is a component of that state's sovereignty.

91. *E.g.*, DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS* (2001); DAVID. E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 4 (2001).

92. For an in-depth discussion see *infra* Section IV.B.

93. For excellent discussions of sovereignty as “relational sovereignty,” see Thomas Biolsi, *Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle*, 32 AM. ETHNOLOGIST 239 (2005); JESSICA CATTELINO, *HIGH STAKES: FLORIDA SEMINOLE GAMING AND SOVEREIGNTY* (2008); VALERIE LAMBERT, *CHOCTAW NATION: A STORY OF AMERICAN INDIAN RESURGENCE* (2007).

of the nation-state is as a gate-keeper of what the state—as the presumptive proxy for the people—determines are the characteristics of culture worthy of support.<sup>94</sup> As such, the role of the state in maintaining sovereignty is to interface with outside states in order to generate enough capital (and have the person-power to do so) to be able to best promote the domestic values that are deemed most worthy. It is this aspect of sovereignty that is the crux of the symbiotic relationship between the outward-focusing and inward-focusing aspects of sovereignty.

In a pivotal way, law is central to these two parts of sovereignty's functional/instrumental component. Law holds this central position because any given nation-state will construct a system of laws to manage both of the characteristics noted above: this system of law is the filter through which the interface with other nation-states occurs, just as it is the structure that determines which cultural elements are supported and which are disfavored.<sup>95</sup> In other words, the national regulation of cross-border capital structures a state's relationship with the global market and is therefore an interface with that global market; at the same time, national regulation structures how incoming capital is distributed domestically/internally. Moreover, these factors are, of course, intertwined: the domestic distribution of capital affects the state's relationship with the global market, and vice versa.

### 1. Sovereignty as an Interface Mechanism

Capital is fungible. Nation-states' laws create interfaces for the transfer of capital. Between and among nation-states, these interfaces intersect. The interfaces are aligned—as if by compatible nozzles on different types of hoses—which makes the movement of capital, as well as people, possible. So nation-state systems of law on the one hand create the interface necessary to interact—among other things, to do business—with other countries, and on the other hand allow each individual country to regulate the flow of capital, people, and business across its borders.

To put it differently, sovereignty here is the structural form that, via its procedural mechanisms, allows nation-states to interface with other nation-states. All nation-states are different: their people are different and they function differently internally. But by convention,

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94. Obviously, what a culture “is,” and what its values are, are always and continuously contested.

95. This function takes place not only explicitly but also by virtue of the structure of the system itself. As a simple analogy, imagine a taxing regime that favors those with capital gains over those with wage income; by virtue of the system itself, the “pie” is divided in such a way that is to the benefit of one group and to the detriment of the other.

all nation-states have come to have specific sets of structural attributes. They have things like passports, embassies, a flag, a capital, *et cetera*. Yet, each nation-state also has particular sub-sets of laws that provide the mechanisms for interfacing with other countries, such as customs laws, immigration laws, and import/export laws. These particular sets of laws serve to translate domestic laws into a global lingua franca. So, for instance, the property laws and employment laws that apply at an industrial factory, otherwise wholly domestic (and unique) in nature, are linked to the international marketplace and can be made to function in conjunction with a foreign company that might buy (or hire) the factory.

A simple illustration can be seen in the postal systems of the countries of the world. Each functions very differently internally, domestically. Take, for example, two countries where I have performed research, Sweden and the Cook Islands. An on-going debate in Sweden involves whether mail-carriers should be relieved of putting the mail through the individual mail slot of each and every family's door in a multi-story apartment building (as is the current practice), given the wear-and-tear on the carrier's knees from going up and down so many flights of stairs each day. In the Cook Islands, by contrast, not only is there no such debate regarding the physiological strains of the country's postal carriers, there is in fact no mail delivery service at all; instead, all mail is placed in post-office boxes, for retrieval by the recipient. As such, there are phenomenal differences between these two countries' domestic postal systems. But the two systems—like compatible nozzles on different hoses—interface, they function together: mail can be and is sent seamlessly between the two countries—across half the planet. Even packages—goods requiring the state intervention of customs clearance—regularly cross borders, carried between diverse senders and recipients by the compatible machinery of interlocking global relationships. More complex systems of law and commerce function similarly.

Keep in mind, of course, that the whole of global economics is made up of much more than basic national systems that interface with a global system—there are many, many layers and varieties of economic systems at play.<sup>96</sup> Moreover, each of these many economic sub-systems can and will interface differently with the global system, with one or more national systems, and/or with each other. But in these cases, there are still points of interface where the systems meet, where translation between them occurs, and where sovereignty consequently becomes implicated and is often negotiated.

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96. See, e.g., SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* 1–2 (2006).

a. Evidence from the Cook Islands

(1) The Visible Doorway: Customs and Immigration

The Cook Islands maintains a customs office and an immigration office, each of which operates under a set of laws enacted for these purposes.<sup>97</sup> In regard to interface mechanisms with the global community, customs and immigration schemes—regulating the arrival of goods and individuals, respectively—are of central importance, as they stand as perhaps the most obvious regulatory doorway onto the physical land of the Cook Islands and into the jurisdiction of the nation-state.

The impact of these two offices on the country is, of course, substantial. For instance, customs laws restrict—by means of duties and levies—the importation of pork and certain seasonal vegetables grown in the Cook Islands.<sup>98</sup> Domestic producers are naturally the beneficiaries of these regulations. Other duties and levies on alcohol<sup>99</sup> raise the price of alcoholic beverages, thereby affecting consumption (while naturally raising government revenue<sup>100</sup>).

At the same time, immigration rules dictate who can be in the country and for how long. One focus of such regulation is to attempt to limit foreign residents to those who benefit the Cook Islands, whether by contributing capital and entrepreneurship or by providing direct wage labor. Furthermore, unless one receives permanent resident

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97. Cook Islands: Entry, Residence and Departure Act 1971–72, §§ 7, 27, (Mar. 20, 1972) <http://www.refworld.org/docid/3ae6b536c.html> [https://perma.cc/7WCP-FPXN] (archived Sept. 27, 2016) (addressing, *inter alia*, the responsibilities of immigration officers (Section 7), entry into the Cook Islands (Part III), and the inspection of crews, passengers, shops and aircraft (Section 27)); Customs Tariff Act 1980, §§ 6, 7, [http://www.pacii.org/ck/legis/num\\_act/cta1980178/](http://www.pacii.org/ck/legis/num_act/cta1980178/) (last visited Oct. 15, 2016) [https://perma.cc/T9LK-82KF] (archived Sept. 27, 2016) (addressing, *inter alia*, determinations relating to certain goods (Section 6) and the power to alter duties (Section 7)).

98. Import Levy Amendment Act 1978–79 (Cook Islands) [http://www.pacii.org/cgi-bin/sinodisp/ck/legis/num\\_act/ila19781979246/ila19781979246.html](http://www.pacii.org/cgi-bin/sinodisp/ck/legis/num_act/ila19781979246/ila19781979246.html) (last visited Oct. 15, 2016) [https://perma.cc/ZK7S-MVSH] (archived Oct. 15, 2016) (imposing a 25 percent levy on “Pork and pig products, frozen, chilled or similar,” as well as a 25 percent levy on a range of vegetables including cabbages, carrots, lettuce, pumpkin, radishes, and tomatoes).

99. *Id.* (imposing the following duties: Beer (60 cents per liquid gallon); Cordials, Liqueurs and Bitters, Spirituous beverages, the strength of which can be ascertained by Sike’s hydrometer (\$15.50 per liquid gallon); Wines, all kinds (\$6.10 per liquid gallon); Other Alcoholic beverages (\$6.10 per liquid gallon)).

100. Some 30 percent of the government’s direct revenue for purposes of the national budget comes from fees taken in by the customs office, of which duties and levies on alcohol make up one part.

status,<sup>101</sup> a residence permit must be renewed yearly so that the state can annually reevaluate a foreigner's perceived worthiness.

These portals for international movement are subject to the vagaries of human intuition, predilection, and mistake. This is natural. The point is that this key interface with the global community and the global marketplace is dynamic on multiple levels. First, it is Parliament that establishes the laws that mark the blueprint of this interface mechanism. Within this blueprint, the internal regulations of the Customs Office and the Immigration Office structure the day-to-day functionings of the mechanism. And then, of course, the individual staff members play their own role in applying the regulations to the real-world issues that they confront. Then, importantly, in regard to perceived successes or failures of these regimes (such as whether too many foreigners might be settling in the country), public sentiment might influence Parliament to alter the laws—continuing the feedback mechanism.

But, regardless of any such adjustments to the law, the fact remains that the customs and immigration laws and offices, as the portals they are, interface with the outside world. Moreover, they do so as a function of state sovereignty.

## (2) Tourism: The Core of the Cook Islands' Economy

A nation-state's interface with other sovereignties is primarily for purposes of participation in the global marketplace. But states' abilities to do so vary greatly and no state has available to it a full range of interface options. This is because a given state will only be attractive to the global market in regard to those resources available in that state *and* based on the state's ability to furnish those resources in an efficient, sufficient, and compelling manner.

That said, states certainly have the power to affect the types of interfaces that they have with the global market—the key point is that they are forced to do so within the boundaries of what is available. Thus, Greenland could obviously not compete on the global market as a sun-and-fun locale, just as Barbados cannot re-create itself as a snowboarding destination.

As a small state in the middle of the ocean, the Cook Islands is, of course, a good example of a state that is limited in the ways that it can interface with the global marketplace. For a location like the Cook Islands, tourism is a manifest option and the Cook Islands has very

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101. Although currently permanent resident status is decided by the Immigration Office—that is to say, by the state—proposals have been put forth to involve in that decision-making process the local traditional leader of the applicant's residence area.

much pushed to be a player in this market.<sup>102</sup> But, just as no state has available to it every economic option, it is equally true that the availability of a resource does not guarantee that the resource will be profitable, or even that taking advantage of that resource is a foregone conclusion. In short, the possession of beautiful beaches does not automatically turn a given state into a prime tourism destination.<sup>103</sup> The Cook Islands possesses the natural attributes of a sunny tourist destination but has had to proactively manage the process of transforming its islets of tropical beauty into functional nodal points—transmitters and receptors—of the global economy. This effort has been ongoing since independence.

Furthermore, this effort has evolved in a broader regional and global context. Much has been written about the mystique of Polynesia, largely in regard to Tahiti;<sup>104</sup> interestingly, the Cook Islands has benefitted from this myth and has also been harmed by it. On the one hand, Cook Islands' tourism is enhanced by the European/American construction of Polynesia as a place of beauty and fantasy. On the other hand, the geographic proximity of Tahiti has meant that the Cook Islands also has had to compete directly against Tahiti. This direct competition is made all the more difficult by the long head-start that Tahiti has had in terms of marketing itself (and in having its imposed myths market for it). But, at the same time, the directness of the competition is eased by the difference in colonial language and the natural tendency of Tahiti to attract native French speakers while some native English speakers prefer the Cook Islands.<sup>105</sup>

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102. By contrast, the Cook Islands is ill-suited to most production-type industries, even those that might exist on a small scale. A major problem is the procurement of materials. Thus, as it was explained to me, even something that seems small and simple, like jam production (which might otherwise seem like a promising business in a place where fresh fruit is so abundant), can be very difficult. After all, when on a small island, if one runs out of, say, lids for jam jars, one is simply out of luck until the next shipment arrives. Conversation with Louisa Sifakula, Pacific Island Trade and Investment Commission, April 7, 2010. Indeed, even if parts have been ordered, the timing of deliveries, unless air-freighted, can easily be delayed because of weather that prevents a ship from docking or due to other logistical factors relating to sea transportation.

103. Around the South Pacific, there are certainly many countries that have beautiful beaches and climates but that receive very little tourism; certainly, many islands of the Cook Islands, while in classical terms among the most spectacular in the world, receive almost no tourists. Samoa is an example of a South Pacific country that is actively working to build up its currently under-developed tourism industry. On the opposite side of the globe, the states surrounding the Mediterranean Sea offer other good examples. In terms of sea-side tourism, Albania and Montenegro have nowhere near the drawing power of neighboring global icons Italy and Greece, and therefore can demand nowhere near the same prices; in this regard, Croatia is interesting as a less-expensive but up-and-coming mid-point.

104. See generally NICOLE, *supra* note 66.

105. Recall that historically and culturally, the people of Tahiti are among the most closely related to Cook Islanders and the two groups speak mutually intelligible



Several factors have combined to make tourism the core—some 70 percent—of the Cook Islands' economy. First, as noted, the Cook Islands is made up of a genre of natural beauty that is held in high esteem by many. That beauty, in turn, has been mystified, objectified, and transformed into a market commodity by forces of colonialism (exoticism) and capitalism (the tourism industry, among others). Second, successive generations of Cook Islander leaders have recognized the (economic) value of tourism and have pushed the country, with some considerable success, to build itself in the image of a (pre-constructed) tourist destination.<sup>106</sup> Third, changes in the local economy have facilitated the solidification of tourism as the primary economic factor, at least on the main island of Rarotonga and the island of Aitutaki.

These latter changes in the local economy have in part been caused by shifts in the global economy. Over the past several decades agricultural production has become less profitable in the Cook Islands because earlier target markets—including New Zealand and Australia, as well as the United States and Europe—can now all obtain similar fruits from cheaper global locations. The combination of decreasing profits from agriculture and more lucrative profits from the tourism sector—as well as the spread and amplification of Western, individualist practices—have led many on the island of Rarotonga to cease growing crops and to construct one or more bungalows or other living spaces for rental to tourists.<sup>107</sup> Not only are such bungalows and rooms often more profitable than agriculture, but they also generally require much less time and physical labor.

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Indigenous languages. But as mentioned, the contemporary English-versus-French linguistic splice between the two is another marker of the arbitrariness of post-colonial nation-state building.

106. For a corresponding discussion in regard to the Dali region in China, see BETH E. NOTAR, *DISPLACING DESIRE: TRAVEL AND POPULAR CULTURE IN CHINA* (2006). Further, these efforts confirm the fact that a given country's success in a certain market is not due solely to what the global market allows but is also necessarily related to human factors, such as who promotes an idea and how and when. In the case of the Cook Islands, one important catalyst for a shift from an agricultural economy to a tourist economy was the drive of former Prime Minister Geoffrey Henry who, as he himself has put it, "wanted to stop bringing the fruits to the mouths and instead bring the mouths to the fruits." Conversation with former Prime Minister, Sir Geoffrey Henry, April 16, 2010.

107. The relative ease of earning money within the tourism industry has also sapped many Cook Islanders of the incentive to be innovative in other ways. I was told, for example, that hotels on Rarotonga would have a need for the provision of local foodstuffs, such as eggs; nevertheless, in part because of the availability of easier money, no local Cook Islander has yet set up a domestic egg production industry that could perform this service. In Samoa, by comparison, where the tourism industry is in its infancy, the local people often have to be more innovative in these regards. Conversation with Louisa Sifakula, Pacific Island Trade and Investment Commission, April 7, 2010.

The shift to a tourist economy has had widespread consequences for the day-to-day lives of the people on Rarotonga and Aitutaki. These consequences are multi-layered. Following independence, Sir Albert Henry began leading the people into a conceptual shift that transformed the Cook Islands—and consequently the people as the substance of the nation—into a tourist destination. As part of this conceptual shift, cultural practices took on new meanings and cultural articulations took on new forms. On top of these changes, many people, overnight, went from being agriculturalists to landlords, and thereby from being people of the land to being people of capital, with all the related types of changes in action and consumption that have been well documented elsewhere.<sup>108</sup> In the words of one local informant, today “a tourist dollar touches everyone here.”<sup>109</sup>

Lastly, technology has also played an important role in the development of the Cook Islands’ tourism-based economy. Of course, the completion of the airport in Rarotonga in 1973 literally opened the country to mass tourism. Other technological advances have also been significant. For example, the internet has made it possible for individual bungalow owners to advertise their accommodations worldwide and therefore to manage a segment of the interaction with the global economy/community on an individual basis. Although these interactions are still subject to other filters of the state, such as customs and immigration and taxation, here the individual actor gains a tremendous amount of agency.

A corollary of this centrality of tourism is that every family on Rarotonga—indeed nearly every individual—is engaged in, and dependent on, the tourist industry. As such, issues affecting tourism are widely discussed and closely followed. This mass engagement is exemplary of the feedback mechanism that exists in popular sentiment among the residents of the nation and the nation *qua* state. For example, during 2009 and 2010, a number of internal crises shook the Cook Islands’ tourism industry, subjecting the industry to yet further domestic debate, resulting in state-driven intervention.

The state is implicated in other ways as well. A further consequence of the fact that tourism is the core of the Cook Islands’ economy has been that the state has had to make sure to manage its global interface as well as possible. In regard to other, less profitable

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108. See, e.g., CLUNY MACPHERSON & LA’AVASA MACPHERSON, *THE WARM WINDS OF CHANGE: GLOBALISATION IN CONTEMPORARY SAMOA* (2010).

109. Cf. HARDT & NEGRI, *supra* note 21, at 32 (“[M]oney touches everything.”). There are, however, fears and frustrations about who might be receiving the largest share of each such dollar, with some locals complaining that foreign owners (because of their profits) and/or foreign laborers (who do a good deal of the low-wage labor within the tourism sector) might be benefitting from tourism dollars more than many local Cook Islanders themselves.

areas of the economy, the disciplining forces of the global economy are occasionally more forgiving, but here, the Cook Islands is forced to compete at an extremely high level that allows less room for error.<sup>110</sup>

Further, tourism is not only responsible for a large portion of the country's capital accumulation, but it is also through tourism that the global community in literal, embodied form—via the tens of thousands of visitors per year—interfaces with the state. Consequently, through the regulation of tourism, the Cook Islands state regulates its interactions with the global community and the global marketplace.

### (3) National Dreams and the Regulation of Off-Shore Banking and Related Industries

Many in the Cook Islands recognize the financial precariousness of the country's reliance on tourism. For decades, therefore, leaders and others have searched for alternative sources of national revenue. This search has at times strayed from the kind of long-term planning and difficult ground work that can lay the foundation for a truly diversified economy. Instead, some of the efforts have focused on what might be seen as “easy money” schemes.

These schemes are, for some, a part of a national dream that reflects the ambivalence that many Cook Islanders feel toward economic development: there is often a desire for increased earning power (or, more accurately, for more spending power) but with staunch resistance to dramatic structural modifications or changes to the “way of life” in the islands. The current debate about seabed mining is an excellent example of this;<sup>111</sup> seabed mining is a scheme that requires little effort but that produces high (perhaps even extremely high) profits for all.<sup>112</sup>

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110. See Layna Mosley, *Globalisation and the State: Still Room to Move?*, 10 NEW POL. ECON. 355, 355–356 (2005) [hereinafter Mosley, *Globalisation and the State*]; Layna Mosley, *Room to Move: International Financial Markets and National Welfare States*, 54 INT'L ORG. 737, 737 (2000).

111. See, e.g., Atasa Bosevakaturaga, *Deep Sea Mining has Viable Future*, COOK ISLANDS NEWS (Apr. 13, 2016), <http://www.cookislandsnews.com/national/local/item/57755-deep-sea-mining-has-viable-future> [https://perma.cc/HP3W-VM9D] (archived Sept. 7, 2016) (building on the premise that “[t]he Cook Islands could have a viable, beneficial deep sea mineral (DSM) industry sometime in the future”).

112. By contrast, note the pearl industry. Pearl farming—which occurs primarily among the Northern Group islands—is extremely difficult work, but coming out of the 1970s it was an industry worth approximately NZD \$18 million annually for the country, second only to tourism. Now it brings in less than NZD \$5 million per year. The fluctuations of the global market – exacerbated by a flooding of cheap pearls from French Polynesia (which I have been told has sixty or seventy islands that produce pearls for some \$180 million per year, compared to one or two islands in the Cook Islands), have significantly harmed the ability of Cook Islanders to compete on the global market; at the same time, the availability of money through tourism and/or wage labor in New Zealand and Australia, has meant that few children of pearl farmers have been willing

The primary version of this national dream in the 1980s and 1990s involved the off-shore financial services industry. Many Cook Islanders saw this industry as an opportunity to generate huge amounts of revenue for the country with no greater investment than a few small offices where, through basic office labor, fees for these off-shore services would flood in.

Such a scheme is formed by national regulation and is dependent on foreign capital. As such, the scheme demonstrates the sovereignty of the nation-state as an interface mechanism. In this particular case, the scheme is especially illustrative because it shows the active role of the state in ways that can prove to be both beneficial and harmful; it also serves as a sharp example of the disciplining nature of the global market.

In short, in regard to so-called “off-shore” financial services, national regulation and sovereignty are interwoven in several ways. For one, national financial regulation is the *sine qua non* of an off-shore banking industry. In other words, national financial regulations create the very conditions that allow for foreign individuals and companies to hold money in that country. At the same time, sovereignty is continuously implicated because it is the perceived boundary of sovereignty that prevents regulators and others in a given client’s home country from accessing this money.<sup>113, 114</sup>

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to or are interested in following in their parents’ footsteps. Moreover, most of the money from pearls is earned by the middle-men, not by the pearl farmers; one former pearl farmer told me that the most she had received for a single pearl was NZD \$32—for a pearl that would probably sell in the store for NZD \$1,000.

113. Take the example of an off-shore trust. An individual, say, an American, deposits a million dollars in a trust managed in the Cook Islands. That individual is later sued in the United States and is ordered by the court to pay a million dollars. Let’s say also that the individual has retained very few assets in the United States and therefore does not have the funds, in the United States, to pay the judgment. Now, the U.S. court can certainly order that those assets existing in the United States be forcefully obtained—or in the case of goods, sold and the proceeds paid to the prevailing party in the litigation. But as to the million dollars in the Cook Islands, that money cannot be forcefully removed from the Cook Islands—because of the sovereignty of the Cook Islands—except under very limited circumstances, and even in those cases, a court action must be brought in the Cook Islands itself (because the Cook Islands does not recognize foreign judgments). At the same time, regulation *in the United States* could wipe out this type of off-shore trust by placing barriers to their access by U.S. citizens; in such a way, unilateral action by one sovereign (here the United States) can have large effects on the abilities of other sovereignties (here the Cook Islands, and the many other small countries that profit from off-shore services) to function. See Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 INT’L ORG. 151, 155 (2002).

114. Note also that Cook Islands trust laws do not recognize the rule against perpetuities, and therefore, unlike in many U.S. jurisdictions, one can in the Cook Islands set up dynastic trusts, that is to say, trusts that continue for generation after generation without end.

Sovereignty is also implicated because the fees generated by the off-shore financial services bring revenue to the country, allowing it to function. As such, not only the creation of, but also the support for, the industry is a national project. The Cook Islands government, for example, maintains an agency for the international promotion of the country's off-shore services, the Financial Services Development Authority.<sup>115</sup> As part of this national project, it is even important for companies offering off-shore services to work together in promoting the country's off-shore industry, even though they are otherwise competing against each other for clients. As one financial regulator explained it, it is like opening a restaurant—if you open it in too remote of a location, no one will come; instead, you need a critical mass. Without that focused critical mass of off-shore services in the Cook Islands, would-be clients are likely to turn to service-providers in other sovereignties, such as in the Cayman Islands.

But off-shore services are not without risk to a country. In the early 1990s, an international scandal broke in New Zealand, part of which involved money managed by Cook Islands firms. Holes in the Cook Islands' financial regulation came to light and the event—commonly referred to as the Winebox Affair—was a black eye to the Cook Islands.<sup>116</sup> This black eye was not merely symbolic, however. Indeed, in addition to detrimental effects on tourism, the Cook Islands was placed on international black-lists due to its financial services

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115. COOK ISLANDS FINANCIAL SERVICES DEVELOPMENT AUTHORITY, <http://www.cookislandsfinance.com/>, (last visited Sept. 27, 2016) [<https://perma.cc/HJ6C-LNXX>] (archived Sept. 27, 2016).

116. Conrad de Aenlle, *Vanuatu and the Cook Islands Exploit the Australasian Niche: Farther Offshore: South Sea Havens*, N.Y. TIMES (Oct. 25, 1997), <http://www.nytimes.com/1997/10/25/your-money/25iht-mcook.t.html> (subscription required) [<https://perma.cc/ZJ7P-NQJY>] (archived Sept. 6, 2016) (“The reputation of the Cooks was tarnished several years ago . . . by the ‘wine-box affair,’ in which documents found in a wine box implicated New Zealand companies in questionable practices using Cook Islands legal structures. It also raised doubts about how well client confidentiality is safeguarded. . . . An investigation by New Zealand police found no wrongdoing, however.”). As the recent revelations of the so-called Panama Papers demonstrate, the consequences of such scandals to individuals and institutions alike can be considerable. *E.g.*, New York Times, *The Panama Papers: Here's What We Know*, N.Y. TIMES (Apr. 4, 2016), [http://www.nytimes.com/2016/04/05/world/panama-papers-explainer.html?\\_r=0](http://www.nytimes.com/2016/04/05/world/panama-papers-explainer.html?_r=0) (subscription required) [<https://perma.cc/F89M-SCDR>] (archived Sept. 6, 2016) (providing background on the scandal); Raphael Minder, *Spain's Industry Minister Steps Down Over Panama Papers Revelations*, N.Y. TIMES (Apr. 15, 2016), <http://www.nytimes.com/2016/04/16/world/europe/panama-papers-spain.html> (subscription required) [<https://perma.cc/PT4Z-7DC5>] (archived Sept. 6, 2016) (discussing the resignation of the Spanish Minister of Industry, Energy and Tourism, José Manuel Soria, as a result of revelations made in the Panama Papers and noting how Prime Minister Sigmundur David Gunnlaugsson of Iceland had stepped aside a week earlier for related reasons).

industry,<sup>117</sup> and the Cook Islands government was forced to overhaul its financial services laws, among others.<sup>118</sup> In doing so, the Cook Islands set up its Financial Supervisory Commission<sup>119</sup> and its Financial Intelligence Unit<sup>120</sup> to better regulate its financial services, including more effective monitoring of cross-border transactions and verification that given monies are legitimate and not parts of money-laundering or other illicit schemes.

In short, the Cook Islands was playing here on the global field. But, as noted, the disciplining powers of the global market can be severe. The Cook Islands, in being connected to an international scandal, was forced to bear the brunt of that discipline and, among other things, to alter domestic regulation accordingly.

#### (4) The Interface Mechanism: A Few Final Examples

A few final illustrations of elements of the state that serve as interface mechanisms may be useful here. First, an excellent direct example can be found in the Cook Islands Business Trade Investment Board. Pursuant to the rules of the board, as mandated by state regulation, foreign individuals and entities wishing to make investments within the Cook Islands are subject to a number of restrictions.<sup>121</sup> Among others, foreign investors must, in many circumstances, partner with one or more Cook Islanders and must demonstrate a potential benefit of the investment to the Cook Islands; the sale of local businesses must also be advertised for thirty days for purchase by locals before the sale is opened up to foreigners. So in a

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117. New Zealand Herald, *Nauru Still in the Doghouse*, N.Z. HERALD (Sept. 10, 2001) (explaining that as of 2001 the Cook Islands was still on the so-called OECD black list); John Ridgway, *Worldwide: The Pacific Islands Region: Being On The OECD Grey List*, MONDAQ (Oct. 2, 2009), <http://www.mondaq.com/australia/x/86952/wealth+management/The+Pacific+Islands+Region+Being+On+The+OECD+Grey+List> [<https://perma.cc/8QHG-5KMT>] (archived Sept. 6, 2016) (explaining that by 2009 the Cook Islands was on the OECD “grey” list, which “means that whilst the OECD considers them ‘tax havens’, they have substantially committed to implementing the OECD International Tax Standard”).

118. As a result, although the Cook Islands continues to permit—and to promote—its off-shore trust services, the country has largely phased out its off-shore banking services.

119. FINANCIAL SUPERVISORY COMMISSION: COOK ISLANDS, <http://www.fsc.gov.ck/cookIslandsFscApp/content/home> (last visited Jan. 13, 2016). [<https://perma.cc/73EH-J9P7>] (archived Sept. 6, 2016).

120. *Cook Islands Financial Intelligence Unit*, FINANCIAL SUPERVISORY COMMISSION: COOK ISLANDS, <http://www.fsc.gov.ck/cookIslandsFscApp/content/fiu> (last visited Jan. 13, 2016). [<https://perma.cc/JM44-RZAQ>] (archived Sept. 6, 2016).

121. *Rules of Investment*, BUSINESS TRUST INVESTMENT BOARD: COOK ISLANDS [http://www.btib.gov.ck/investment.php?inves\\_id=26](http://www.btib.gov.ck/investment.php?inves_id=26) (last visited Jan. 13, 2016) [<https://perma.cc/DQR8-LH5F>] (archived Sept. 6, 2016).

very deliberate way, the state is shaping the kind of investment capital that comes into the country and by whom.

State regulation also operates in less express ways. For instance, the Cook Islands land tenure system, discussed in more detail below, forbids the alienation of land.<sup>122</sup> This is a traditional rule that is now enforced by the state. As such, through this regulation, the state sets the rules for the engagement between the Cook Islands and the global marketplace in terms of the real property of the islands.

The state's regulation of education is another example of the role of the state as an interface mechanism. In essence, the Cook Islands has made the decision to match its educational system to that of New Zealand—in large part to facilitate the ability of Cook Islanders to move back and forth between the Cook Islands and New Zealand. As such, and given that the educational system of New Zealand is generally considered to be superior to that of the Cook Islands, the Cook Islands state is setting up the structure of the system in such a way so as to cause out-migration. In other words, thanks to the correlating systems, it is easy to transfer one's children from schools in the Cook Islands to schools in New Zealand; and given that schools in New Zealand are seen as superior, many parents/care-givers do indeed move to New Zealand with their children or send their children to live with relatives in New Zealand to attend school there. The interface mechanism in this case is then one that is structurally conducive to out-migration.

## 2. Sovereignty as a Value-Maximization Mechanism

The term “value-maximization mechanism” refers to those aspects of sovereignty by which the state regulates the movement of capital and persons for purposes other than pure economic rationality, that is to say, where the state regulates for reasons related to the preservation of, promotion of, or resistance to, a given set of cultural characteristics. This aspect of sovereignty is therefore a connector between the *sui generis*, subjective cultural stuff of the nation on the one hand, and the state's interface function on the other.

Here then, it is the state that is the arbiter of culture—or a culturally shared sense of identity—because the decisions regarding regulation necessarily emanate from the state. Obviously, the individuals who perform decision-making on behalf of the state can be influenced by broader trends and inclinations among the state's citizens, as well as by outside forces—although the degree to which this

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122. See *infra* Subsection IV.A.2.a.(i).

happens, of course, depends on the scale of democracy and other factors.<sup>123</sup>

If the term “culture” is defined as the sum of a group’s values, then the term “culture” may be substituted for “values” in this discussion: a nation-state exists to most effectively reproduce its culture.<sup>124, 125</sup> For instance, if language preservation is important to a group, as it is in France and the would-be nation-state Quebec,<sup>126</sup> then the nation-state’s capital regulation will be structured so as to support a strong language base—laws will ban certain kinds of foreign-language signage, even though such signage (say, advertising) might otherwise have facilitated and promoted capital generation.<sup>127</sup> Compare this to Sweden, where the use of English words and phrases—from advertisements to movie titles<sup>128</sup>—is rampant; here, the defense against foreign-language intrusion is not a priority of the culture, and, in fact, English-language usage is desired and seen as prestigious for numerous reasons, ranging from trendiness to international cosmopolitanism. Therefore, the value-maximization activities of the Swedish state are focused elsewhere (such as on social welfare).<sup>129</sup>

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123. Sally Engle Merry discusses ways that the relationship between the state and other normative orders is dialectic, mutually constitutive. Sally Engle Merry, *Anthropology, Law, and Transnational Processes*, 21 ANN. REV. ANTHROPOLOGY 357, 358 (1992).

124. As noted above, it is of course difficult to define what a “culture” is or what its values are. And in any event, culture is always contested, always changing.

125. It is for this reason that smaller national groups desire a “state”: self-determination is only a part of the equation. Since no state is really independent anyway and groups are often better off *economically* when *not* an independent state, what is really at stake is the desire and ability for a group to define its own substance – that is to say, “culture.”

126. Quebec is an interesting example because it is not fully “independent” but still exerts these kinds of controls.

127. See Loretta Nelms-Reyes, Comment, *Deal-Making on French Terms: How France’s Legislative Crusade to Purge American Terminology From French Affects Business Transactions*, 26 CAL. W. INT’L L.J. 273, 273 (1996) (“On August 4, 1994, the French Parliament enacted a law making the use of French mandatory in all official, and many commercial, contexts. While this ‘Loi Toubon’ purports to achieve the ‘cultural objective’ of promoting the French language, its impact on the international business community could be far more significant because advertising, trademarks, product documentation, and contracts come within the scope of the statute.”).

128. In other words, although foreign-language movies are subtitled when shown in Sweden, the titles of English-language movies—whether in advertisements or in mainstream movie reviews—are often given and referred to simply by their English name.

129. See Juliana Carlson, *Sweden’s Parental Leave Insurance: A Policy Analysis of Strategies to Increase Gender Equality*, 40 J. SOC. & SOC. WELFARE 63, 64–65 (2013) (“When the Swedish government, headed by the Social Democrats, introduced parental leave insurance in 1974, it replaced the standing maternity leave policy. The legislation provided parents financial benefits to take care of their children for up to six total months, to be divided as decided upon by the parents. . . . In the 1980s and 1990s several iterations of the parental leave legislation increased the amount of leave time to twelve



In short, different cultural values lead to a different regulation of capital in order to better promote those values. Here, sovereignty is both a social glue and a social catalyst; it is the meta-term that describes this relationship between the process of nation-state action and cultural solicitude and regeneration.<sup>130</sup>

a. Evidence from the Cook Islands

(1) Land Tenure Rules: State Regulation in Support of Cultural Norms

Land tenure rules in the Cook Islands are complex.<sup>131</sup> Most pertinent for present purposes is the traditional rule that land cannot be sold. Unlike many Indigenous peoples of the world, Cook Islanders, through a series of historical circumstances, were able to maintain this central rule throughout colonization.

So, until independence in 1965, the rule forbidding the alienability of land was part of the colonial administrative code.<sup>132</sup> When the Cook Islands state took over governance of the country, the state very

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months and brought the earnings-related benefits to the current level of 80% of the income for parents working at the time of leave taking. . . . A second reserved month for each parent was added in 2002, bringing the total leave time to 16 months.”); Linda White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J. OF L. & FEMINISM 185, 190 (2010) (“When scholars look to alternative models to inform analysis of the United States, many tend to look at Scandinavian countries such as Sweden, which have exceedingly generous paid maternity/parental leave and [early childhood education and care] provisions.”).

130. My ideas here owe much to Layna Mosley’s political science insight on “room to move.” Mosley, *Globalisation and the State*, *supra* note 110, at 357–359. There Mosley describes the disciplining effects of globalization. In other words, the demands of the global market will force states to conform in certain ways in order to be able to compete in that market. But Mosley’s key insight is that a state is not forced to conform in *every* way; instead, in between the disciplining demands, there are also spaces where each state has “room to move,” that is to say, the ability to make its own decisions, less impeded by the strictures of the global market. It is in these spaces that a state’s value-maximization is most significant. My debt here also goes to Aihwa Ong for highlighting the profound productive value of different spaces, including in spaces of “exception.” See generally AIHWA ONG, *NEOLIBERALISM AS EXCEPTION: MUTATIONS IN CITIZENSHIP AND SOVEREIGNTY* (2006).

131. For the seminal text in this regard, see generally RON CROCOMBE, *LAND TENURE IN THE COOK ISLANDS* (1964).

132. Cook Islands Act 1915 §§ 467–69 (N.Z.), (“467. No person shall be capable of making, whether by will or otherwise, and whether in favour of a Native or of a European or of the Crown, any alienation or disposition of customary land or of any interest therein. 468. No Native or descendant of a Native shall be capable of alienating (otherwise than to the Crown for public purposes) Native freehold land for an estate in fee-simple or for any other freehold interest whether legal or equitable.”).

deliberately took this administrative provision on as national law.<sup>133</sup> Here then is a crisp example of a state law that has encoded and continues to encode a cultural norm (as most laws in fact do, although often in less obvious ways).<sup>134</sup>

This particular cultural norm *qua* state regulation is pivotally relevant to the Cook Islands' relationship with the global community and the global marketplace. In tandem with increasing tourism and international mobility, the desirability of land as a target of foreign investment by both individuals and companies has grown. In other words, there exist potential foreign buyers of land and there would presumably be a few sellers, but the Cook Islands state, as arbiter of the given cultural norm, refuses to allow the sale.

This transaction-inhibiting policy has important effects on the Cook Islands' economy in three key respects. First, the unavailability of land for purchase naturally greatly reduces direct foreign investment. As a partial remedy, the state has legislation that allows for leases on land of up to sixty years.<sup>135</sup> As such, there is a vehicle for foreign investment in land, for example for hotels or resorts, but the market is relatively meager given that, unlike the value of owned land, which typically increases with time, a lease in land tends to lose value each year.

Second, the land tenure rules in place mean that many, many members of a family often have a say in the use of a larger plot of land.

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133. See generally, COOK ISLANDS CONST., *supra* note 81, at art. 77 ("Subject to the provisions of this Constitution - (a) The existing law shall, until repealed, and subject to any amendment thereof, continue in force on and after Constitution Day; (b) All rights, obligations, and liabilities arising under the existing law shall continue to exist on and after Constitution Day, and shall be recognised, exercised, and enforced accordingly."). Brian Mason, Opinion, *The Cook Islands Act 1915 – Still Strong After 100 Years*, COOK ISLANDS NEWS (Oct. 13, 2015), <http://www.cookislandsnews.com/item/54416-the-cook-islands-act-1915-still-strong-after-100-years/54416-the-cook-islands-act-1915-still-strong-after-100-years> [https://perma.cc/2FBL-MUUh] (archived Sept. 7, 2016) ("For nearly every matter of governance except for Customs, the Cook Islands Act 1915 was a Code. This colossus ran to 660 sections and nearly 100 pages. . . . Over time separate statutes have been enacted to deal with matters such as crimes. But remarkably, the core provisions of the Act relating to native land remain largely unchanged a century on from their passage into law.").

134. See, e.g., JOHN CONLEY & WILLIAM O'BARR, *JUST WORDS: LAW, LANGUAGE AND POWER* (1998).

135. Cook Islands Act, *supra* note 132, at § 469 ("(1.) No Native or descendant of a Native shall be capable of alienating (otherwise than to the Crown) Native freehold land whether by way of lease, license, easement, right of taking the profits thereof, or otherwise howsoever, for a longer term (including any term or terms of renewal to which the lessee, licensee, or other alienee may be entitled) than sixty years computed from the time when the alienation takes effect in possession according to the tenor thereof. . . . (3.) Subject to the provisions of this section as to the maximum duration thereof, every such alienation may confer upon the lessee, licensee, or other alienee a right of renewal for one or more terms.").

So efforts to put larger plots of land to productive/commercial use—whether for tourism or agriculture or otherwise—frequently fail because it proves impossible to get the necessary agreement from all the implicated family members in regard to any particular proposed project.

A third way that the state's regulation against the alienability of land affects the Cook Islands' economy involves the ability of Cook Islanders themselves to generate capital for reasons such as starting a small business. In the United States, just as in countries like New Zealand from which the Cook Islands inherited the backbone of its capitalist economy, a primary vehicle for obtaining capital for starting a small business is by means of a loan for which one's residence serves as collateral. But this avenue is largely unavailable for Cook Islanders.<sup>136</sup>

So, the state's land tenure regulation violates rules of economic rationality, but it does so deliberately and with targeted intentions and results. And indeed, in doing so, it is able to preserve a central tenet of Cook Islands culture even in the face of the forces of the global economy that are as disciplining as they may be enticing. Time and again, informants discussed with me the centrality of land tenure to their understandings of Cook Island-ness. So the state, in prohibiting alienability, as well as in offering the alternative of sixty-year leases, is serving in its sovereign role as a value-maximization mechanism.

## (2) Tourism: A Delicate Balance

As discussed earlier, tourism is the mainstay of the Cook Islands' economy. The relationship, however, between the Cook Islands state and the running of the islands' tourism is a complex one. On the one hand, of course, the state wishes to—and tries to—increase tourism and thereby increase the revenue from tourism. On the other hand, however, the state limits tourism for the purposes of preserving and protecting cultural norms.<sup>137</sup> One example of this is the land tenure regulation described directly above: if land were alienable, then a likely consequence would be more [foreign-owned] hotels and resorts, which would presumably boost tourist numbers, perhaps even dramatically.

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136. In addition to the direct inability to loan money in this way, some informants pointed out to me that there is also a qualitative difference in borrowing money in other ways, such as in a bank loan: when defaulting on one's loan means that one will likely lose one's home, there is an added incentive to work hard to make profitable the money borrowed by the loan so that one can pay the loan back.

137. As one Pacific investment advisor reminded me, the Cook Islands is obviously not alone in wanting to increase foreign investment/tourism but without losing its culture or being overrun.

Other aspects of state regulation also, directly or indirectly, limit tourism. For instance, the state-regulated minimum wage in the Cook Islands is higher than in many other Pacific island nations. These higher wages are a necessity in order to keep Cook Islander workers from leaving the country, given Cook Islanders' easy access to a better standard of living in New Zealand and Australia.<sup>138</sup> Nevertheless, with higher wages come higher prices, which cause tourist visits to the Cook Islands to cost more for the tourist than a visit to many other sunny island states in the region, serving as a disincentive to many potential visitors.

Furthermore, tourism demands the availability of goods and services in timeframes that correspond with tourists' needs. However, the combination of cultural norms that value non-work time and regulations requiring overtime pay mean that these needs are at times poorly met: most shops in Rarotonga close by 4pm on weekdays, noon on Saturdays (if they open at all), and are closed on Sundays. It is not uncommon to see tourists in town after these hours, searching with some significant effort, though in vain, for places to spend their money.

A more visible example involves cruise ships. Cruise ships usually visit Rarotonga for one day only, and that day is sometimes a Sunday.<sup>139</sup> Even though the residents are generally informed well in advance of the arrival of any cruise ship, only a tiny percentage of shops open on a Sunday when cruise ship passengers are on the island (similarly, after noon on a Saturday). In such instances, literally hundreds of well-financed visitors are on the island, cash seemingly falling out of their pockets, but, in spite of their eager endeavors, these tourists are unable to find many places to exchange that cash for local goods or services.

Here again, state regulation serves to maximize key cultural ideals, even at the expense of "economic rationality." Because what is the cost of these closed shops? As Cook Islanders are smartly aware, the answer is, among other things, more time with family, more time with friends, more time enjoying life rather than earning it. The mathematical complexities of the global economy be damned, it is, for many Cook Islanders, actually quite a simple calculation.

In a similar vein, a rise in the number of tourists to Rarotonga would require significant changes to existing infrastructure: roads would need to be repaved and even widened, buildings would need to

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138. At writing, the minimum wage in the Cook Islands, at NZD \$6.25/hour, is still far less than those of New Zealand and Australia, which are NZD \$14.75/hour and AUD \$17.29/hour respectively.

139. For more on cruise ship tourism and economic development in the South Pacific, see generally Cluny Macpherson, *Golden Goose or Trojan Horse? Cruise Ship Tourism in Pacific Development*, 49 ASIA PAC. VIEWPOINT 185 (2008).

be constructed, other services—such as, perhaps, a casino—might need to be offered. But these are steps that many Cook Islanders are opposed to because of the toll they would take on the character of Rarotonga. So, although a vast majority of the people articulate a desire for “economic development,” often in the stated form of expanded tourism, very few claim that they want Rarotonga to be transformed in the physical sense necessary to support such tourism or that they would welcome the changes to the local dynamic that more tourism would cause. As a consequence, the state, as manager of national tourism, works to increase tourism in smaller numbers but without a full-scale effort to push the numbers to their full possibility. Once more, the land and the cultural norms of daily lifestyle are the beneficiaries of state regulation at the expense of direct foreign income via the global market.

As this latter example shows, the state, therefore, often has an ambiguous—and a nearly always contested—role in the process of value maximization. Another example relates to the preservation of the Cook Islands Maori language, as language is such an important element and marker of culture. On the one hand, the state has mandated, among other things, a Maori language requirement in the country’s primary schools. On the other hand, as noted, the state has purposefully aligned the Cook Islands school system with that of New Zealand, a maneuver that facilitates the move of Cook Islander children from the Cook Islands to New Zealand—a New Zealand where children are unlikely to get any school instruction at all in Cook Islands Maori.

Importantly, the school itself is, of course, a key institutional implementation of the values of the state. In the case of the Cook Islands, the Maori language requirement and the inclusion of various dancing and related cultural activities at school are illustrations of ways that the state, through its role as value-maximization mechanism, literally trains its children in the valued ways of culture.<sup>140</sup>

Returning to the question of language, English is tolerated or even encouraged in many areas of public life in the Cook Islands. The state possesses the power to mandate Maori in many situations, but chooses not to. This choice is not made without forethought or without understanding its significance; instead, unlike the situation in regard to land tenure, the state in this circumstance chooses to sacrifice aspects of the culturally important realm of language in exchange for the perceived benefits that come with having citizens who are fluent in the language of the two closest sources of labor and money for

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140. See also Anne Allison, *Japanese Mothers and Obentōs: The Lunch-Box as Ideological State Apparatus*, 64 *ANTHROPOLOGICAL Q.* 195 (1991).

emigrating families, namely New Zealand and Australia. For many Cook Islanders, the sacrifice is a worthwhile one; as a staunchly pro-Cook Islands father, who nevertheless spoke primarily English instead of Maori to his children, told me poignantly: “No doctor is ever going to ask for the scalpel in the Maori language.”<sup>141</sup>

### B. *The Emotional Component of Sovereignty*

As the insightful scholar Benedict Anderson, among others, has asked, why is it that individuals are frequently willing to die for their country, rather than, typically, for their city, county, or continent?<sup>142</sup> That is, why is the nation-state frequently the primary political body with which individuals identify?

There is something special about sovereignty that cannot be explained by quantitative measures. The other component of contemporary nation-state sovereignty is therefore inherently emotional. And, like all things emotional, this emotional component of sovereignty is both individualized and lacking in clear boundaries. In a nutshell, this aspect of sovereignty is the cultural magic that makes sovereignty collective, that renders the whole larger than the sum of its individual parts, the fusion whereby human allegiance and affection form a sacred bond superior to Western forms of logic. It is like—and most likely akin to—the magic that makes family relationships more important than other relationships. (It should come as no surprise that the *fraternité* of love for a brother is, in European vocabulary at least, the same term as the brotherhood said to be felt among a nation’s citizens.) As researchers, we cannot know what inspired the first siblings or the first cousins or the first second-cousins to initially feel the affections of a familial bond (although, to be sure, we can make a guess); similarly, we cannot know what stirred the first would-be citizens to emotional allegiance to their nation-state (though again, we can make a guess). Whatever the case, we are at a moment where such relationships exist and can be studied.

Significantly, we can describe in categorical terms the contours of the emotional side of sovereignty, yet the contents of those contours for each nation are unique for each group; they are *sui generis*. In other words, for some groups sovereignty is born of the land, for others it is an outgrowth of kinship and ethnicity, and for still others, it is the loyalty to a set of rights and a rule of law. So, even though nation-states have come to take on commensurate forms, the substance that

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141. Interview notes on file with Author.

142. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 9–10 (2d ed. 1983).

animates those forms is generally different. This emotional<sup>143</sup> component of sovereignty therefore involves the subjective, local understandings of sovereignty.<sup>144</sup>

Indeed, sovereignty has meaning for people. In the middle of my fieldwork, I took to asking Cook Islanders the un-politically correct question of whether the Cook Islands would not just be better off if it simply became a part—whether state or territory—of New Zealand. (It is almost beyond question that if the Cook Islands became a part of New Zealand, it would become better off economically.) With almost no exception, I was told that this was a bad idea because the consequence of the Cook Islands being a part of New Zealand would be that Cook Islanders would cease to be Cook Islanders. To which I always retorted: are not the tens of thousands of Cook Islanders who already live in New Zealand still Cook Islanders even though they reside within New Zealand's borders? I was never, however, given credit for this smug *tour de force* of logic because my question missed the whole point: sovereignty matters in part because of what it means to the people themselves, because of the subjective, emotional qualities that it inspires.

This emotional component permeates innumerable aspects of daily and ceremonial life. This component of sovereignty derives in part from the mechanics of the state, but these emotional attachments continuously impact those mechanics. A salient illustration can be seen in the case of Iceland. A small nation-state of some 330,000 inhabitants, the country was hit especially hard by the 2008 global financial crisis.<sup>145</sup> The reason for Iceland's particular vulnerability

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143. Barry Barclay has written about the way that using terms like “intellectual property” in regard to creations by Indigenous persons instantly recategorizes what might be an Indigenous understanding of what the thing is to a Western one (namely, *property*). At the same time, when such objects enter the global marketplace they generally *become* property precisely in the Western sense. BARRY BARCLAY, *MANA TUTUTU: MAORI TREASURES & INTELLECTUAL PROPERTY RIGHTS* (2005). The emotional component of sovereignty entails a similar phenomenon: every group on the globe maintains an Indigenous, *sui generis* understanding of the sources and character of its relationships with its nation-state; nevertheless, given that *all* nation-states are connected in the constellation of globalization, those Indigenous understandings are, in the connections to the global, translated into a *form* of sovereignty that is the same for all nation-states.

144. As Sir Geoffrey Henry, former prime minister of the Cook Islands, said to me: “Sovereignty has to come from the inside too. It's not just a flag. It's an internal belief, a conviction.” Conversation with former Prime Minister, Sir Geoffrey Henry, April 16, 2010. In his inimitable style, Sir Geoffrey also said that the longer Cook Islanders are away from the islands, the more “the scent of sovereignty diminishes.”

145. See Birgir Petursson & Andrew P. Morriss, *Global Economies, Regulatory Failure, and Loose Money: Lessons for Regulating the Finance Sector from Iceland's Financial Crisis*, 63 ALA. L. REV. 691, 693, 695 (2011) (“By 2004, the Icelandic economy appeared as strong as any in the world, Iceland was widely touted as an example of how a small open economy could succeed, and Iceland was the sixth wealthiest country in the

stemmed from the loose regulation that the state, until that time, had imposed on its domestic banks.<sup>146</sup> A recovery from their financial straits therefore required an overhaul of this banking regulation. Three primary options were considered: restricting domestic banks to operation within Iceland, integrating banking regulation and scope with other Nordic states, or integrating banking regulation and scope with the European Union.<sup>147</sup> Significantly, the debate about these options centered not only on the potential economic benefits of each alternative but also on the question of who Icelanders felt they were and wanted to be: isolationist, Nordic, or European. In other words, rather than arising in a vacuum, or even in a test-tube of economic rationality, the push was to enact banking regulations that reflected Icelandic *identity*. The emotional component of sovereignty drove corresponding changes to the functional/instrumental component.

Furthermore, it is possible to say as to this emotional component that it has an inherent element and a cultural element. In short, the experience of emotional supra-familial group attachment is somehow inherently human—immutable—because it exists in all cultures. In the Cook Islands, for example, that pre-colonial attachment was tribal. An additional element, however, is cultural—and therefore mutable—because the scope, strength, and contours of this supra-familial attachment are arbitrary. Again in the case of the Cook Islands, tribal attachments have become shattered into multi-pronged attachments that include tribe, village, island, and nation-state.

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world as measured by GDP per capita.” However, “[b]y October 1, 2008, Iceland’s currency had lost all of its prior gains and more, falling well below its 2001 value against all major currencies; its three major banks had collapsed and been essentially nationalized; leading investors and businessmen were in or on the verge of bankruptcy; the United Kingdom had invoked anti-terrorism legislation to seize local Icelandic assets; the Icelandic government, politically isolated home and abroad, was being pressured to accept responsibility for ISK 340 billion in foreign depositors’ accounts in the banks, a debt equivalent to 17% of GDP; and the repayment obligation provoked a political crisis in Iceland . . .”).

146. See *id.*, at 694, 697–98 (explaining how, in the early 2000s, “Iceland was a success, a poster child for deregulation, sustainability, and open economic policies.” But with the global financial crisis, “[f]inancial regulators both in Iceland and elsewhere were caught off-guard by the impact of [the dramatic increase in global liquidity], which transformed Iceland’s deregulation of a primarily domestic banking industry into an event that ultimately had international significance.”).

147. See Kristín Loftsdóttir, *The Loss of Innocence: the Icelandic Financial Crisis and Colonial Past*, 26 ANTHROPOLOGY TODAY 9, 9 (2010) (discussing the effects that the global financial crisis had on Icelandic identity through an anthropological lens).



## 1. Evidence from the Cook Islands

### a. Fault Lines: The Growing Pains of Nation-Building

What makes the Cook Islands possible as a sovereignty is not solely its existence as an administrative jurisdiction. Instead, what truly makes Cook Islands sovereignty possible is the on-going transformation of Cook Islanders' emotional attachments from focusing on individual islands to encompassing the group of fifteen islands together, as one whole—as a sovereign entity.

The Cook Islands, after all, is a political project. It is a puzzle piece carved out of an unbelievably large swath—thousands of square miles—of the oceanic fabric that makes up Polynesia. This metaphor of a puzzle piece is apt. Each piece is only one portion of the total picture of Polynesia; alone, it neither represents nor speaks to the diversity that the region comprises. At the same time, its lines are arbitrary, drawn by the hand of man [*sic*] with an eye to overall fit—a complement to the surrounding puzzle pieces whose contours themselves had already been awkwardly shoehorned into an existing framework.

As such, the Cook Islands is an arbitrary nation. Although the people of its many islands are related by both genetics and culture, the peoples' historical allegiances usually extended only—at most—to the shores of their own islands. While trading and intermarriage occurred to some extent, such relationships, with a few exceptions for close islands like Manihiki and Rakahanga, generally took place through alliances rather than unions.

Nevertheless, the Cook Islands has made tremendous progress in nation-building. To some degree, this is due to the hard work and creative—perhaps intuitive—ingenuity of a small number of key political leaders, not to mention the enabling framework of the globalized discourse of nation-building that became increasingly pervasive following World War II. One cannot, however, erase overnight the overlapping cultural and political divisions that have marked the islands for generations, for centuries even. The residue of these divisions is still experienced and reproduced on multiple levels:

*Islands.* As noted, historical differences exist between most of the individual islands. Importantly, those differences have engendered a strong island-specific loyalty among most of the inhabitants (a loyalty that is, however, often compromised by village-specific loyalties within the island social structure).

*Northern Group/Southern Group.* The Northern Group of islands and the Southern group of islands are separated by a wide stretch of Pacific Ocean. The majority of the population resides in the Southern Group, mostly on the main island of Rarotonga. Beyond the lingering

pre-colonial allegiances to one's own island, there is also a pre-existing cultural divide between the Northern Group and the Southern Group. It was, in fact, not until the work of the London Missionary Society in the 1800s that more systematic social connections were put in place between the two island groups.<sup>148</sup>

*Rarotonga as capital.* The decision to make Rarotonga the administrative hub of the Cook Islands unit exacerbated the pre-existing divide between the islands and the island groups by skewing the balance of power. These shifts came in three successive stages. The first was the appropriation of direct and indirect political power. In becoming the capital, Rarotonga was able to co-opt elements of the colonists' power at the expense of the other islands, especially those in the Northern Group with whom the Rarotongans, due to culture and geography, already had the most distant relationships. Given that nearly all the colonial administrators, typically men, were physically located in Rarotonga,<sup>149</sup> they were most likely to develop personal relationships with Rarotongans, even marrying local women. These relationships, while further biasing the colonial administrators in favor of Rarotonga, also made the administrators more susceptible to influence by the Rarotongans, to the detriment of the Outer Islanders.

Second, the political preeminence of Rarotonga quickly transformed Rarotonga into the economic hub of the country. The administrative operation, due to its presence alone, spurred economic development. More importantly, however, outsiders—generally New Zealanders and some British—were enticed to settle in Rarotonga and open businesses there. These foreigners were often part of the colonial administration or originally came to the island to do business with the administrators; of course, others came by chance, in escape from other dilemmas or were drawn to the island by the picture, already long established, of Polynesia as a land of warmth and exoticness (including exotic women).<sup>150</sup>

That these many would-be and wanton entrepreneurs should land in Rarotonga rather than in the Outer Islands was natural, given not only the administrative presence there but also the fact that Rarotonga was already becoming the transportation entryway to the colony as a whole. The process was cyclic: with the arrival of each new European,<sup>151</sup> whether administrator or not, the need for goods and

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148. See Sissons, *supra* note 77, at 12.

149. As a possible unconscious reflection of Rarotonga's status as a place larger than its islandness, Cook Islanders generally refer to location on the island of Rarotonga as "in" Rarotonga rather than "on" Rarotonga; note too that in common discourse, Rarotonga is most often referred to as "Raro."

150. See Nicole, *supra* note 66.

151. In local parlance, white people, whether from Europe or New Zealand, Australia or America, are all referred to as "Europeans," even in contemporary speech.

services targeted toward Europeans increased; as the need for goods and services targeted toward Europeans increased, additional Europeans were lured to Rarotonga to fill the need.

Third, the opening of the country's first international airport in Rarotonga in 1973 sealed Rarotonga's position—symbolically and physically—as the hub and gate-keeper of the Cook Islands politically, economically, and in regard to the flow of goods and services. With the subsequently growing importance of air transportation, the Outer Islands (with some exception for Aitutaki) became increasingly dependent on Rarotonga for the provision of both political and abstract benefits. That dependency now includes the actual delivery of goods and the ability of individuals—whether residents or visitors (along with whatever kind of economic benefit they might bring with them)—to go to or to leave each Outer Island. In so many ways, Rarotonga continues to be the “center” of the Cook Islands.

An understanding of the emotional aspects of sovereignty in the Cook Islands therefore requires an appreciation of the extent to which the country's nation-building has taken place through two symbiotic processes. The first is this positioning of Rarotonga as the political center, as the policy-maker as well as spokesperson, of the greater nation. The second is the resistance to Rarotonga that continues to subtly animate the allegiances of Outer Islanders. As such, nation-building in the Cook Islands is not a linear flow toward unity but instead is subject to some potential diversion from fourteen directions.

Nevertheless, regardless of competing island allegiances, and although formed in the foundry of colonialism, the idea of the Cook Islands as a single nation is making successful headway. The accomplishments of the islands in cohering is, in measurable part, due to the work and ingenuity of the first Prime Minister of the Cook Islands, Sir Albert Henry. Although his career was later torpedoed by the very dynamics that created it—politics—his charismatic efforts to lead the Cook Islands from the yoke of colonial rule still echo in contemporary articulations of the state.

Two important aspects of Albert Henry's influence are especially relevant here. First, he possessed immense political savvy in terms of understanding the opportunities created by the changing global order. He did not blindly urge the people forward toward an imagined salvation of “independence” simply for the sake of independence. Instead, he helped set up the foundation for the Cook Islands' savvy relationship with New Zealand that still exists, in more sophisticated form, today.

Second, Henry had a compelling sense of cultural pride that simultaneously served as anchor and rallying cry for the young nation. With fervent persuasiveness, he was able to lift the nation by its bootstraps by revitalizing a cultural pride that had been increasingly chipped away during several prior generations. Indeed, during those

previous generations, Cook Islanders had been expressly taught—and, internalizing the message, taught themselves—that the *papa'a*,<sup>152</sup> the white people, were simply smarter, always superior to the Cook Islanders themselves. Henry therefore set in motion a rejection not only of foreign political dominance but also of perceptions of outsiders' cultural superiority.

Cook Islanders, however, have tended to polarize around political questions, and Albert Henry was not without his ardent critics. In 1978, he was engulfed—many would say ensnared—in scandal and was forced from office. In the turbulent currents of those early days, when the trajectory of the nation was still unclear, Dr. Thomas Davis—later, Sir Tom—took over the helm. In the counterpoint of politics, he was a man with starkly different ambitions and approaches than Albert Henry.

Whereas Henry had guided the nation under the flag of cultural pride and cultural difference, Davis brought an economic practicality to the table.<sup>153</sup> The strategies set in motion under Davis' leadership, like those under Henry's, continue in various forms in the current era. Indeed, the political parties led by Albert Henry and Thomas Davis respectively remain the core parties of the Cook Islands political system.

Furthermore, the periods of leadership under Henry and Davis, while laying the foundation for all politics that followed, were still marked by the precariousness of early nation-building. It was not until the 1990s, and the ascent to power of Albert Henry's cousin, Geoffrey Henry—later, Sir Geoffrey—that the contemporary era of Cook Islands politics began. Faced with financial crises that threatened the very existence of the nation, Geoffrey Henry successfully steered the country from the instability of youth, a youth that had been marked by qualities of naïveté, idealism, and inexperience.

To do so, Geoffrey Henry was forced to cut public sector employment by two-thirds and to reduce remaining public sector salaries by up to 50 percent,<sup>154</sup> propelling substantial numbers of Cook Islanders into unemployment and spurring mass emigration to New Zealand. At the same time, however, Geoffrey Henry was not only a fervent advocate of Cook Islands independence but also possessed, like his cousin Albert Henry before him, an insightful political savvy in

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152. *Papa'a* is the Cook Islands Maori word for white people and white things. The word is filled with complex sets of meanings—perhaps symbolic of the complexity of white/Cook Islander relationships over the years. The word itself means “four layers,” which, although of unknown origin, is thought to possibly refer to the many layers of clothing that the original European explorers wore when they first arrived in the islands.

153. See Sissons, *supra* note 77, at 93.

154. *Id.* at 118.

terms of his domestic constituents as well as in regard to New Zealand and other international actors.

During these crises, the Cook Islands experienced the post-nascent shock of the fickle global market and was forced toward the financial discipline required of modern states. Still, in this brutally disciplinary move, the Cook Islands solidified itself further as a nation-state of international character. In 2001, for example, the Cook Islands signed a Joint Centenary Declaration with New Zealand, which, while purporting only to “restate” the nature of the relationship between New Zealand and the Cook Islands, actually served to cement the Cook Islands’ independent status.<sup>155</sup>

So, although it does not fit neatly into Westphalian notions of independence, the Cook Islands’ independent status in fact exists by virtue of—and thanks to—the ties that the Cook Islands maintains with New Zealand. At the same time, independence exists in the hearts of Cook Islanders, an emotional attachment to this young, budding nation-state. In other words, Cook Islanders inherited from the capricious hands of colonialism an arbitrary array of somewhat mismatching islands and peoples. In that process, the contours of the *state* were fixed. But rather than a federation (or a state of dysfunction), the Cook Islands has become a largely successful and unified nation-state. That success, while building on the political boundaries that the state was heir to,<sup>156</sup> is expressly due to the development of an emotional attachment on the part of the Cook Islands people to the Cook Islands as a cohesive nation-state which they identify with and belong to.

#### b. Articulations of Emotional Sovereignty

The emotional element of sovereignty, like the idea of “nation,” is not a single, bounded one. Instead, sovereignty exists in a myriad of sentiments. It is important to examine some of these many factors and not simply rely on commonly attributed rubrics such as language. Indeed, language in the Cook Islands is as much, if not more of a shibboleth to distinguish the islands as it is a grammar to unify them. The following sections discuss several examples of how, in the Cook

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155. As one salient example, the Declaration expressly refers to the Cook Islands as a “sovereign and independent state.” Joint Centenary Declaration of the Principles of the Relationship Between the Cook Islands and New Zealand, Cook Islands-N.Z., June 11, 2001. My thanks to former High Commissioner Mike Mitchell for pointing me to many of the nuances of this agreement.

156. For a general discussion of the ways that traditions can be invented and mobilized in nation-building, see generally *THE INVENTION OF TRADITION* (Eric Hobsbawm & Terence Ranger, eds., 1983).

Islands, “nation” becomes articulated in ways that lead to the production and re-production of emotional sovereignty.<sup>157</sup>

*Politics.* As discussed above, the Cook Islands nation itself was born in the arena of politics, where Albert Henry and Thomas Davis translated a nascent nationalism into the preconceived structure of the nation-state even within the unique relationship that they established between the Cook Islands and New Zealand. Recall that the two political parties begotten by Henry and Davis continue to both drive and polarize the Cook Islands today. In the dialectics of the opposition of these two parties comes the centripetal force of national sentiment.

*Sports.* Sports are of great significance in the Cook Islands.<sup>158</sup> It should perhaps come as no surprise that Geoffrey Henry, one of the key architects of modern Cook Islands sovereignty, later segued from politics into a role in Cook Islands sports. As President of the Cook Islands Sports and National Olympic Committee, Henry continued to influence Cook Islands sovereignty on the global stage as well as in the hearts and minds of Cook Islanders.

Sport affects emotional sovereignty in several ways. First, of course, there are the Cook Islands sports teams that inspire loyalty. In the process of cheering on “their” “national” team, Cook Islander supporters both internalize and reinforce the idea of the Cook Islands nation as a cohesive entity. Second, Cook Islanders in New Zealand and Australia have established a variety of sports clubs and leagues, ranging from rugby for men to netball for women. In these clubs, established and operated under the banner of Cook Island-ness, the nation becomes reproduced in the very actions and activities of the sports groups. Similarly, Cook Islanders from New Zealand and Australia participate together with resident Cook Islanders on national teams such as the Cook Islands netball team, competing against teams from other countries.

Third, sport gives the Cook Islands the opportunity to relate on equal (team versus team/individual versus individual) terms with other nation-states. Even the title alone, for instance, “Cook Islands vs. Fiji,” posits the nation as always already existing in the form of the modern nation-state, interpellating Cook Islanders as members of this preconceived community.

Fourth, in addition to competing, sport has given the Cook Islands the opportunity to host international sporting events.<sup>159</sup> As hosts, the

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157. See also CATTELINO, *supra* note 93.

158. Among the most popular are rugby, netball, and rowing.

159. One noteworthy example is the hosting of the Pacific Mini Games in 2009. See PACIFIC MINI GAMES 2009, [http://www.foxsportspulse.com/assoc\\_page.cgi?c=0-4592-0-0-0&sID=53098](http://www.foxsportspulse.com/assoc_page.cgi?c=0-4592-0-0-0&sID=53098) (last visited Sept. 27, 2016) [<https://perma.cc/AXU4-MD5K>] (archived Sept. 7, 2016).

nation has presented itself as a coherent Cook Islands nation-state and, in the process, has engendered emotional attachment to a coherent nation.

Fifth, changes to the demographic make-up of professional rugby leagues in Australia and New Zealand have meant that the teams, once almost exclusively white, have, over the past decade, been transformed by a solidly growing presence of Pacific Islanders, including Cook Islanders. The success of Cook Islander players like brothers Kevin Iro and Tony Iro have painted the canvas of emotional sovereignty with the brush of national pride.

*Dancing and drumming.* Cook Islands dancing and drumming are “traditional” cultural practices that have become adapted—if not occasionally reinvented—in contemporary contexts.<sup>160</sup> Like language, dancing and drumming both divide and unify. On the one hand, their performance reproduces different practices among the islands, serving as reminders, like linguistic dialects, of differences between the islands. But, on the other hand, dancing and drumming can be cohesion-building. For example, the most important national holiday in the Cook Islands is Constitution Day (Te Maeva Nui). A high point of the week-long Constitution Day celebrations is a dance competition between troupes from the different islands.<sup>161</sup> As such, the differences between the islands serve as a catalyst for nation-building because the differences are both articulated and performed as an *element* of the nation.

Similar performances occur elsewhere inside and outside the Cook Islands, such as at the Pasifika Festival, a yearly one-day event held in Auckland, New Zealand. The Pasifika Festival showcases crafts, food, and performances from many of the main island groups of the South Pacific and attracts upwards of 200,000 visitors annually.<sup>162</sup> There, dance groups from many of the Cook Islands’ different islands perform both *within the context of* Cook Island-ness and as representatives of the entire *nation*.

In regard to these dancing and drumming events in New Zealand and Australia, which are anchoring activities for many Cook Islanders,

160. See generally KALISSA ALEXEYEFF, DANCING FROM THE HEART: MOVEMENT, GENDER, AND COOK ISLANDS GLOBALIZATION (2009); cf. THE INVENTION OF TRADITION, *supra* note 156.

161. To highlight the universal importance of dance to Cook Islanders: a prominent ex-pat government official told me the story of how he had been in Rarotonga several years ago during the Constitution Day celebrations. While in the middle of the crowd, he overheard some Cook Islanders—large “rugby-looking blokes”—saying things like, “I think we’re going to beat Penrhyn this year, but Aitutaki sure do look strong . . .” At first, he had assumed they were talking about rugby; but no, as it turned out, they were discussing the inter-island *dance* competition!

162. See *Pasika Festival 2017*, AUCKLAND, <http://www.aucklandnz.com/pasifika> (last visited Sept. 27, 2016) [<https://perma.cc/R947-RXYJ>] (archived Sept. 7, 2016).

two different but related phenomena are taking place. First, Cook Islands dancing and drumming are not just dancing/drumming *per se* but are a symbol of the panoply of aspects that Cook Islanders feel are important to Cook Islands culture, ranging from language to family to food to heritage and tradition—all of which become reproduced at dancing and drumming performances. It is in part for this symbolic value that dancing and drumming are so valued. Second, dancing and drumming, in this form of community performances, serve as a practical mechanism for bringing the community together, the result of which is the sharing of, reinforcement of, and teaching/learning of the full breadth of Cook Island-ness, that is to say, Cook Islands culture in the various forms noted a few lines above for their symbolic worth: language, family, food, heritage, and tradition. Dancing and drumming, therefore, are valued not just for their own sake but also because they help to perpetuate Cook Islands culture, a process that occurs through the actual dancing and drumming, as well as, or perhaps even more so, through the contexts that their performance generates.<sup>163</sup>

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The concept of emotional sovereignty expresses the idea of the nation as it exists for a given people. Of course, the idea is different for many individuals within that larger group. Nations are able to function as nation-states, however, because—by history, chance, or political engineering—there is frequently enough of an overlap among the different individual ideas to create a cohesive core regarding what most of the citizens think that the nation is. In other situations, enough citizens are able to get out of the nation what they hope to or expect to so that they continue their emotional allegiance to that nation; or such attachment can exist by default where the state or circumstances will not permit citizens to leave.

Whatever the case, a people's idea of their nation also impacts what the nation is and how it operates. The emotional component and the functional component of sovereignty are therefore symbiotic; they exist together, they influence each other. In short, people have an emotional attachment to their state, which affects the functioning of the state in relevant ways. Of course, what those emotional attachments are, and how and to what degree those emotions sway state leaders, is different in every instance. But, whatever the case, one way or another—through support or resistance—people's subjective

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163. There are other events which serve as similar catalysts for cohesion, such as church services and other church events, as well as weddings and funerals, family reunions, and, for some Cook Islanders, hair-cutting ceremonies.



engagements with the state, the emotional component of sovereignty, will influence the functioning of the state. At the same time, the state's functional regulation will impact the people's emotional attachments, altering their collectively shared sense of identity.

*C. A Few Additional Comments: Seemingly Incongruous Articulations of Sovereignty and So-Called "Failed States"*

Be all this as it may, how does one explain the curious and seemingly incongruous articulations of sovereignty that occur around the world? For example, why did the republics of the former Yugoslavia fight so hard for something called sovereignty only to appear to immediately plead to give up that sovereignty—sovereign borders, sovereign currency, *et cetera*—by applying for membership in the European Union?<sup>164</sup>

This Article suggests that there are three related reasons that groups—whether former Yugoslav republics, Indigenous tribes, or otherwise—call their struggle one for “sovereignty.” First, “sovereignty” serves as a marker of group identity. It is a label that validates the group's subjective, emotional understandings of itself. It is therefore a slogan of identity and a rubric of meaning. Second, that meaning then often gets mapped onto the form of the nation-state. This is because it is the nation-state, as an interface mechanism, that has become the primary form of globalized social and commercial interaction. In this way, nation-states have—largely by default—taken on the form of a globally-recognized “ideal” mode of social organization. Groups therefore often tend to reach for that “ideal.” Third, in order to perpetuate the elements of culture that gave the group meaning in the first place—in other words, to reproduce their subjective understandings of identity—groups require, not self-determination for its own sake, but instead control over the value-maximization mechanism that allows them to manage, in functional terms, the values—the subjective meanings—of the group.

Sovereignty, then, serves as an umbrella term for a variety of desired powers and attributes, and, as such, can be a compelling rallying cry. But the term “sovereignty” is also, in common discourse, ambiguous, often mistakenly associated with ideas like

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164. *E.g.*, Dan Bilefsky, *Joyous Croatia Joins Europe Amid a Crisis*, N.Y. TIMES (July 1, 2013) [http://www.nytimes.com/2013/07/02/world/europe/croatia-joins-european-union.html?\\_r=1](http://www.nytimes.com/2013/07/02/world/europe/croatia-joins-european-union.html?_r=1) (subscription required) [<https://perma.cc/43FX-EPTF>] (archived Sept. 7, 2016) (“Croatia became the 28th member of the European Union on Monday, a joyous moment for the small, predominantly Roman Catholic country about 20 years after it won independence in the bloody wars of the Balkans. . . . Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia – nations carved from the former Yugoslavia – are all hoping to join the bloc. Slovenia joined in 2004.”).

“independence.” Sovereignty is not independence, nor do most groups want to be fully independent (that is to say, severed from all interaction with outside groups). So, having achieved what many call “sovereignty,” a group must then focus on managing that sovereignty—which is to say, to put in place its interface mechanisms and set up its value-maximization mechanisms in ways that the group considers to be beneficial. The former Yugoslav republics, for example, have determined that the best way to perform this management is as part of the European Union. As such, it might appear that they are abdicating some of their “sovereignty,” but, in reality, they are simply working to manage it effectively. This Article argues that this management of relationships is precisely what sovereignty in the contemporary era is.

An additional objection might be raised in regard to so-called “failed states”—those jurisdictions where the state’s presence is so thin that arguably no state is functioning at all. But such states are still comprised of the components of sovereignty described here. After all, all states evoke different qualities and strengths of allegiance, and all states function with different levels of efficiency. Just because a given state is not able to monitor a given border or provide given services does not mean that the above components of sovereignty do not exist. Take the Central African Republic, for example. There, the subjective relationship between the people and the state is often one of tremendous expectation by the people; the people believe that the state should be providing for them in ways that it is not doing. As such, the people experience the world through the organizational structure of the state, even as their beliefs in the state in many ways exceed the state’s capacities. Meanwhile, the state’s failure to fully manage borders or to otherwise regulate domestically simply evidences a lack of efficiency. Even though something like cross-border commerce might be taking place completely outside of the involvement of the state, the expectation—by not only locals but also by the international community—is that this area of regulation is within the purview of the state.<sup>165</sup> In other words, part of the point is that the functional aspects

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165. Similarly, there is no question that illicit trade—in drugs and beyond—takes place across U.S. borders, outside the reach of U.S. government authorities. See, e.g., Richard Pérez-Peña, *Drug-Smuggling Tunnel, Found in San Diego, Is Longest Yet*, N.Y. TIMES (Apr. 21, 2016), <http://www.nytimes.com/2016/04/22/us/drug-smuggling-tunnel-from-tijuana-mexico-found-in-san-diego.html> (subscription required) [<https://perma.cc/ST9U-W2NF>] (archived Sept. 7, 2016) (“For all the talk about a wall between the United States and Mexico, the problem with border security continues to be as much below ground as above. On Wednesday, officials in San Diego announced the discovery of another cross-border tunnel built by drug smugglers – the longest one found yet, at about half a mile. . . . Despite the superlatives cited by officials, the cat-and-mole game between law enforcement and drug cartels shows no sign of abating. In the last five years, the authorities said, they have found more than 75 cross-border tunnels . . . .

of sovereignty are in part constructed; there is nothing *a priori* about them. States could be modeled differently, but they are not. States are imagined—indeed, required—to be modeled a certain way so that the global market can function in the way that it happens to function. The fact that states like the Central African Republic are commonly referred to as “failed states” only confirms this—what this phrase means is not that the Central African Republic is somehow something different from a state, a different genre of entity, but only that it is not operating at the full level of efficiency expected of it as exactly what it is, a sovereign state.<sup>166</sup>

V. FOR THE FIRST TIME IN HISTORY, THE DISTINCTION BETWEEN  
INDIGENOUS SOVEREIGNTY AND CONVENTIONAL SOVEREIGNTY HAS  
CEASED TO EXIST

The term “sovereignty” is a Western invention. The hegemony of its Western-born meaning influences the concept on multiple levels. As such, “[Indigenous] sovereignty” is frequently framed as qualitatively different and therefore always in opposition to “[conventional/Western] sovereignty.”<sup>167</sup>

This oppositional framing is problematic for two reasons. First, it subtly adopts discourses about Western “sovereignty”—for instance, that sovereignty is equivalent to complete independence—that, as discussed above, are now inaccurate, if they ever were correct to begin with. Second, and more importantly, framing Indigenous sovereignty

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Specialists on border control say no one has a clear idea how many tunnels are operating, or how much of a role they play in the drug trade, but they will be a factor for the foreseeable future.”); Lizette Alvarez, *In Puerto Rico, Cocaine Gains Access to U.S.*, N.Y. TIMES (May 29, 2014), <http://www.nytimes.com/2014/05/30/us/in-puerto-rico-cocaine-gains-access-to-us.html> (subscription required) [https://perma.cc/26JG-H8XX] (archived Sept. 7, 2016) (“Much of the cocaine being smuggled here now bypasses other surrounding islands and is taken directly from South America to Puerto Rico, a prized transshipment hub because it is on United States land. Once inside, packages that conceal drugs do not need to clear customs. . . . Gen. John F. Kelly, the leader of the Southern Command, warned the Senate Armed Services Committee . . . that the Coast Guard and law enforcement are failing to capture an estimated 80 percent of the drugs, almost all of it cocaine, that are flowing through the Caribbean Sea to the United States.”). Yet, I know of no allegations suggesting that such trade means that the United States is not sovereign.

166. I owe my critical insight and background information about the Central African Republic to conversations with Louisa Lombard, PhD, who wrote her dissertation on that country, including issues of sovereignty. See generally Louisa Lombard & Sylvain Batianga-Kinzi, *Violence, Popular Punishment, and War in the Central African Republic*, 114 AFR. AFF. 52 (2014).

167. E.g., Brown, *supra* note 16, at 178; see generally Menno Boldt & J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians*, XVII CAN. J. POL. SCI. 537 (1984) (arguing that “sovereignty” is a double-edged sword).

in opposition to Western sovereignty continuously discredits Indigenous sovereignty as always already (in Althusserian terms) after Western sovereignty. That is to say, where a distinction is made between “Indigenous sovereignty” and “conventional sovereignty,” it tends to be because the former is seeking to become the latter, and, in this way, conventional sovereignty appears always as the preferable—and therefore superior—form.

But today, for the first time in history, the distinction between Indigenous sovereignty and conventional sovereignty has ceased to exist. That is, the framework for both is the same, being a framework that must include interactions between groups *and* that must still be able to account for how each group itself understands and experiences that “sovereignty.” For this reason, the model proposed here is non-prescriptive: it accounts for the function of sovereignty while still reflecting the essential fact that any group will organize itself, and understand itself, in any way it sees fit.

Nevertheless, I predict at least three particular avenues of critique to this model of sovereignty in general, and to this conjoining of Indigenous and conventional sovereignty in particular. First, critics might say that the model overestimates the link between capital flow and culture; in harsher terms, the model might be called capitalist or imperialist or both. “Capital is the problem,” this critique would argue, “whereas you claim it as some kind of solution. Shame on you!” In response I say that my model is one that is proposed not as an ideal, but rather as a true reflection of the state of the world as we live it today. I agree that better worlds are possible, desirable, and that we all have an obligation to work towards them on behalf of all peoples; but, in the current moment—as short or long as future history may prove it to be—a refusal to recognize the significant role of capital regulation in the management of culture can only weaken the ability of any group to protect that culture. This Article expresses no opinion whatsoever on how a given group should regulate its cross-border capital; it does not suggest that any specific cultural traits are more worthy of protection than others nor does it propose any particular pathway of action. Rather, the Article stands for the proposition that to understand the inextricable relationship between sovereignty, culture, and the legal regulation of capital is to gain tools of empowerment (even recognizing the harsh and, at times, brutal realities of contemporary globalization).

Second, one might contend that this model, by some sleight of hand, attempts to erase all that is unique about Indigenous peoples more broadly, and about Indigenous conceptions of sovereignty more precisely. It does not. There is, with perhaps only extremely minor exception, no group on the planet today that does not wish to engage with the global market, that is, to obtain at least some global goods. As such, sovereignty for all groups hinges on relationships with other

sovereignties and must therefore be founded on the management of those relationships, whether by invitation or resistance. Furthermore, I refuse the temptation to romanticize Indigenous groups by suggesting that they are not interested in goods and other products of the global market.

Third and finally, by relying so heavily on the Cook Islands for evidence, some might accuse this Article of bias, too narrow a focus, or unawareness of the real differences among the peoples of the world. As noted, however, this Article offers a model. The model is purposefully designed to allow for differences among people. The evidence here from the Cook Islands is an example—it demonstrates one articulation of the principles here suggested; these same principles are equally reflected in articulations of sovereignty from all other locations across the planet. I encourage comparative research in this area.

There are, no doubt, other worthy critiques. But I stand by these four simple and significant points: First, every group on the planet—whether conventional nation-state or Indigenous group—engages with the global market because at least some of its members want to obtain manufactured goods from other groups. Second, in order to engage with the global market, every group—whether conventional nation-state or Indigenous group—must make sacrifices; that is, although the basic trading of goods and services still takes place, the acquisition of manufactured goods requires a group to make *some* compromises, to sacrifice something, typically to provide for foreign investment, in order to generate the wealth to obtain those goods. Third, different groups are willing to sacrifice different things; in each instance, what a group is willing to sacrifice depends on what that group considers to be most valuable.<sup>168</sup> Fourth, because each type of regulation that affects cross-border capital jeopardizes some cultural traits while protecting others, each piece of regulation must be carefully considered not only for its economic value but also for its cultural consequences. This works in two directions: when evaluating any regulation that might impact cross-border capital flow, particular care must be given to what the cultural consequences may be; likewise, where certain cultural elements are especially important, all regulation affecting cross-border capital flow should be assessed with the protection of those elements as the explicit goal.

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168. For instance, Cook Islanders will sacrifice citizenship but not land-holding rules; the French will sacrifice economic control via the European Union but not the right to regulate foreign-language signage/advertisements; Swedes will sacrifice Swedish-language use but not social welfare payments to its citizens; *et cetera*.

## VI. CONCLUSION

This Article approached these topics through the combined lenses of law and anthropology. To be sure, there is much to be said about sovereignty and globalization from the point of view of the discipline of law itself; the same is true of the viewpoints of economics and political science, which tend to be the disciplines that law is most influenced by. But here, the contributions of anthropology are crucial.

Together then, law and anthropology provide excellent collaborative tools for investigating the contemporary processes of sovereignty and globalization. As described above, sovereignty is in part made up of a subjective component referred to as emotional sovereignty.<sup>169</sup> This is because sovereignty has different meanings for different peoples. And this emotional component is indispensable to a broader definition of sovereignty because it is impossible to understand the functional/instrumental aspects of sovereignty without it. People live sovereignty and people believe in sovereignty; why else would people be willing to die for their countries? Why else would Indigenous peoples and others around the world be demanding sovereignty? Sovereignty is valued, although valued differently and for different reasons by different people.

So, any model that does not recognize the subjective component of sovereignty must be faulty. After all, it seems silly to suggest that sovereignty means the same thing for Americans as it does for the French, the Maori, the Chinese, or the Cherokee. It is likewise clear that the ways that these groups manage their sovereignty domestically—the ways they run their groups internally—are all remarkably different.

By contrast, other aspects of sovereignty are nearly identical in regard to every nation-state and Indigenous group. This is because, as noted, no group exists in a vacuum. Instead, all states are interconnected in the matrix of global commerce, and all the more so through the transformations taking place through global value chains. In order for this to be possible, all states must function in the same way: they must serve as an interface mechanism with other states and they must function similarly so that the interfaces can work. In other words, they must set up the conditions of law that make commerce possible between and among the various states of the planet. This functioning, again, is continuously influenced by the group's emotional, subjective views on what is important and on what the state is and should be.

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169. *See supra* Section IV.B.

A comprehensive model of sovereignty must then incorporate all of these various aspects of what sovereignty is and how it functions. In this myriad of different ways, globalization, sovereignty, law, and capital all come together; in the contemporary era, each is inextricable from the other, creating a system. Some states and some cultures fare well in this system, others fare poorly. The system nevertheless makes clear that legal scholarship must take better account of these relationships—not just individually, but as a whole. Further, these conclusions are not simply theoretical niceties. Rather, an understanding of these systemic relationships empowers the policy-makers of conventional states and Indigenous groups alike not just to manage capital flow, but also to be able to do so in ways that more explicitly, efficiently, and effectively integrate different forms of value—both economic and social.