

Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law

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I. INTRODUCTION

The past fifty years have seen a move toward “multilateralization”—attempts to deal with the frictions of an ever-shrinking world through the establishment of new legal regimes designed to apply globally, or nearly so. This “multilateralization” takes two forms. First, there has been an explosion in the number of public international organizations, such as the United Nations, the International Monetary Fund and the World Bank.¹ Nation-states are generally said to have surrendered a portion of their sovereignty to these organizations in return for the prospect of enforced cooperation on a range of issues.² Second, there has been a proliferation of multilateral sets of rules, some formalized in treaties and some not, responding to the need to overcome conflict-of-law problems and to counterbalance the effects of unequal bargaining power among the members of the international community.³

This move toward “multilateralization,” in both its forms, has so fundamentally transformed the character of international law that even the term “international law” is an anachronism. This transformation gives rise to my principal thesis in Part II of this Article: in order to accommodate the changes of the past half-century, a broader term and concept is required—“supranational law.”⁴

To illustrate this thesis, Part III of the Article examines the European Bank for Reconstruction and Development (European Bank), now in its fourth year of operation. In my view, the European Bank represents an important post-Cold War attempt to advance supranational law. It is a third-generation international financial institution⁵ with much broader mandates—political, economic and environmental—than those of its predecessors.⁶

In Part IV, I hazard a look to the future. Is the effort at “multilateralization,” and the supranational law that it is producing, just a flash in the pan, or is it the beginning of a profound change in the character of

1. For a discussion of the rise of these three institutions, see *infra* notes 120-54 and accompanying text. The emergence of public international organizations generally, as the first form of “multilateralization,” is discussed in the first portion of Part II.B., *infra*.

2. See *infra* notes 127, 137-38 and accompanying text.

3. For a discussion of the proliferation of multilateral sets of rules, see the latter portion of Part II.B., *infra*, particularly notes 174-83 and accompanying text.

4. For a summary of that thesis and an explanation of the term “supranational law,” see *infra* notes 105-14 and accompanying text.

5. For an explanation of the notion of a “third-generation international financial institution,” see *infra* notes 188, 213-28 and accompanying text.

6. For a discussion of the three special mandates of the European Bank, see Part III.A., *infra*, particularly notes 189-212 and accompanying text.

worldwide political relations? I address this question by making two main observations. First, "multilateralization" appeals both to the rich industrialized states of the "North" and to the poorer states of the "South," although for very different reasons.⁷ Second, despite that appeal, the emergence of an effective system of supranational law is unlikely, barring a global catastrophe, for two of the same reasons that traditional international law has never matured into a fully effective legal system: a swollen sovereignty gland and the absence of generally accepted fundamental rules.⁸

II. INTERNATIONAL LAW, NATION-STATES AND EFFORTS AT "MULTILATERALIZATION"

What is today considered traditional international law developed out of a reordering of the political landscape in Europe as the prospects for a unified Christendom faded and feudalism yielded to the rise of the nation-state.⁹ As the influence of that fundamental political reordering in Europe spread throughout most of the world, the concept of international law—its sources, its character, its aims—changed. Sovereignty emerged as the central pillar of international law.¹⁰

The political landscape is changing again. This section of the Article traces the evolution of international law in the last four centuries and describes the two aspects of "multilateralization" that now are making the traditional view obsolete.

A. Traditional International Law

Hugo Grotius is widely considered the father of international law.¹¹ He might more accurately be likened to Old Man Carnes in the musical *Oklahoma!*¹² Old Man Carnes was the character who kept insisting that "[t]he farmer and the cowman should be friends,"¹³ notwithstand-

7. See *infra* part IV.A., particularly notes 265-312 and accompanying text.

8. See *infra* part IV.B., particularly notes 313-44 and accompanying text.

9. See *infra* notes 38-42 and accompanying text.

10. See *infra* notes 43-101 and accompanying text.

11. MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 13 (5th ed. 1984); CHARLES S. EDWARDS, *HUGO GROTIUS: THE MIRACLE OF HOLLAND* 9, 141 (1981); GERHARD VON GLAHN, *LAW AMONG NATIONS* 30 (5th ed. 1986). *But see* J.L. BRIERLY, *THE LAW OF NATIONS* 28 (Sir Humphrey Waldock ed., 6th ed. 1963).

12. See RICHARD ROGERS & OSCAR HAMMERSTEIN II, *OKLAHOMA!* vocal score 142 (Albert Sirmay ed., 1943); see also RICHARD ROGERS & OSCAR HAMMERSTEIN II, *OKLAHOMA!* act I, sc. 1, libretto-vocal book, at 21 (Rogers & Hammerstein Theatre Library Rental ed. 1943) [hereinafter *OKLAHOMA!* libretto].

13. *OKLAHOMA!* libretto, *supra* note 12, act II, sc. 1, at 39. Act II of *Oklahoma!* opens with Old Man Carnes singing this plea:

ing the fact that the farmers had gradually encroached on the territory and livelihood of the cowmen by claiming land parcels and surrounding them with fences to close them off to grazing.¹⁴ By the year 1600, when Grotius was entering his prime,¹⁵ the nation-state had evolved in Europe into a political entity far stronger than the Church¹⁶—a development similar to the growing strength of the farmer in relation to the cowman in the American Plains by the turn of the twentieth century.¹⁷

What Grotius did, largely through his treatise *De Jure Belli ac Pacis* (*The Law of War and Peace*),¹⁸ was to facilitate the marriage of the two competing forces of his day by setting forth a body of rules that acknowledged the political primacy of the nation-state, but subjected its leaders to fundamental dictates of natural law deriving from Christian teaching.¹⁹ This is not unlike what Old Man Carnes was trying to do in *Oklahoma!* That character's efforts at bringing some degree of peace between the farmers and the ranchers helped facilitate the marriage of Curly (a cowboy) and Laurey (a farmer's daughter).²⁰ While we do

The farmer and the cowman should be friends,
 Oh, the farmer and the cowman should be friends.
 One man likes to push a plow,
 The other likes to chase a cow,
 But that's no reason why they cain't be friends.

Territory folks should stick together,
 Territory folks should all be pals.
 Cowboys, dance with the farmers' daughters!
 Farmers, dance with the ranchers' gals!

The Farmer and the Cowman, id.

14. In the words of the cowmen in *Oklahoma!* (joining in Old Man Carnes's song about the farmer and the cowman being friends), the farmers had "come out west and built a lot of fences! And built 'em right acrost our cattle ranges!" *Id.* The same friction between ranchers and farmers occurred during the settlement of Kansas. For a discussion of that friction and the fence laws and herd laws that emerged from it, see SAM BROWNBACK & JAMES B. WADLEY, *KANSAS AGRICULTURAL LAW* 258-60 (1989); Robert C. Casad, *The Kansas Law of Livestock Trespass: A Study in Statutory Underpainting*, 10 KAN. L. REV. 55, 57-63 (1961); Alvin Peters, *Fences and Settlers*, in *THE LAW AND LAWYERS IN KANSAS HISTORY* 16 (Kansas State Historical Society ed., 1992).

15. Grotius, born Huig de Groot in Delft, Holland in 1583, was declared "the miracle of Holland" at the age of fifteen. EDWARDS, *supra* note 11, at 1, 183 n.1. He died in 1645. *Id.* at 8.

16. See *infra* text accompanying notes 38-42.

17. BROWNBACK & WADLEY, *supra* note 14, at 259-60.

18. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* [THE LAW OF WAR AND PEACE IN THREE BOOKS] (Francis W. Kelsey trans., 1925) (1625) [hereinafter GROTIUS I].

19. See *generally id.* For an account of Grotius's views, see *infra* notes 66-70 and accompanying text.

20. OKLAHOMA! libretto, *supra* note 12, act II, sc. 2, at 53-55.

not know whether Curly and Laurey lived happily ever after, we do know that the farmers soon prevailed in their territorial claims, bringing an end to open grazing.²¹ Likewise, Grotius's success was short-lived. The role of natural law quickly dissipated, leaving the rulers of nation-states at liberty to do as they pleased.²²

Because the history of what is now called international law is central to the thesis of this Article, it warrants some elaboration. At the risk of oversimplification, I divide the development of international law through the middle of the twentieth century into four chapters. Only in the fourth chapter can the term "international law" be properly used. Before that time, for reasons explained below, a more appropriate term would be "the set of legal rules governing relations between peoples of different legal and political cultures"—or, stated more simply but less accurately, "the law of nations."²³

The first chapter in the history of the law of nations, like so much else in Western civilization, features the Greeks. In conquering and possessing other territories, establishing colonies, entering into alliances, engaging in trade and concluding peace treaties, the Greeks exemplified the functioning of "viable rules affecting the interactions of self-conscious political societies."²⁴ For the Greeks, the most important political societies were city-states.²⁵

21. See 3 THE NEW ENCYCLOPÆDIA BRITANNICA 696 (15th ed. 1974) [hereinafter ENCYCLOPÆDIA BRITANNICA] ("As the agricultural frontier moved west, the open range was transformed into farms, and . . . [cattlemen were] forced to settle on ranches with barbed-wire boundaries . . ."); see also 13 *id.* at 198. Statutes passed by the Kansas legislature in 1929 "swung the Kansas fence law battle in favor of the farmer and against the rancher," thus ending this state's days as an open-range state. BROWNBACK & WADLEY, *supra* note 14, at 259-60.

22. See *infra* notes 73-96 and accompanying text.

23. See generally EDWARDS, *supra* note 11, at 71-81. Legal scholars and politicians generally used the term "the law of nations" until 1780, when Jeremy Bentham coined the term "international law." *Id.* at 147. For a discussion of these two terms, see MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 228-33 (2d ed. 1993); Mark W. Janis, *International Law?*, 32 HARV. INT'L L.J. 363, 371-72 (1991). The loss in accuracy that comes from using "the law of nations" instead of my longer formulation ("the set of legal rules governing relations between peoples of different legal and political cultures") derives from the fact that the primacy of the nation-state in recent centuries prompts most people, especially in the United States, to equate "nation" with "state." As indicated below, however, in earlier ages the law of nations was by no means a "law of states." See, e.g., *infra* notes 24-30 and accompanying text.

24. EDWARDS, *supra* note 11, at 71.

25. See ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 11-13 (1947). Treaties between Greek and non-Greek communities were much less common than treaties between Greek city-states. See *id.* at 12-13. For references to legal rules governing relations between even earlier political communities (for example, Mesopotamian city-states of the fourth millennium B.C. and Egyptian, Hittite and other groups of the second millennium B.C.), see *id.* at 7-11. Although many of those ancient legal rules derived from treaties, sanctified by oaths to local gods, some of them emerged also from writings, such as the book of Deuteronomy's canons

The second chapter in the history of the law of nations features the Romans. While Rome was a republic, it entered into treaty relations with other powers, including Carthage. From those treaties a few rules and doctrines of the law of nations emerged, including the doctrine of a "just war."²⁶ It was when Rome became an empire, however, that it made its main contribution to the development of the law of nations. Rome was, after all, an empire of many nations, if the word "nations" is understood to denote peoples or "self-conscious political societies" or, in Latin, *gens*.²⁷ Questions arose in the Roman Empire as to whether, and how, the laws of the city of Rome proper (*jus civile*) should apply to those nations.²⁸ The answer was to develop a new body of law, derived partly from those aspects of laws and customs common to Romans and non-Romans, and partly from a sense of equity and justice.²⁹ This new body of law became known by the term *jus gentium*, translated as the "law of nations."³⁰

The third chapter in the history of the law of nations features the Church. The Christian religion, at first considered a threat to Roman civilization, was by the fourth century A.D. the religion of the most influential Roman classes.³¹ With the fall of the Roman Empire the power of the Church and its leaders increased, in part because the Church "represented a tie to the civilized, unitary past and survived the empire as the one institution seemingly capable of promoting universal values and of imposing some measure of order throughout the politically shattered West."³² The vehicle for promoting those values and imposing that order was canon law (also called ecclesiastical law), as promulgated and administered by churchmen.³³ This canon law,

on warfare. *Id.* at 7-9; see also MALCOLM N. SHAW, INTERNATIONAL LAW 13-14 (2d ed. 1986) (discussing the early origins of the law of nations).

26. See NUSSBAUM, *supra* note 25, at 16-18.

27. EDWARDS, *supra* note 11, at 72.

28. *Id.*

29. See generally HENRY S. MAINE, ANCIENT LAW 49-52, 58-61 (1861) (discussing the development and features of the *jus gentium*); NUSSBAUM, *supra* note 25, at 19 (same). See also EDWARDS, *supra* note 11, at 73 (referring to the views of Sir Henry Maine).

30. EDWARDS, *supra* note 11, at 73. Scholars disagree over the precise logic and chronology by which the Roman judicial officials came to develop the notion and term *jus gentium*. See *id.* (citing scholars of Roman law disagreeing with some aspects of Sir Henry Maine's view). It seems clear, however, that the term had come into general use by the first century B.C., when Cicero described the *jus gentium* as a common law of mankind. See *id.* at 74. For the view that the sources of *jus gentium* are "a matter of conjecture," see J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 63 (1976). See also SHAW, *supra* note 25, at 15-16 (discussing confusion among Roman lawyers over the relationship between the law of nature and *jus gentium*).

31. EDWARDS, *supra* note 11, at 75.

32. *Id.* at 75-76.

33. See *id.* at 76. A somewhat different picture of Europe during the Dark Ages that

“though oftentimes confused and contradictory, assumed the appearance of a law common to all those within the fold.”³⁴ Its influence extended increasingly beyond spiritual and ecclesiastical matters into areas that had previously been under the jurisdiction of secular authority.³⁵

For approximately seven centuries after the fall of the Roman Empire, the political landscape of Europe presented no effective obstacles to the gradual expansion of the Church’s authority. Feudalism, the prevailing form of political and social organization between the eighth and the twelfth centuries, fostered decentralization of political power into relatively small geographic areas.³⁶ Largely unchallenged, the churchmen clung to the notion of a universal spiritual community—Christendom—with the pope as the head.³⁷

followed the fall of the Roman Empire is drawn by René David, a leading comparative law scholar. David claims that “the reign of law had ceased” and that “society had returned to a more primitive state.” RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 38 (3d ed. 1985). The Church, according to David, encouraged this view, “extoll[ing] love of one’s fellow man instead of justice [L]aw itself was considered a bad thing.” *Id.*

34. EDWARDS, *supra* note 11, at 76. For an account of the development of canon law, see WALTER ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES* 119-59 (1975). Although in the ninth century canon law was “only one of the several legal and governmental sources and had to take its place next to the particular law passed by kings or by councils,” *id.* at 127, and therefore took different forms in different parts of Europe, *id.* at 127-33, a comprehensive official collection of canon law was published in the form of five books in September 1234 by Pope Gregory IX, *id.* at 142. Although this version, called the *Liber Extra*, was supplemented by later books (the *Liber Sextus* and the *Clementines*), *id.* at 142, 145-46, it remained in force for nearly seven hundred years, until 1918, *id.* at 143. Later codes of canon law were promulgated in 1917 and 1983. See *THE CODE OF CANON LAW* vii-xv (The Canon Law Society of Great Britain and Ireland trans., 1983).

35. EDWARDS, *supra* note 11, at 76; see also NUSSBAUM, *supra* note 25, at 24 (“[E]cclesiastical law was the dominant type of universal law in the Middle Ages.”); SHAW, *supra* note 25, at 17 (discussing the Church’s “comprehensive structure of power” during the Middle Ages). By the close of the period, however, canon law was by no means the only source of “universal law” in Europe. The rediscovery of the *Digest* from Justinian’s *Corpus Juris Civilis* around the end of the eleventh century facilitated a revival of interest in Roman law, and a body of commercial law had been developing since the time of the Crusades. JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 8-9, 12-13 (2d ed. 1985). Roman law and canon law combined to create what has been called the *jus commune* (common law) of Europe that lasted until the rise of the nation-state. *Id.* at 10-11.

36. See EDWARDS, *supra* note 11, at 76; NUSSBAUM, *supra* note 25, at 28; see also BRIERLY, *supra* note 11, at 2-3 (describing the feudal system). For a discussion of feudal law and institutions, see ULLMANN, *supra* note 34, at 215-19.

37. EDWARDS, *supra* note 11, at 77. Edwards points out that in 1075 Pope Gregory VII “maintained that the Roman church was divine in origin, that the Roman pontiff alone could be called universal ruler, that the pontiff could depose kings and emperors and be judged by no human powers, and that the Roman church had never erred and could not err.” *Id.* at 77-78; see also NUSSBAUM, *supra* note 25, at 23 (“[T]he pope became in the latter part of the Middle Ages the foremost representative of unitary rule in Western civilization.”).

Then the political landscape of Europe changed radically. The modern state system, composed of national monarchies, swept across Europe from the thirteenth century onward.³⁸ Having gained power partly as a natural extension of feudalism³⁹ and partly as an outgrowth of the Reformation,⁴⁰ the nation-state had firmly established itself by the time Grotius came of age.⁴¹

Thus began the fourth chapter in the history of the law of nations. One historian emphasizes how dramatically the rise of the nation-state changed the respective roles of the Church and the monarchs:

The Christian faith cut across territorial boundaries, and the peoples within the realms were oftentimes caught in a dilemma of loyalty to new sovereign authority or loyalty to the church. In order to strengthen their positions and to promote the loyalty of their peoples, the monarchs intensified their resistance to any possible encroachments of the papacy. . . . [T]he vast religious upheaval which swept all of Europe [in the sixteenth century] helped to promote the phenomenon of nationalism. By 1560 most of the basic tenets of Protestantism had been asserted, and the changing circumstances dispelled once and for all any lingering notion that Christendom was a monolithic unity directed from Rome.⁴²

It was in this chaotic setting that Grotius, by all marks a genius,⁴³

38. EDWARDS, *supra* note 11, at 81.

39. A central feature of feudalism, loyalty to a lord in return for protection, gradually translated into loyalty to a national monarch. BRIERLY, *supra* note 11, at 4; MAINE, *supra* note 29, at 106-08.

40. See BRIERLY, *supra* note 11, at 1, 5; EDWARDS, *supra* note 11, at 82.

41. According to Briery, "[t]he Peace of Westphalia, which brought to an end in 1648 the great Thirty Years War of religion, marked the acceptance of the new political order in Europe." BRIERLY, *supra* note 11, at 5. For details about the Peace of Westphalia and the changes in relations among European states that followed it (for example, increases in diplomatic activities and commercial treaties, changes in rules of neutrality and proposals for securing peace in Europe), see NUSSBAUM, *supra* note 25, at 86-96. See also JANIS, *supra* note 23, at 154 ("The Peace of Westphalia legitimated the right of sovereigns to govern their peoples free of outside interference The Peace was a great property settlement for Europe, a quieting of title across the continent."). See generally Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20 (1948) (discussing the character, background and implications of the Peace of Westphalia).

42. EDWARDS, *supra* note 11, at 81-82.

43. Hersch Lauterpacht, writing on the three-hundredth anniversary of Grotius's death, offered an estimate of Grotius's contribution. Lauterpacht began with this accolade:

In a very real sense [Grotius] was one of the greatest international figures of his age—a prodigy, almost a miracle, of learning; an intimately familiar name to all interested in religious controversy at a time when questions of religious dogma and polemics were in the very centre of public attention; a brilliant literary scholar; the acknowledged greatest exponent of the law of nations. It would be necessary to go back to Erasmus to find a figure who was as much a household name wherever learning and culture reached.

H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 2 (1946); see also NUSSBAUM, *supra* note 25, at 96-97 (describing Grotius as a "child prodigy" and listing

set about writing his *De Jure Belli ac Pacis*⁴⁴ as a manual of legal rules by which the national monarchs of Europe should be guided in their relations with each other. He was not the only one to do so, nor was he the first. Machiavelli had written *The Prince* in 1513 as “a handbook of advice for a ruler on how to achieve, exercise, and retain political power.”⁴⁵ A central theme was that there was no law or set of obligations among rulers of states, since the ruler of a state could (and indeed must) be a law unto himself in order to create a stable state for the benefit of himself and his people.⁴⁶

Contrasting with Machiavelli’s view was that of Jean Bodin, whose *Six Livres de la Republique* (*The Six Books of the Commonwealth*), first published in 1576, defined sovereignty in a way that made a king, even though supreme within his kingdom and therefore not bound by laws that he makes, bound nonetheless by several external sources of law.⁴⁷ These included divine law (since sovereign power came from God), natural law (the universal precepts of nature discernible to all rational beings) and the customs and traditions of the people being ruled.⁴⁸

Of these two approaches, Machiavelli’s “every state for itself”⁴⁹ approach soon became dominant, leading to what many theorists at the time considered an appalling disregard for decency in the relations

many academic achievements in his youth).

44. GROTIUS I, *supra* note 18.

45. EDWARDS, *supra* note 11, at 82. See generally NICCOLO MACHIAVELLI, *IL PRINCIPE* [THE PRINCE] (Ninian H. Thomson trans., 2d ed. 1897) (1513).

46. EDWARDS, *supra* note 11, at 82; see also BRIERLY, *supra* note 11, at 6. Brierly notes that “Machiavelli’s *Prince* . . . [gave] the world a relentless analysis of the art of government based on the conception of the state as an entity entirely self-sufficing and non-moral.” *Id.* The non-moral character of Machiavelli’s advice is evident in the following excerpt from *The Prince*:

[A] Prince . . . cannot observe all those rules of conduct in respect whereof men are accounted good . . . [but instead is] often forced, in order to preserve his Princedom, to act in opposition to good faith, charity, humanity, and religion. He must therefore keep his mind ready to shift as the winds and tides of Fortune turn, and . . . [although] he ought not to quit good courses if he can help it, . . . [he] should know how to follow evil courses if he must.

. . . .
 . . . [I]f a Prince succeeds in establishing and maintaining his authority, the means will always be judged honourable and be approved by every one. For the vulgar are always taken by appearances and by results, and the world is made up of the vulgar

MACHIAVELLI, *supra* note 45, at 128-30.

47. See BRIERLY, *supra* note 11, at 9; EDWARDS, *supra* note 11, at 83-84; SHAW, *supra* note 25, at 20. For translated excerpts from Bodin’s *Six Livres de la Republique*, see JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM *THE SIX BOOKS OF THE COMMONWEALTH* (Julian H. Franklin ed. & trans., 1992).

48. See EDWARDS, *supra* note 11, at 84.

49. *Id.* at 82.

between monarchs.⁵⁰ “Though history, like a giant hammer, had fallen upon the West, breaking it into numerous pieces, these theorists [opposing Machiavelli’s view] came to believe that the fragments could be held together in a meaningful whole with universal law serving as a bonding medium.”⁵¹ Many of these theorists insisted that rules governing the behavior of nations derived from two sources: (i) a law of nature and (ii) custom evidencing common consent.⁵²

Perhaps the most important of these theorists was not Grotius but Francisco Suarez, a Spanish Jesuit theologian who conceptualized a system consisting of four types of law—eternal, divine, natural and human.⁵³ As explained in his treatise *De Legibus ac Deo Legislatore* (*On Laws and God the Lawgiver*), published in 1612, eternal law was at the root of all law; it resided from the beginning of creation in the mind of God.⁵⁴ It was not promulgated, however, and thus not accessible to human knowledge.⁵⁵ Humans could, though, know divine law, which was directly promulgated by God.⁵⁶ They also could, according to Suarez, know natural law,⁵⁷ which was based on “the natural qualities of mankind.”⁵⁸ The final category, human positive law, was entirely the product of the actual customs of nations⁵⁹ and was intended to supplement natural law.⁶⁰ Of the four types of law, Suarez said, both natural law and human positive law could be considered part of the law of nations.⁶¹

50. *Id.* at 84-85.

51. *Id.* at 85.

52. *See id.* at 85.

53. *See id.* at 86-88. Other authors give greater prominence to another Spanish theologian, Francisco de Vitoria, and to an Italian Protestant, Alberico Gentili. *See BRIERLY, supra* note 11, at 26-27; NUSSBAUM, *supra* note 25, at 71, 75-85; SHAW, *supra* note 25, at 21-22.

54. *See EDWARDS, supra* note 11, at 86-87.

55. *Id.* at 87.

56. *See id.* at 88.

57. *Id.*

58. *Id.* at 106 (quoting 2 FRANCISCO SUAREZ, SELECTIONS FROM THREE WORKS 271 (Gwladys L. Williams et al. trans., 1944) (translating bk. II, ch. XIV, sec. 7 of *De Legibus ac Deo Legislatore*, one of three works featured in the 1944 translation)).

59. *Id.* at 88. Suarez disagreed with those who had interpreted Aquinas to argue that the valid human law was directly deduced from natural law without human consent as a condition. *See id.* at 88-89.

60. NUSSBAUM, *supra* note 25, at 66-67.

61. EDWARDS, *supra* note 11, at 90. Edwards attributes Suarez with having said that states, because they are never entirely self-sufficient when standing alone, engage in various forms of association and intercourse, and therefore they:

have need of some system of law whereby they may be directed and properly ordered with regard to [their] intercourse and association; and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in direct manner with respect to all matters; therefore, it was possible for certain special

While Suarez and others⁶² provided theoretical foundations, Grotius built a tangible, visible structure of the rules governing relations between states. His *De Jure Belli ac Pacis* relied heavily on the work of those who preceded him⁶³—so much so, in fact, that some scholars have accused him of lifting ideas directly from Suarez and others without proper attribution.⁶⁴ The difference was largely one of presentation. Grotius's treatise offered not only a comprehensive theoretical exposition, but also a practical substantive manual.⁶⁵

The gist of Grotius's view of the law of nations, again at the risk of oversimplification, is that the relations between sovereigns on behalf of their states are governed by binding rules derived from two sources: *jus gentium voluntarium* and natural law.⁶⁶ His *jus gentium voluntarium* was based on consent of states as manifested in custom and usage.⁶⁷

rules of law to be introduced through the practice of these same nations. For just as in one state or province law is introduced by custom so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations.

Id. at 87 (emphasis added) (quoting SUAREZ, *supra* note 58, at 349 (translating bk. II, ch. XIX, sec. 9 of *De Legibus ac Deo Legislatore*)). For a different translation of this famous passage, see NUSSBAUM, *supra* note 25, at 67. As for Suarez's "splitting of international law" into natural law and custom ("*jus gentium* in its international meaning"), see *id.* at 71.

62. Edwards mentions several other jurists and theologians whose works in the sixteenth and early seventeenth centuries formed part of the backdrop to Grotius's work. See EDWARDS, *supra* note 11, at 85; see also *supra* note 53.

63. BRIERLY, *supra* note 11, at 28; EDWARDS, *supra* note 11, at 141.

64. See, e.g., EDWARDS, *supra* note 11, at 148-53. Edwards offers several explanations for Grotius's failure to cite Suarez. These include the fact that Suarez's treatise had been burned publicly by the kings of both England and France for its endorsement of a right of tyrannicide; for Grotius to have cited Suarez heavily could have invited trouble not only for Grotius's treatise but for Grotius himself, who lived in France at the time. *Id.* at 152-53.

65. See *id.* at 95-96. Grotius's intent was "to produce a treatise that was more weighted to the substance of law than to its theoretical foundations." *Id.* at 96; see also BRIERLY, *supra* note 11, at 29 ("Grotius's purpose was practical.").

66. See BRIERLY, *supra* note 11, at 30; NUSSBAUM, *supra* note 25, at 104 ("Grotius derives the law of international relations primarily from the law of nature, and secondly from the *jus gentium* by which the law of nature is supplemented."). For a discussion of *jus gentium voluntarium*, see *infra* note 67. For a discussion of the law of nature, see *infra* note 70.

67. Brierly and Nussbaum both point out the confusion generated by Grotius's imprecise definition of the term *jus gentium*. See BRIERLY, *supra* note 11, at 30; NUSSBAUM, *supra* note 25, at 104. For this reason, the term *jus gentium voluntarium* is sometimes used to reflect the element of volition or voluntary consent that Grotius believed was crucial to *jus gentium*:

[I]us Gentium . . . est quod Gentium omnium aut multarum voluntate vim obligandi accipit. ([T]he law of nations . . . is the law which has received its obligatory force from the will of all nations, or of many nations.)

HUGONIS GROTII, DE IURE BELLI AC PACIS LIBRE TRES 30 (P.C. Molhuysen ed., 1919) (1625) [hereinafter GROTIUS II] (footnote omitted); GROTIUS I, *supra* note 18, at 44 (translating bk. I, ch. XIV, sec. 1). In other passages, Grotius himself uses the term *jus gentium voluntarium*. See, e.g., GROTIUS II, *supra*, at 227 (bk. II, ch. VIII, sec. 1). The 1925 English translation of the treatise rendered the phrase *jus gentium voluntarium* as "the volitional law of nations." GROTIUS I, *supra*

His law of nature was the "dictate of right reason,"⁶⁸ a set of "broad and unchanging principles of justice"⁶⁹ derived from Christian theology.⁷⁰

Grotius thus combined the new with the old: he acknowledged the primacy of the nation-state as the fundamental unit of political organization in Europe; nevertheless, he insisted that the nation-state was subject in its external relations to the principles of natural law that had governed behavior under the previous regimes.

The history of fence laws and herd laws in the American Plains states shows that compromises between the conflicting demands of farmers and ranchers were short-lived, notwithstanding the pleas of Old Man Carnes and others that "[t]he farmer and the cowman should be friends."⁷¹ The farmers ultimately prevailed in their territorial claims, bringing an end to open grazing.⁷² Likewise, Grotius's attempt to limit the growing strength of the nation-state by "marrying" it to the Church-based rules of proper behavior did not last long.⁷³ A split soon reappeared between the "naturalist" school and the "positivist" school of theorists.⁷⁴ Those in the naturalist school downplayed or denied the relevance of custom or treaty rules to a discussion of international law,⁷⁵ focusing instead on "a theoretical construction of

note 18, at 295. Lauterpacht also uses the term *jus gentium voluntarium* in describing Grotius's work and defines it as "the product of consent as manifested in the practice of states." Lauterpacht, *supra* note 43, at 21; see also NUSSBAUM, *supra* note 25, at 104.

68. GROTIUS I, *supra* note 18, at 38-39 (translating bk. 1, ch. X, sec. 1).

69. EDWARDS, *supra* note 11, at 105.

70. See *id.* at 60-67. For a comprehensive treatment of Grotius's view of the law of nature, see *id.* at 27-69. Edwards's thesis is that "even though Grotius . . . freed natural law theory from its traditional medieval tie [with divine revelation], he was not a secularist [one who takes the view that theological considerations should be excluded from the subject of natural law]." *Id.* at 47. In other words, natural law for Grotius was not grounded in the rationality of man alone, but instead had some theological foundation. See *id.*

71. See *supra* notes 13-14.

72. See *supra* note 21.

73. See BRIERLY, *supra* note 11, at 33. Briery assesses the impact of Grotius's treatise on the law of war and peace in this way:

[I]f it is a proof of success that within a few years of its author's death his book had become a university textbook, that it has often since been appealed to in international controversies, that it has been republished and translated scores of times, and that every subsequent writer treats his name with reverence, however widely he may depart from his teaching, then Grotius must be accounted successful. But if by success is meant that the doctrines of Grotius as a whole were accepted by states and became part of the law which since his time has regulated their relations, then his work was an almost complete failure.

Id. at 32-33.

74. SHAW, *supra* note 25, at 23.

75. *Id.* at 23-24.

absolute values.”⁷⁶ Those in the positivist school, by contrast, largely or completely dismissed natural law as an element of international law, focusing instead on the actual practice of states.⁷⁷

The positivist approach soon prevailed,⁷⁸ partly because it reflected the growing acceptance of empiricism derived from the Renaissance⁷⁹ and partly because it coincided with popular theories of state sovereignty.⁸⁰ In the latter part of the eighteenth century and throughout the nineteenth century, the dominant view of international law was that the only rules governing relations between states, as a practical matter, were voluntary in character, as manifested in custom or treaties.⁸¹

76. *Id.* at 24.

77. *Id.* For discussions of the “naturalist” and “positivist” writers following Grotius in the seventeenth century, see BRIERLY, *supra* note 11, at 35-37; NUSSBAUM, *supra* note 25, at 112-25; VON GLAHN, *supra* note 11, at 31.

78. For a summary of the positivist approach and the views of John Austin, one of its most well-known proponents, see Richard E. Levy, *International Law and the Chernobyl Accident: Reflections on an Important but Imperfect System*, 36 KAN. L. REV. 81, 83-84 (1987).

79. See SHAW, *supra* note 25, at 24. “Empiricism as formulated by Locke and Hume denied the existence of innate principles and postulated that ideas were derived from experience.” *Id.* (footnote omitted).

80. *Id.* at 24-25. For a survey and criticism of some of those theories of sovereignty, see BRIERLY, *supra* note 11, at 7-13. In particular, Brierly points out that Thomas Hobbes, writing in the mid-1600s, defined sovereignty in such a way as to identify it with might instead of legal right. See *id.* at 12-13. In criticizing this approach, Brierly argues that “[t]o the extent that sovereignty has come to imply that there is something inherent in the nature of states that makes it impossible for them to be subjected to law, it is a false doctrine . . .” *Id.* at 47. For more recent discussions of sovereignty, see HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 14-26 (1990) (discussing the history and limits of sovereignty and its relation to nationalism, especially for the modern nation-state); Janis, *supra* note 23, at 364, 368-69 (attacking some of the legal notions related to the sovereign state); Ali Khan, *The Extinction of Nation-States*, 7 AM. U. J. INT’L L. & POL’Y 197, 202-19 (1992) (discussing popular sovereignty, universal sovereignty and “Free State”); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990) (discussing popular sovereignty, human rights and humanitarian intervention); Louis Henkin, *The Mythology of Sovereignty*, ASIL NEWSLETTER (American Soc’y of Int’l Law, New York, N.Y.), Mar.-May 1993, at 1, 6-7 (claiming that “[i]t is time to bring sovereignty down to earth”). For purposes of this Article, “sovereignty” is used to refer to a “bundle of entitlements” supposedly granted by the international community to every state upon its legal independence and protected by international law against encroachment by any state. See, e.g., ANTHONY D’AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 16-18 (1987), *excerpt reprinted in* BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 34-35 (2d ed. 1990). This view corresponds to that held by Brierly, who explains that sovereignty “is merely a term which designates an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states.” BRIERLY, *supra* note 11, at 47.

81. See SHAW, *supra* note 25, at 24-27. Shaw writes of the nineteenth century as follows:

Positivist theories dominate this century. The proliferation of the powers of states and the increasing sophistication of municipal legislation gave force to the idea that laws were basically commands issuing from a sovereign person or body. Any question

One of the most widely read international law treatises of the period was Vattel's *Le Droit des Gens (The Law of Nations)*.⁸² Although Vattel recognized some theoretical importance of natural law, he claimed that only the "voluntary law of nations"—that set of rules to which states had agreed—was enforceable.⁸³ By emphasizing the independence of states, Vattel was responsible for "cutting the frail moorings which bound international law to any sound principle of obligation."⁸⁴ Hence, "[b]y the end of the nineteenth century, most authorities on international law conceded only the will of nations to be the source of the law, a view typical of a period in which the absolute sovereignty of states was affirmed with conviction by virtually every statesman and publicist."⁸⁵

Thus the status of international law as of the early part of our century may be stated as follows: With the disappearance of natural law as an element of international law, the only remaining source of international law was, to use Grotius's phrase, *jus gentium voluntarium*.⁸⁶ The state had become "absolutized"⁸⁷—bound only by those rules that emerged from its own volition, as shown by actual practice. This view was reflected in one of the most widely quoted definitions of international law, the one announced in 1927 by the Permanent Court of International Justice (PCIJ)⁸⁸ in the *Lotus* case:⁸⁹

of ethics or morality was irrelevant to a discussion of the validity of man-made laws. The approach was transferred onto the international scene and immediately came face to face with the reality of a lack of supreme authority.

Since law was ultimately dependent upon the will of the sovereign in national systems, it seemed to follow that international law depended upon the will of the sovereign states.

Id. at 27. For a comprehensive discussion of the development of international law in the eighteenth and nineteenth centuries, see NUSSBAUM, *supra* note 25, at 126-237.

82. See BRIERLY, *supra* note 11, at 37; NUSSBAUM, *supra* note 25, at 160-61; VON GLAHN, *supra* note 11, at 34-35. See generally 3 E. DE VATTEL, *LE DROIT DES GENS [THE LAW OF NATIONS]* (Charles G. Fenwick trans., 1916) (1758).

83. See BRIERLY, *supra* note 11, at 38 (citing 3 VATTEL, *supra* note 82, at 304-06 (bk. III, ch. XII)).

84. BRIERLY, *supra* note 11, at 40. According to Brierly, Vattel's "exaggerated emphasis on the independence of states had the effect . . . of reducing the natural law, which Grotius had used as a juridical barrier against arbitrary action by states towards one another, to little more than an aspiration after better relations between states . . ." *Id.* at 38.

85. VON GLAHN, *supra* note 11, at 35.

86. See *supra* note 67.

87. The term "absolutize" is borrowed from WESTON ET AL., *supra* note 80, at 1086.

88. The PCIJ was established at about the same time as the League of Nations, following World War I. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 714-16 (4th ed. 1990). For a comprehensive history of the PCIJ, see ANTONIO S. DE BUSTAMANTE, *THE WORLD COURT* (Elizabeth F. Read trans., 1925).

89. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law⁹⁰

The same view of international law—emphasizing the element of *jus gentium voluntarium* and excluding any reference to natural law—is reflected in Article 38 of the Statute of the International Court of Justice (ICJ).⁹¹ Article 38(1) is widely viewed as providing a comprehensive list of sources of international law.⁹² It reads as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁹³

None of the items listed in Article 38 reflects Grotius's view that natural law is a source of international law. Even the reference to "general principles of law" is qualified by the words "recognized by civilized nations."⁹⁴ These general principles of law therefore are not immutable, but instead are subject to the changing, competing views of human society.⁹⁵

In short, traditional international law had evolved by the first part of the twentieth century into a body of rules that acknowledged and

90. *Id.* at 18. The idea expressed in the first sentence is reflected also in the opening of Brierly's famous treatise, first published in 1928: "The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another." BRIERLY, *supra* note 11, at 1.

91. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 38, 59 Stat. 1031, 1055, 1976 U.N.Y.B. 1052 [hereinafter ICJ STATUTE]. The ICJ was established in 1945 as the judicial organ of the United Nations. BROWNLIE, *supra* note 88, at 714, 716; INTERNATIONAL COURT OF JUSTICE, THE INTERNATIONAL COURT OF JUSTICE 9 (1976). Except for some introductory wording, the language of Article 38 of the ICJ Statute is identical to the wording of Article 38 of the statute of the PCIJ, which is reprinted in BUSTAMANTE, *supra* note 88, at 360.

92. AKEHURST, *supra* note 11, at 23; BROWNLIE, *supra* note 88, at 3.

93. ICJ STATUTE, *supra* note 91, art. 38, para. 1.

94. *Id.* For an explanation of the drafting history of the "general principles" language, see BROWNLIE, *supra* note 88, at 15-16. Brownlie points out that an earlier draft of the language, designed to reflect natural law concepts ("the rules of international law recognized by the legal conscience of civilized peoples") was rejected by the committee of jurists that prepared Article 38 of the PCIJ statute. *Id.*

95. For further discussion of general principles of law, see BROWNLIE, *supra* note 88, at 15-19; VON GLAHN, *supra* note 11, at 22-24.

supported the primacy of the nation-state and consisted only of those rules that had been accepted by states, either by treaty or through practice. This regime offered little or no room for entities other than states or for rules not "emanat[ing] from their own free will."⁹⁶ The sovereign independence of states had become the central pillar of international law.

The foregoing account of the evolution of international law is almost entirely Euro-centric. Why should this be, when Europe's size and population are quite small in comparison with the rest of the world?⁹⁷ The answer lies in another key development of recent centuries: colonization. Beginning in the 1500s, several European states succeeded in conquering and colonizing much of the world's territory.⁹⁸ At one time or another, these European colonies covered most of North America, South America, the Indian sub-continent, Australia and the islands of the Pacific, as well as substantial portions of Asia and the Middle East.⁹⁹ In gaining political independence, the former colonies became nation-states.¹⁰⁰ Thus through the process of colonization and

96. See the excerpt quoted from the *Lotus* decision, *supra* notes 89-90 and accompanying text.

97. Europe occupies only 6.6% of the world's land area, and its population in 1991 accounted for only 9.2% of the world's population. THE WORLD ALMANAC AND BOOK OF FACTS 1993, at 817 (1992) [hereinafter 1993 WORLD ALMANAC]. Indeed, at no time in the last four centuries has Europe's population exceeded a quarter of the world's population. *See id.*

98. 3 ENCYCLOPÆDIA BRITANNICA, *supra* note 21, at 464-65. For a survey of European colonization of the world, see 18 *id.* at 866-69.

99. *See* HERMANN KINDER & WERNER HILGEMANN, 2 THE ANCHOR ATLAS OF WORLD HISTORY (Ernest A. Menze trans., 1978), at 30 (map showing colonies and bases in about 1800), 90 (map showing foreign bases and spheres of influence in China by 1912), 98 (map showing colonial distribution of the world in 1914), 116 (map showing possessions and bases in East Asia and the Pacific 1865-1914), 178 (map showing possessions, colonies and other holdings in Africa in 1939).

100. *See generally* 18 ENCYCLOPÆDIA BRITANNICA, *supra* note 21, at 876-78, 888-90. Among the first such nation-states to emerge from European colonies was the United States of America. *Id.* at 876-77. The decolonization of South America had yielded several new states by the mid-1800s. *Id.* at 878. South and Southeast Asian colonies, such as India and Indonesia, gained independence just following World War II. *Id.* at 888-90. The decolonization of Africa took place largely in the 1960s. *Id.* at 890. *See also* KINDER & HILGEMANN, *supra* note 99, at 224 (map showing over two dozen new African states admitted to the United Nations by 1965); *Preface to THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW xi* (Frederick E. Snyder & Surakiart Sathirathai eds., 1987) [hereinafter Snyder & Sathirathai] (noting that "89 former colonies . . . achieved independence as newly-formed states in the past 40 years"). Largely because of this decolonization process, the number of nation-states in the world has more than tripled in our century. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 3 (1979) ("At the turn of the century some fifty acknowledged States constituted the world community."); 1993 WORLD ALMANAC, *supra* note 97, at 823-24 (listing 178 members of the United Nations as of September 1992). As of July 1993, the United Nations had 184 members. *My Land, Your Land and Sealand*, THE ECONOMIST, Oct. 2, 1993, at 48.

decolonization the European model of sovereign independence of states, together with the traditional view of international law that this model had produced, was imposed on the rest of the world.¹⁰¹

B. The Changing Paradigm: New Players and New Rules

The traditional view of international law has become an anachronism.¹⁰² Two related developments have made obsolete the concept of an “international” law concerned solely or primarily with nation-states abiding by rules emanating from their own free will. First, the past half-century has seen the emergence of a multitude of international organizations.¹⁰³ Second, many new sets of rules have been established at the multilateral level.¹⁰⁴

I examine these two developments in the following paragraphs. In doing so, I suggest that they reflect a new chapter in the history of the law of nations—or, to use the language I suggested earlier, a new chapter in “the set of legal rules governing relations between peoples of different legal and political cultures.”¹⁰⁵ Just as the term “international law” cannot properly be applied in describing the set of rules that governed before the rise of the nation-state (that is, in the first three “chapters” of the historical progression described above¹⁰⁶), likewise the term “international law” should not be applied in describing the new chapter that has begun in this century.

Instead, I use the term “supranational law.” The terms “supranational” and “supranational law” have been used in several contexts, some quite broad (for example, in referring to the canon law as of the late medieval period¹⁰⁷) and some narrow (for example, in referring to the settlement of disputes through commercial arbitration using rules that are detached from local law¹⁰⁸). One of the more common uses of

101. For other accounts of the “exportation” of the nation-state and the principle of sovereignty from Europe to the rest of the world, see 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 973-75 (Rudolf Bernhardt ed., 1992); ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 42, 47 (1986); SHAW, *supra* note 25, at 36-37.

102. For two perspectives on the anachronistic nature of traditional international law, see generally Janis, *supra* note 23; Reisman, *supra* note 80.

103. For a review of the rise of international organizations, see *infra* notes 120-70 and accompanying text.

104. For a discussion of these new multilateral sets of rules, see *infra* notes 174-83 and accompanying text.

105. See *supra* note 23 and accompanying text.

106. For a discussion of the first three chapters of that historical progression, featuring the Greeks, the Romans and the Church, respectively, see *supra* notes 24-37 and accompanying text.

107. SHAW, *supra* note 25, at 17.

108. CLAIRE M. GERMAIN, *GERMAIN'S TRANSNATIONAL LAW RESEARCH: A GUIDE FOR ATTORNEYS* 1-5 (1991). For other uses of these terms, see Wolfgang Fikentscher, *Third World*

“supranational law”—also a narrow one compared to my usage of the term—appears in connection with the European Communities (EC).¹⁰⁹ One author, writing a quarter of a century ago, referred to “supranational” as then “[a] relatively new word in the vocabulary of politics”¹¹⁰ that highlighted the dilemma between honoring the traditional concept of state sovereignty and meeting the need for some means of regulating the actions of states.¹¹¹ He pointed out that states had in this century begun to “submit voluntarily to restrictions of their sovereignty by allocating powers . . . to international organizations.”¹¹² For him, the term “supranational” signified “a level of international integration beyond mere intergovernmentalism yet still short of a federal system.”¹¹³

Drawing on these connotations, I use the term “supranational law” in a broad sense, to describe today’s version of the set of legal rules

Trade Partnership: Supranational Authority vs. National Extraterritorial Antitrust—A Plea for “Harmonized” Regionalism, 82 MICH. L. REV. 1489, 1489 (1984) (referring to the Seabed Authority called for in the 1982 Convention on the Law of the Sea as a “supranational authority”); James D. Kurek, *Supranational Regulation of Transnational Corporations: The UNCTAD and CTC Efforts*, 2 MICH. Y.B. INT’L LEGAL STUD.: CORPORATE CONCENTRATION 268, 269-70 (1981) (discussing the need for a “supranational framework to control TNC activities”); Paul H. Nitze, *Foreword: International Security in a New World*, 81 GEO. L.J. 481, 488 (1993) (referring to the United Nations, NATO and the Conference on Security and Cooperation in Europe as “supranational institutions”). A Chinese author, Liu Fengming, has used the term “supranational law” in referring to the writings of certain Anglo-American writers, including Jessup, Lauterpacht and Jenks, who he says belong to the “expansionist school” of international law theorists, as distinct from the “traditional school, . . . which still adheres to the concept of state sovereignty.” Hungdah Chiu, *Xiandai guoji fa gangyao (Essentials of Modern International Law)*, 79 AM. J. INT’L L. 466, 467 (1985) (book review). For a definition of the term “supranational organization,” see PARRY AND GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 384 (1986).

109. See, e.g., THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 51-53 (2d ed. 1990) (explaining the concept and definition of “supranational organizations” in the context of the EC); see also Jost Delbruck, *A More Effective International Law or a New “World Law”?—Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 705 (1993) (referring to the EC as a “supranational organization”); Jose Sette-Camara, *Marine Pollution in International and Middle Eastern Law*, 81 AM. J. INT’L L. 981, 982 (1987) (book review) (referring to EC law as “a true ‘supra-national law’” and hence distinct from “interstate regional arrangements, which constitute international treaty law rather than supranational law”).

110. FOREST L. GRIEVES, SUPRANATIONAL AND INTERNATIONAL ADJUDICATION vii (1969).

111. *Id.*

112. *Id.*

113. *Id.* In expanding on this point, Grievess explains that “supranational” has been seen by some as an actual transfer of sovereignty and by others as a limitation on sovereignty. *Id.* at 11-12. He adopts the former view:

The term “supranational” signifies that signatory states have transferred to an international institution certain limited decision-making powers normally exercised only by the governmental organs of a sovereign state

Id. at 14 (emphasis omitted).

governing relations between people of different legal and political cultures. Today's version of that set of rules, unlike the version that existed in earlier chapters of history, is not solely or even primarily confined to nation-states in its origin or application. In addition to *inter-national* rules in the traditional sense—rules applying only to individual nation-states in their relations with each other—there are rules involving international organizations and other entities that are more influential economically and politically than many nation-states. Moreover, the rise of new multilateral sets of rules has complicated the traditional view of rules emerging from the volitional acts of states (“emanat[ing] from their own free will”¹¹⁴), such as by bilateral treaty. The image of a sovereign state exercising freedom of choice in its participation in the international community no longer seems valid, or even desirable, except perhaps for the most powerful of nation-states.

The first of the two developments I consider significant is the dramatic rise of international organizations as new players on the international scene. Unlike the long history of international law, stretching back thousands of years,¹¹⁵ the history of international organizations is quite short, dating only from the middle of the nineteenth century.¹¹⁶ The International Telegraphic (now Telecommunications) Union and the Universal Postal Union were established in 1865 and 1874, respectively,¹¹⁷ and the League of Nations began operations in 1920, after the close of World War I.¹¹⁸ The League, unlike the international organizations that came before it, was designed as a global organization empowered to deal with a comprehensive range of issues.¹¹⁹

The turning point in the rise of international organizations, however, came with the end of World War II. Of the several new international organizations formed then, the most widely known is the United Nations. It was created in an attempt to remedy the defects of the League of Nations,¹²⁰ which had failed to prevent World War II.¹²¹

114. See the excerpt quoted from the *Lotus* decision, *supra* notes 89-90 and accompanying text.

115. See *supra* note 25 and accompanying text.

116. JANIS, *supra* note 23, at 187.

117. *Id.*

118. *Id.* at 194; see also BROWNLIE, *supra* note 88, at 679. The Covenant of the League of Nations, which came into force on January 10, 1920, constitutes Part I of the Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188, 195. M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 37-38 (1984). For a discussion of predecessors to the League of Nations and the importance of international conferences, beginning with the Congress of Vienna in 1815, see JANIS, *supra* note 23, at 191-93; SHAW, *supra* note 25, at 587-89.

119. SHAW, *supra* note 25, at 589.

120. *Id.* at 592-93.

It is difficult to overstate what a radical change the establishment of the United Nations represented in 1945.¹²² Up to that point, the traditional view of international law held that a state had virtually unlimited legal authority to wage war in its own self-interest.¹²³ Although some attempts had been made to change the traditional view by limiting the hasty exercise of that authority—the Covenant of the League of Nations, for example, required a state to observe a three-month “cooling-off period” before resorting to war¹²⁴—no effective means had been established before 1945 for prohibiting the aggressive use of force by one state against another.¹²⁵

The United Nations Charter sought to change all that. By including Article 2(4) in the Charter,¹²⁶ the states that created the United Nations agreed to surrender the sovereign right to use force in their international relations, except in self-defense.¹²⁷ Instead of resting with states, the right to use such force rests with the United Nations Security Council, which Chapter VII of the Charter authorizes to take a range of collective security measures, including “such action by air,

121. JANIS, *supra* note 23, at 196. For a brief review of the League’s performance, see *id.* at 194-95. The opening words of the United Nations Charter reveal the primary intent of the drafters: “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.” U.N. CHARTER pmb1.

122. The United Nations grew out of a series of war-time declarations and conferences, culminating in the San Francisco Conference of 1945, which adopted the United Nations Charter. SHAW, *supra* note 25, at 593.

123. VON GLAHN, *supra* note 11, at 583. Only a quarter of a century before the United Nations was emerging from the ashes of World War II, the U.S. Secretary of State had advised President Woodrow Wilson that “[t]o declare war is one of the highest acts of sovereignty.” *Id.* at 583 n.2 (citing H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 5 n.1 (1947)). See also Edward Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT’L L. 271, 271-72 (1985).

124. SHAW, *supra* note 25, at 542; see also AKEHURST, *supra* note 11, at 218; VON GLAHN, *supra* note 11, at 584. For accounts of attempts made both before and after the formation of the League of Nations to restrict the legal right of a state to use force, see AKEHURST, *supra* note 11, at 216-19; SHAW, *supra* note 25, at 539-43; VON GLAHN, *supra* note 11, at 583-88; Gordon, *supra* note 123, at 274-75.

125. The most ambitious attempt to do so was the Pact of Paris (Kellogg-Briand Pact) of 1928, which entered into force July 24, 1929. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. That attempt was doomed, however, by the treaty’s shortcomings. It provided no means of enforcement and did not define the methods through which relations between states might be changed without resort to force. VON GLAHN, *supra* note 11, at 584-85. Von Glahn believes that the Pact of Paris “represented nothing more than a moral preachment.” *Id.* at 586.

126. “All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state” U.N. CHARTER art. 2, para. 4.

127. For discussions of Article 2(4), see AKEHURST, *supra* note 11, at 219-21; SHAW, *supra* note 25, at 543-47. The defensive use of force was permitted as a temporary measure in the case of “an armed attack” against a member. U.N. CHARTER art. 51.

sea, or land forces as may be necessary to maintain or restore international peace and security."¹²⁸

During the period of the Cold War, the Security Council proved unable to assert its authority as envisioned under the Charter. Only once before 1990—in the case of Korea in 1950—did the Security Council exercise its Chapter VII powers, and then only because the Soviet Union, miffed over the issue of China's representation in the United Nations, was not present to cast a veto.¹²⁹ Between 1950 and 1990, countless instances of the use of force between states took place with only minimal involvement by the United Nations.¹³⁰ Indeed, the practice of states seemed to show such disregard for Article 2(4)'s prohibition on the aggressive use of force that some writers began debating as early as 1970 whether Article 2(4) was "dead or alive."¹³¹

The events of 1990 and 1991 in the Persian Gulf demonstrated, however, that the most powerful states in the world do recognize a role for the Security Council that, if not entirely consistent with original expectations, is nevertheless pivotal in any serious case of military action by one state against another.¹³² As in the case of Korea in

128. U.N. CHARTER art. 42. Other provisions of Chapter VII authorize the Security Council to make recommendations to restore international peace, to call on member states to apply measures not involving armed force and to conclude agreements with member states for the supply of armed forces to the Security Council. *Id.* arts. 39, 41, 43. In a similar vein, Article 24(1) confers on the Security Council "primary responsibility for the maintenance of international peace and security." *Id.* art. 24, para. 1. The Security Council acts on behalf of the members of the United Nations when it carries out that responsibility. *Id.*

129. SHAW, *supra* note 25, at 561; *see also* VON GLAHN, *supra* note 11, at 595. Both Shaw and von Glahn take the view that the forces in Korea did not in fact amount to United Nations forces in the sense envisioned under the Charter. SHAW, *supra* note 25, at 561-62; VON GLAHN, *supra* note 11, at 595; *accord* AKEHURST, *supra* note 11, at 185-86. Some commentators analyze the Security Council's actions in Korea as falling under Article 39 of the Charter, if at all. *See, e.g.*, JOHN F. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE* 32 (1982). Others consider those actions as falling under both Article 39 and Article 42. *See, e.g.*, ROSALYN HIGGINS, *2 UNITED NATIONS PEACEKEEPING 1946-1967*, at 177 (1970).

130. *See* SHAW, *supra* note 25, at 562-64, 566-67. Shaw notes, surely by understatement, that "[t]he functioning of the United Nations system for the preservation and restoration of world peace has not been a tremendous success." *Id.* at 567. *See also* Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 809, 836-37 (1970); W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, 78 AM. SOC'Y INT'L L. PROC. 74, 77-78 (1984).

131. *Compare* Franck, *supra* note 130 with Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971).

132. For accounts of the United Nations-authorized action in the Gulf, carried out by an allied force led by the United States, *see generally* JOHN N. MOORE, *CRISIS IN THE GULF: ENFORCING THE RULE OF LAW* (1992); Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506 (1991); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452 (1991); Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516 (1991). Janis

1950, the ability of the Security Council to take decisive action¹³³ turned on the absence of a Soviet veto.¹³⁴

Even if there were a return to a deadlocked Security Council, however, the mere fact that the United Nations, with Article 2(4) in its Charter, was created at all is sufficient to support my thesis. That thesis is that international law has been replaced by supranational law. Because the traditional state-centered concept of international law does not take into account the existence and role of the United Nations¹³⁵ as a new subject of international law,¹³⁶ that concept is inadequate to

points out that, like the action in Korea in 1950, "the United Nations framework in the Persian Gulf War fell short of constituting a true United Nations international security action as envisioned by the organization's founders." JANIS, *supra* note 23, at 202. As in the case of the Security Council's 1950 actions concerning Korea, *see supra* note 129, it is not clear what provisions of Chapter VII of the United Nations Charter support the Security Council's 1990 actions concerning Iraq's invasion of Kuwait, *see Schachter, supra*, at 459.

133. On November 29, 1990, the Security Council adopted Resolution 678 calling on states to "use all necessary means" to restore peace and security to the Gulf region following Iraq's invasion of Kuwait in early August 1990. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., at 27, U.N. Doc. S/RES/678 (1990), *reprinted in* 29 I.L.M. 1565 (1990).

134. For a summary of the U.S.S.R.'s participation in the United Nations, and its change of attitude beginning in 1987, *see* MAURICE BERTRAND, *THE THIRD GENERATION WORLD ORGANIZATION* 131-32 (1989).

135. By focusing on the United Nation's role in matters relating to the use of force, I do not mean to dismiss other functions it fills as a "new player" in the formerly state-monopolized world. For discussions of some of those roles, *see* AKEHURST, *supra* note 11, at 176-80, 195-99; JANIS, *supra* note 23, at 198-99; SHAW, *supra* note 25, at 596-600.

136. To say that an entity is "a subject" of international law means the same as to say that the entity is "a legal person" under international law. AKEHURST, *supra* note 11, at 69. Either designation signifies that the entity has capacity to enter into legal relations and to have legal rights and duties. *Id.* Akehurst explains the distinction between entities that do have legal personality ("subjects" of the law) and those that do not (sometimes called "objects" of the law):

In modern systems of municipal law all individuals have legal personality, but in former times slaves had no legal personality; they were simply pieces of property. Companies also have legal personality, but [non-human] animals do not; although rules are made for the *benefit* of animals (for example, rules against cruelty to animals), these rules do not confer any *rights* on the animals (for instance, animals cannot start judicial proceedings if the rules are broken).

Id. For discussions of the legal capacity of the United Nations and other international organizations, *see* BROWNLIE, *supra* note 88, at 680-83; JANIS, *supra* note 23, at 188-90; FREDERICK L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 7-14 (2d ed. 1993); SHAW, *supra* note 25, at 125-26, 165, 614-17; Gunther Hartmann, *The Capacity of International Organizations To Conclude Treaties*, in *AGREEMENTS OF INTERNATIONAL ORGANIZATIONS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES* 127, 131-40 (K. Zemanek ed., 1971). *See also* Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *done* Mar. 21, 1986, art. 6, U.N. Doc. A/CONF.129/15, 25 I.L.M. 543, 549 ("Capacity of international organizations to conclude treaties").

capture today's reality of the rules governing relations between people of different legal and political cultures.

The United Nations is only one of several international organizations formed at the close of World War II. Among the most influential of those organizations today are the International Monetary Fund (IMF), the World Bank and the General Agreement on Tariffs and Trade (GATT).¹³⁷ Like the United Nations, these organizations are significant because they represent, either in their inception or in their evolution, surrenders of sovereignty by states to international organizations.

In the case of the IMF, the element of sovereignty that member states surrendered was the prerogative to set currency exchange rates as they wish.¹³⁸ Under the original version of the IMF's charter as written at the Bretton Woods Conference of July 1944,¹³⁹ each IMF member country was required to establish a par value for its currency in terms of gold and to maintain the market rate of its currency within a narrow margin on either side of that value.¹⁴⁰ A par value could not be changed substantially without IMF approval.¹⁴¹ The aim underlying these rules was to overcome the breakdown that occurred in the international monetary system during the years just preceding World War II.¹⁴²

Over time, the role of the IMF has changed. The par value system broke down in the early 1970s,¹⁴³ and the IMF's charter was radically

137. As a legal matter, the GATT is not in fact an organization but rather a treaty. *See infra* note 158 and accompanying text.

138. KENNETH W. DAM, *THE RULES OF THE GAME: REFORM AND EVOLUTION IN THE INTERNATIONAL MONETARY SYSTEM* 88-101 (1982); A.W. HOOKE, *THE INTERNATIONAL MONETARY FUND: ITS EVOLUTION, ORGANIZATION, AND ACTIVITIES* 18-19 (IMF Pamphlet Series No. 37, 1982).

139. *See* ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 [hereinafter IMF ARTICLES OF AGREEMENT] (entered into force Dec. 27, 1945). For a general exposition on the IMF, see RICHARD W. EDWARDS, JR., *INTERNATIONAL MONETARY COLLABORATION* 4-43 (1985) [hereinafter INTERNATIONAL MONETARY COLLABORATION].

140. HOOKE, *supra* note 138, at 2.

141. *Id.* at 2-3.

142. *See* DAVID D. DRISCOLL, *INTERNATIONAL MONETARY FUND, WHAT IS THE INTERNATIONAL MONETARY FUND?* 3-5 (1988); *see also* MARGARET GARRITSEN DE VRIES, *THE IMF IN A CHANGING WORLD: 1945-85*, at 6-7 (1986); INTERNATIONAL MONETARY COLLABORATION, *supra* note 139, at 4-8.

143. For a detailed description of the breakdown of the par value system, see INTERNATIONAL MONETARY COLLABORATION, *supra* note 139, at 491-501. For a summary description, see Richard W. Edwards, Jr., *International Monetary Law: The Next Twenty-Five Years*, 25 VAND. J. TRANSNAT'L L. 209, 212-13 (1992). What replaced the par value system has been referred to as a "non-system" of exchange arrangements. *See id.* at 216.

amended.¹⁴⁴ The charter, as amended, effectively transferred sovereignty over exchange rates back to the member states and left the IMF with a much more modest role—overseeing the international monetary system to ensure its effective operation and overseeing the compliance of member states with their obligations to collaborate with the IMF and other members.¹⁴⁵

With the emergence of the international debt crisis in the early 1980s,¹⁴⁶ however, the IMF took on a broader role once again—serving as a source of financing for lesser developed countries (LDCs).¹⁴⁷ This reassertion of the IMF's central position in the international economic system has been criticized on the ground that it encroaches on the sovereignty and independence of those LDCs that are compelled by economic circumstances to borrow from the IMF.¹⁴⁸ Regardless of whether those criticisms are valid, the fact remains that

144. Second Amendment to the Articles of Agreement of the International Monetary Fund, Apr. 30, 1976, 29 U.S.T. 2203 [hereinafter Second Amendment] (entered into force Apr. 1, 1978). The IMF's charter has been amended two other times. The first amendment was made in the late 1960s to establish the special drawing right (SDR) as a new international reserve asset. Amendment to the Articles of Agreement of the International Monetary Fund, May 31, 1968, 20 U.S.T. 2775, 726 U.N.T.S. 266 [hereinafter First Amendment] (entered into force July 28, 1969). The IMF Charter as amended by the first and second amendments appears in 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 321 (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter Zamora & Brand]. The third amendment was made in the early 1990s, when provisions were added to permit a suspension of voting and related rights. Third Amendment to the Articles of Agreement of the International Monetary Fund, June 28, 1990, 31 I.L.M. 1307, 1309-10 [hereinafter Third Amendment] (entered into force Nov. 11, 1992); see also John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter*, 33 VA. J. INT'L L. 591, 592 (1993) [hereinafter Head, *IMF Third Amendment*]. Throughout the remainder of this Article, all references to the IMF Charter reflect the text as existing following the Third Amendment, unless otherwise specified. IMF ARTICLES OF AGREEMENT, *supra* note 139; First Amendment, *supra*; Second Amendment, *supra*; Third Amendment, *supra* [hereinafter collectively IMF CHARTER].

145. IMF CHARTER, *supra* note 144, art. IV, § 3(a); see also Head, *IMF Third Amendment*, *supra* note 144, at 599.

146. The debt crisis is generally considered to have surfaced in 1982 with Mexico's announcement that it was unable to service external debt obligations. See DE VRIES, *supra* note 142, at 184. According to the usual explanation, the debt crisis arose from an unfortunate combination of factors: (i) falling prices for commodities on which lesser developed countries largely relied for export revenues (or a failure of these prices to rise as hoped); (ii) an over-reliance by many of these countries on loans made in the 1970s, mainly by commercial banks from funds deposited with them from OPEC countries following the dramatic rise in oil prices during that decade; and (iii) rising interest rates applicable to those loans. See, e.g., *id.* at 182-86; see also Bahram Nowzad, *Lessons of the Debt Decade*, FIN. & DEV., March 1990, at 9, 9-12.

147. Head, *IMF Third Amendment*, *supra* note 144, at 599-600.

148. For examples of these criticisms, see various readings in WESTON ET AL., *supra* note 80, at 535-36, 551-56, 558-61. See also Head, *IMF Third Amendment*, *supra* note 144, at 641 (discussing the criticism that the IMF charter is a "contract of adhesion").

the IMF is recognized, albeit grudgingly by some, as having an enormous influence over economic and financial policy decisions in many states.¹⁴⁹

The World Bank,¹⁵⁰ a sister institution to the IMF, is another heavyweight among international organizations. Unlike the IMF, its creation involved no transfer of sovereignty from member states to the organization. Like the IMF, however, its role has evolved over the years, especially during the 1980s, so that now its annual lending totals more than \$23 billion.¹⁵¹ About one-sixth of that amount is adjustment lending¹⁵²—loans conditioned on certain economic and financial policy adjustments being made by the borrowing member countries.¹⁵³ Also like the IMF, the World Bank has been criticized on the ground (among others) that it unfairly imposes its policy prescriptions on countries that do not welcome those prescriptions but have no alternatives because of their need for the World Bank's financial support.¹⁵⁴

When the IMF and the World Bank were formed at the close of World War II, a third international organization was also envisioned.

149. For an overview of the mechanism by which that influence is exercised, see John W. Head, *Environmental Conditionality in the Operations of International Development Finance Institutions*, 1 KAN. J.L. & PUB. POL'Y 15 (1991) [hereinafter Head, *Environmental Conditionality*] (discussing the use of performance criteria and conditionality); Head, *IMF Third Amendment*, *supra* note 144, at 594 n.5 (discussing the triggering effect that IMF loans have on other external financing).

150. The term "World Bank" refers to two legally and financially distinct institutions: the International Bank for Reconstruction and Development and the International Development Association. THE WORLD BANK, 1993 ANNUAL REPORT 4 (1993) [hereinafter 1993 WORLD BANK ANNUAL REPORT]. Although these two institutions have separate charters and were formed at different times, *see infra* note 162 and text accompanying note 220, they are operated by the same staff and are treated as a single entity for most purposes. For general discussions of the World Bank, see INTERNATIONAL MONETARY COLLABORATION, *supra* note 139, at 44-48; George C. Coggins & John W. Head, *Beyond Defenders: Future Problems of Extraterritoriality and Superterritoriality for the Endangered Species Act*, 43 J. URB. & CONTEMP. L. 59, 75 (1993); Head, *Environmental Conditionality*, *supra* note 149, at 15-16; Karen Hudes, *Introduction and Bibliography to Articles of Agreement of the International Bank for Reconstruction and Development*, in 1 Zamora & Brand, *supra* note 144, at 421.

151. See 1993 WORLD BANK ANNUAL REPORT, *supra* note 150, at 15.

152. See *id.*

153. For an overview of the World Bank's adjustment lending operations, see IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD 25-27, 58-59 (1991) [hereinafter SHIHATA I].

154. One form of this criticism appears as the "symmetry in adjustment" claim. Head, *Environmental Conditionality*, *supra* note 149, at 22. By imposing conditionality on borrowing member countries, the IMF and the World Bank, in effect, are placing the burden of adjusting to changing economic circumstances solely on the LDCs, because they are the only countries that borrow from the institutions. *Id.* Countries with stronger economies should, according to this criticism, pay at least part of the costs of bringing LDCs to a position of economic sustainability. See *id.* at 22-23.

This organization, to be called the International Trade Organization, would have taken responsibility for the regulation of international trade between member states,¹⁵⁵ in much the same way that the IMF was expected to regulate exchange rates and the World Bank was expected to mobilize the international financing needed to rebuild Europe and develop the economies of LDCs.¹⁵⁶

The International Trade Organization, however, was never created. For political reasons related to the Cold War, the United States failed to agree to that organization's proposed charter.¹⁵⁷ The gap created by the absence of an International Trade Organization has been partially filled by the GATT. Originally intended merely as a treaty to implement the results of some tariff negotiations in 1947, the GATT in fact has been applied "provisionally" for over forty years.¹⁵⁸ Recently it was strengthened in several respects by the relatively successful conclusion of the Uruguay Round of trade negotiations.¹⁵⁹ This development provides further evidence that the traditional view of international law—governing relations only between states and consisting of rules emanating from their own free will—is now outdated. While it is technically true that no country is forced as a

155. For historical background on the proposed International Trade Organization and its relationship to the GATT, see KENNETH W. DAM, *THE GATT 10-12* (1970); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 2-3, 9-10, 35-52 (1969); I G. GREGORY LETTERMAN, *LETTERMAN'S LAW OF PRIVATE INTERNATIONAL BUSINESS* 180 (1990).

156. The countries emerging as victors from World War II believed the war had resulted in part from an international economic order gone haywire because of high tariff barriers, competitive devaluations of currencies and economic conditions in Europe that had become too chaotic to attract investment. To avoid another world war, the theory went, would require a new international economic order with (i) a multilateral system of binding rules governing international trade, (ii) a stable monetary system with predictable exchange rates and (iii) a financing system to channel the post-war wealth of the United States into profitable overseas investments. John W. Head, *Making International Trade Less Foreign: A "Nutshell" for Nonspecialists on the Changing Rules Governing International Trade*, J. KAN. B. ASS'N, Dec. 1992, at 42, 43 [hereinafter Head, *International Trade*]. The International Trade Organization, the IMF and the World Bank, respectively, were to manage these three systems. *Id.* at 43; see also Robert L. McGeorge, *Accommodating Food Security Concerns in a World of Comparative Advantage: A Challenge for GATT's International Trade System*, 71 NEB. L. REV. 368, 376-77 (1992).

157. See McGeorge, *supra* note 156, at 378.

158. Head, *International Trade*, *supra* note 156, at 43; see also McGeorge, *supra* note 156, at 378-80. Letterman points out that although the GATT is a treaty and not an international organization, it has taken on some of the characteristics of an organization. I LETTERMAN, *supra* note 155, at 180-81. It has various governing bodies, standing and ad hoc committees, and a large Secretariat. *Id.* at 181.

159. See Roger Cohen, *After 7 Years, a Trade Accord*, N.Y. TIMES, Dec. 16, 1993, at C1. The new agreement calls for a further reduction in tariff levels, extension of the GATT's coverage to include agriculture and other industries, and the establishment of a new international trade organization to enforce GATT rules. *Id.* at C6. The Uruguay Round was difficult to conclude. See Keith Bradsher, *Farm Subsidies Still Threaten GATT Talks*, N.Y. TIMES, Sept. 27, 1993, at C1.

legal matter to become a party to the GATT, or a member of the World Bank or the IMF, as a practical matter few countries can avoid it. Tariff rates into the United States, for example, are much lower on the average for states that have adopted the GATT rules than for those that have not.¹⁶⁰ In addition, World Bank and IMF loans, and the additional financing triggered by these loans,¹⁶¹ are available only for the benefit of countries who are members.¹⁶² Probably as a reflection of these factors, the IMF, the World Bank and the GATT have all now become nearly global in their membership.¹⁶³

It would be a mistake to assume from the emergence of these highly influential international organizations that the traditional idea of state sovereignty is dead. For all their apparent independence and autonomy, the United Nations, the IMF, the World Bank and the GATT still clearly reflect the importance of the nation-state. Indeed, all of these organizations constantly experience a tension between a *surrender* of state sovereignty and a *sanctification* of state sovereignty. In ways that will be examined more closely in Part IV of this Article,¹⁶⁴ all of them are highly protective of the interests of a relatively small group of economically, politically and militarily dominant states.

Nevertheless, the rise of these four organizations illustrates the change in the legal landscape over the past fifty years. The traditional language of state sovereignty remains central to any discussion of the relations between states and international organizations, and for a few

160. For evidence of this disparity, compare the tariff rates appearing in the "General" portion of Column 1 of the Harmonized Tariff Schedule of the United States (HTSUS), which generally applies to imports from countries following GATT rules, with those appearing in Column 2, which generally applies to imports from countries that do not. See U.S. INT'L TRADE COMM'N, PUB. NO. 2449, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (1992).

161. For an explanation of the triggering effect of IMF financing, see JOSEPH GOLD, CONDITIONALITY, 14-15 (IMF Pamphlet Series No. 31, 1979). See also Jacques J. Polak, *The Changing Nature of IMF Conditionality*, in ESSAYS IN INTERNATIONAL FINANCE 1, 22 (Princeton University Department of Economics ed., 1991) (referring to IMF "seal of approval" and its effects). Technically, most of the IMF's provision of financing to member countries does not take the form of loans but rather arrangements for the purchase and repurchase of currencies. See Head, *IMF Third Amendment*, *supra* note 144, at 594-96.

162. For references to the fact that IMF and World Bank financing is confined to member states, see IMF CHARTER, *supra* note 144, art. I(v), art. V, § 2(a); ARTICLES OF AGREEMENT OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, July 22, 1944, art. III, § 1(a), T.I.A.S. No. 1507, 2 U.N.T.S. 134 [hereinafter IBRD CHARTER] (entered into force Dec. 27, 1945), reprinted as amended Dec. 17, 1965 in 1 Zamora & Brand, *supra* note 144, at 427.

163. See THE WORLD BANK, 1991 ANNUAL REPORT 12 (1991) [hereinafter 1991 WORLD BANK ANNUAL REPORT]; 1993 WORLD BANK ANNUAL REPORT, *supra* note 150, at 16; IMF Moved Toward Universal Membership During 1991/92, 21 IMF SURV. 273, 273 (1992); 1 LETTERMAN, *supra* note 155, at 179 (GATT); see also RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL 154 (4th ed. 1992) [hereinafter IBT NUTSHELL].

164. See *infra* notes 266-77 and accompanying text.

states the traditional level of autonomy can be retained. For most states, however, the practical costs of declining to surrender substantial discretion in political, monetary, financial and trade matters to the international organizations discussed above are simply too high to avoid joining the organizations and thereby accepting the obligations that membership entails.

If we move beyond the global organizations¹⁶⁵ to regional ones, we see an even greater number and variety of entities that are challenging states for influence in political and economic spheres. Two examples will suffice. First, the European Communities, beginning in 1951 with the European Coal and Steel Community, have developed into a free trade area¹⁶⁶ and seem poised to move toward further economic and perhaps political unification in the coming few years.¹⁶⁷

Second, based on the model of the World Bank, several regional development banks have been established, including the Asian Development Bank, the African Development Bank, the Inter-American Development Bank and most recently the European Bank for Reconstruction and Development.¹⁶⁸ With combined annual lending in the billions of dollars,¹⁶⁹ and with conditionalities similar to those of the World Bank,¹⁷⁰ these banks have tremendous influence over the course of economic development in their member countries.

For the most part, the various international organizations discussed above exercise influence not by "legislating" formal rules intended to

165. In addition to the four main global intergovernmental organizations already discussed, there are others of varying degrees of notoriety and influence. One of these is the International Labour Organization, which has promoted the establishment of a great many multilateral labor standards. See, e.g., INTERNATIONAL LABOUR OFFICE, SUMMARIES OF INTERNATIONAL LABOUR STANDARDS 1-121 (1989); INTERNATIONAL LABOUR OFFICE, INTERNATIONAL LABOUR STANDARDS: A WORKER'S EDUCATION MANUAL 3-26 (3d rev. ed. 1990).

166. For details on the European Communities and their constituent agreements, see 3 LETTERMAN, *supra* note 155, at 629, 640; 2 Zamora & Brand, *supra* note 144, at 3-4, 47-178.

167. See Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247. The Treaty on European Union, commonly referred to as the Maastricht Treaty, came into force on November 1, 1993. *EC Summit Decides Frankfurt Will Be Seat of Future European Central Bank*, 10 Int'l Trade Rep. (BNA) No. 43, at 1835 (Nov. 3, 1993). It calls for the establishment of a European central bank and a single currency by 1999. Head, *International Trade*, *supra* note 156, at 46.

168. For information on the first three of these, see generally DICK WILSON, *A BANK FOR HALF THE WORLD: THE STORY OF THE ASIAN DEVELOPMENT BANK 1966-1986* (1987); INTER-AMERICAN DEVELOPMENT BANK, *BASIC FACTS ABOUT THE INTER-AMERICAN DEVELOPMENT BANK* (1991) [hereinafter *FACTS ABOUT THE IDB*]; JOHN SYZ, *INTERNATIONAL DEVELOPMENT BANKS* (1974). The European Bank is discussed at length in Part III of this Article.

169. In 1991, the Inter-American Development Bank made loan commitments of \$5.4 billion. INTER-AMERICAN DEVELOPMENT BANK, 1991 ANNUAL REPORT v (1992). In 1992, the Asian Development Bank made loan commitments of \$5.1 billion. ASIAN DEVELOPMENT BANK, 1992 ANNUAL REPORT 7 (1993) [hereinafter 1992 ASDB ANNUAL REPORT].

170. See Head, *Environmental Conditionality*, *supra* note 149, at 16-21.

have directly binding effect¹⁷¹ but instead through operational decisions made by the organizations. For example, by making loan disbursements conditional on a borrowing country's implementation of certain economic and financial policies, the IMF obviously influences behavior, but without actually issuing any sort of legal rule. In short, the IMF is not a legislature. Nor is the United Nations. It is generally thought, for instance, that resolutions of the General Assembly do not constitute legally binding rules, but rather are to be considered evidence of the material element of custom.¹⁷²

Although the international organizations themselves generally do not have authority to promulgate rules with generally binding legal force, many such rules do exist—more now than ever. The past fifty years have seen an explosion in the number and variety of multilateral treaties establishing general rules of behavior governing relations between states that are parties to the treaties. Although these rules probably cannot properly be considered rules of law in the usual sense—since they are more in the nature of contractual obligations than in the nature of legislative pronouncements¹⁷³—they nevertheless constitute a remarkably broad set of norms to which states have subjected themselves.

I need mention only a few of these multilateral sets of rules to make my point. First, the United Nations Convention on Contracts for the International Sale of Goods (International Sales Convention)¹⁷⁴ supplies rules governing contracts involving parties having their places of business in different Contracting States, unless those parties opt out

171. An exception is the European Economic Community, which has been given authority to issue binding legal rules in some respects. See Mark L. Jones, *Introduction and Bibliography to Treaty Establishing the European Economic Community*, in 2 Zamora & Brand, *supra* note 144, at 3, 16-17.

172. AKEHURST, *supra* note 11, at 37-38; ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 2-5 (1963), *excerpt reprinted in* WESTON ET AL., *supra* note 80, at 134-36. In order to prove the existence of a rule of customary international law, it is generally thought necessary to show the material element (uniformity of the practice, generality of the practice and duration of the practice) and the psychological element (*opinio juris*, a sense of obligation). AKEHURST, *supra* note 11, at 25-31; WESTON ET AL., *supra* note 80, at 81.

173. For a discussion of whether treaties are more like contracts or more like legislation, see AKEHURST, *supra* note 11, at 24.

174. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, 19 I.L.M. 668, 671 [hereinafter *International Sales Convention*] (entered into force Jan. 1, 1988). For an overview of the *International Sales Convention*, see IBT NUTSHELL, *supra* note 163, at 76-117; Janet L. Rich & Cynthia R. Perkinson, *New Rules for Contracting in the Global Marketplace: The United Nations Convention on Contracts for the International Sale of Goods (CISG)*, in 1 *INTERNATIONAL TRADE FOR THE NONSPECIALIST* 39 (Paul H. Vishny ed., 1992); Peter Winship, *Introduction and Bibliography to United Nations Convention on Contracts for the International Sale of Goods*, in 2 Zamora & Brand, *supra* note 144, at 767.

of the convention's rules.¹⁷⁵ Since the United States and many of its principal trading partners are Contracting States to the International Sales Convention,¹⁷⁶ innumerable import and export transactions involving U.S. businesses are subject to the convention's rules—perhaps without their lawyers knowing it.

Second, the GATT has been the fountainhead of numerous related agreements on subsidies, dumping, standards, government procurement and customs valuation.¹⁷⁷ Third, intellectual property rights are the subject of several treaties, some of which date back more than a century.¹⁷⁸ Fourth, various international agreements relating to international litigation were developed in the 1960s, including the Hague Conventions on service of process, on evidence and on legalization of foreign documents.¹⁷⁹ Fifth, over seventy states have ratified the New York Arbitration Convention for the recognition and enforcement of foreign arbitral awards.¹⁸⁰

Although the multilateral sets of rules enumerated above exist as treaties,¹⁸¹ many other sets of rules do not. Two examples come from

175. See Winship, *supra* note 174, at 768-69.

176. Included among the Contracting States of the International Sales Convention, for example, are Argentina, Australia, Canada, China, France, Germany, Italy, Mexico, the Netherlands, Russia and Spain. RAY AUGUST, *INTERNATIONAL BUSINESS LAW* 424 (1993).

177. For overviews and texts of these agreements, see 1 Zamora & Brand, *supra* note 144, at 79-110 (GATT Subsidies Code), 111-33 (GATT Antidumping Code), 135-64 (GATT Standards Code), 165-91 (GATT Procurement Code), 193-229 (GATT Customs Valuation Code).

178. For explanations and texts of the Paris Convention (covering industrial property), the Berne Convention (literary and artistic works), the Madrid Agreement (trademark registration), the Universal Copyright Convention and the Patent Cooperation Treaty, see 1 Zamora & Brand, *supra* note 144, at 675-982.

179. For explanations and texts of these agreements, see 2 Zamora & Brand, *supra* note 144, at 803-21, 823-43, and 845-54, respectively.

180. For an explanation and the text of this agreement, see 2 Zamora & Brand, *supra* note 144, at 975-84.

181. Hundreds of other multilateral treaties could be added to the above list, some widely ratified and others not, designed to govern relations between states, or to govern private entities operating between those states. Indeed, a list of multilateral treaties and other international agreements of the United States in force on January 1, 1992 occupies over thirty pages of small print and lists about a thousand such treaties and agreements, about nine hundred of which have been entered into since the end of World War II. IGOR I. KAVASS, *A GUIDE TO THE UNITED STATES TREATIES IN FORCE*, pt. 2, at 75-109 (1992). Many other multilateral treaties that are not in force for the United States, or in some cases not in force at all, are nevertheless considered sources of customary international law. An example of the first of these (a multilateral treaty that has come into force but to which the United States is not a party) is the 1969 Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter 1969 Vienna Convention] (entered into force Jan. 27, 1980), *reprinted in* 8 I.L.M. 679 (1969). The 1969 Vienna Convention is widely viewed as codifying customary international law. AKEHURST, *supra* note 11, at 121. An example of the second of these (a proposed multilateral treaty that has not yet entered into force) is the 1982 Convention on the Law of the

the International Chamber of Commerce (ICC). First, the Uniform Customs and Practice for Documentary Credits are routinely made applicable to letters of credit by banks in more than 170 countries.¹⁸² Second, the ICC's Incoterms provide a short-hand language for establishing the allocation of costs, risks and functions to be undertaken by the parties to international sales transactions.¹⁸³

In sum, the legal landscape of the globe has changed radically in the past fifty years. It has witnessed a "multilateralization" of legal regimes, both through the rise of international organizations and through an explosion in the number and coverage of multilateral sets of rules. For better or worse, we have entered the age of "supranational law." New players and new rules have made obsolete the concept of an "international law" concerned solely or primarily with nation-states abiding by rules emanating from their own free will.

III. SUPRANATIONAL LAW AND THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT¹⁸⁴

The European Bank for Reconstruction and Development (European Bank, or EBRD) was established in 1990.¹⁸⁵ It exemplifies both of

Sea, United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, 1271, many of the provisions of which also are seen as largely reflecting customary international law. LOUIS B. SOHN & KRISTEN GUSTAFSON, *THE LAW OF THE SEA IN A NUTSHELL* xix-xx (1984). For a general analysis of the 1982 Convention on the Law of the Sea, see JAMES B. MORELL, *THE LAW OF THE SEA* (1992). As noted below, the 1982 Convention on the Law of the Sea recently gained enough ratifications to come into force in November 1994. See *infra* note 280.

182. Peter Winship, *Introduction and Bibliography* to International Chamber of Commerce Uniform Customs and Practice for Documentary Credits, in 2 Zamora & Brand, *supra* note 144, at 743, 744. For the text of the 1983 version of the Uniform Customs and Practice, see INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 400 (1983), *reprinted* in 2 Zamora & Brand, *supra* note 144, at 747. For more detailed discussions of the Uniform Customs and Practice, see generally Charles del Busto, *Operational Rules for Letters of Credit: Effect of New Uniform Customs and Practice Rules*, 17 UCC L.J. 298 (1985); James E. Byrne, *The 1983 Revision of the Uniform Customs and Practice for Documentary Credits*, 102 BANKING L.J. 151 (1985). For reference to further changes to the Uniform Customs and Practice, as well as developments in other aspects of the rules governing letters of credit, see James E. Byrne, *Fundamental Issues in the Unification and Harmonization of Letter of Credit Law*, 37 LOY. L. REV. 1 (1991).

183. See INTERNATIONAL CHAMBER OF COMMERCE, *INCOTERMS 1990*, at 5-6 (1990); JAN RAMBERG, *GUIDE TO INCOTERMS 1990*, at 3, 8 (1991).

184. Some of the observations in this Part draw on the author's experience working at the European Bank in the summer of 1993. All views expressed here, however, are those of the author and not necessarily the views of the bank or its staff.

185. IBRAHIM F.I. SHIHATA, *THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT I* (1990) [hereinafter SHIHATA II]; *AGREEMENT ESTABLISHING THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT*, May 29, 1990, 29 I.L.M. 1077 [hereinafter *EBRD CHARTER*] (entered into force Mar. 28, 1991).

the aspects of "multilateralization" discussed in Part II of this Article. First, it is a new player, the first of its kind to be established in the post-Cold War environment. Second, it represents a new set of rules, involving issues that have not previously been addressed effectively at the supranational level. The following paragraphs examine these aspects of the European Bank and consider what relevance its performance so far might have for the future of supranational law.

A. The Special Mandates of the European Bank: Political, Economic and Environmental

At first appearance the European Bank seems in some ways merely a logical addition, a sister institution, to the family of regional development banks modeled after the World Bank.¹⁸⁶ Even its name is identical to that of the International Bank for Reconstruction and Development (IBRD)¹⁸⁷ but for one word. This first appearance, however, is misleading. The European Bank is in fact a very different institution in important ways from the World Bank and the other regional development banks. It represents a new generation in the family of international financial institutions (IFIs).¹⁸⁸

The key differences between the European Bank and the IFIs that came before it lie in three special mandates imposed on it by its charter—a political mandate, an economic mandate and an environmental mandate. The first two of these are closely linked. Article 1 of the European Bank's charter, in stating the institution's purpose, provides as follows:

In contributing to economic progress and reconstruction, the purpose of the Bank shall be to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in the Central and Eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics.¹⁸⁹

The political and economic mandates also feature prominently in the preamble to the European Bank's charter, which announces that the

186. For a discussion of the World Bank and regional development banks, see *supra* notes 150-56, 168-70 and accompanying text. For a survey of the European Bank's capital structure, financing techniques, organization and status, which resemble those of the World Bank and the regional development banks, see D.R.R. Dunnett, *The European Bank for Reconstruction and Development: A Legal Survey*, 28 COMMON MKT. L. REV. 571, 578-92 (1991).

187. *Id.* at 571, 573. As noted above, the IBRD is part of the World Bank. See *supra* note 150; see also *infra* note 217.

188. The European Bank has been hailed as "the first new post-cold war institution." Jacques Attali, *Preface to SHIHATA II*, *supra* note 185, at v; see also Wolfgang Munchau, *Grand Role in a Grander Europe Seen for Euro Bank*, THE LONDON TIMES, Oct. 10, 1990, at 31.

189. EBRD CHARTER, *supra* note 185, art. 1.

parties to the charter are “[c]ommitted to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics.”¹⁹⁰

The inclusion of these two mandates, political and economic, in the European Bank’s charter represents a sharp departure from the charter provisions of the other IFIs.¹⁹¹ The IBRD’s charter, for example, specifically prohibits it from being influenced by political considerations or by the political character of its member countries.¹⁹² The IBRD has relied heavily on this provision in defending itself against criticism for not using its economic muscle to fight political oppression.¹⁹³ In

190. *Id.* pmb., para. 1. The third paragraph “[w]elcome[s] the intent of Central and Eastern European countries to further the practical implementation of multiparty democracy, strengthening democratic institutions, the rule of law and respect for human rights and their willingness to implement reforms in order to evolve towards market-oriented economies.” *Id.* pmb., para. 3. Reading Article 1 and the preamble together, Shihata explains that:

the purpose for which [the] EBRD was established is to assist in the great transformation of Central and Eastern European countries from a command economy controlled by a one-party political system to a new system based on a free market economy and multiparty democracy and to support the private sector development required for this transition.

SHIHATA II, *supra* note 185, at 41-42. For a discussion of the political and economic orientation of the European Bank, see PAUL A. MENKVELD, *ORIGIN AND ROLE OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT* 12-23, 51-58, 70-71 (1991). For other accounts of the European Bank, see generally Dunnett, *supra* note 186; Mark Easton & Kathryn Rorer, *The European Bank for Reconstruction and Development—Agreement Establishing the European Bank for Reconstruction and Development*, 32 HARV. INT’L L.J. 527 (1991); Chris A. Wold & Durwood Zaelke, *Promoting Sustainable Development and Democracy in Central and Eastern Europe: The Role of the European Bank for Reconstruction & Development*, 7 AM. U. J. INT’L L. & POL’Y 559, 565-67 (1992); Stephanie C. Guyett, Note, *Environment and Lending: Lessons of the World Bank, Hope for the European Bank for Reconstruction and Development*, 24 N.Y.U. J. INT’L L. & POL. 889, 911-19 (1992).

191. SHIHATA II, *supra* note 185, at 40-44.

192. *Id.* at 2. The relevant IBRD charter provision reads as follows:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes [of the Bank].

IBRD CHARTER, *supra* note 162, art. IV, § 10. Similar language appears in the charters of the regional development banks. SHIHATA II, *supra* note 185, at 2 n.2.

193. For a defense by the World Bank’s General Counsel of that institution’s handling of what he calls “governance” issues, see SHIHATA I, *supra* note 153, at 53-96. Shihata emphasizes the difference between the IBRD’s charter and the European Bank’s charter on political issues:

Because of the EBRD’s specific mandate as an instrument in the economic and political transformation of Central and Eastern Europe, its charter, unlike those of the IBRD and the IDA [International Development Association], does not include a specific provision prohibiting it from engaging in political activities or from being influenced by the political character of its members in its decision-making. The circumstances which

the mid-1960s, for example, the United Nations General Assembly challenged the World Bank for making loans to Portuguese and South African concerns shortly after the General Assembly had adopted a resolution appealing to the IMF and the World Bank not to do so, in view of the political character of the Portuguese and South African governments.¹⁹⁴ Citing the IBRD charter's prohibition on political involvement, the World Bank rebuffed the General Assembly.¹⁹⁵

The significance of the European Bank's political mandate is difficult to exaggerate.¹⁹⁶ No other IFI, and indeed no other high-profile international organization, including the United Nations, has such a mandate. Article 2(7) of the United Nations Charter provides, for example, that "[n]othing contained in [the] Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state"¹⁹⁷ The United Nations General Assembly has declared this Charter principle to mean that "[e]very State has an inalienable right to choose its political, economic, social and cultural systems"¹⁹⁸

The reason for the dramatic departure from the past in the case of the European Bank's charter is obvious. The charter was written after the great experiment in anti-democratic centralized political control had been declared a failure by its own proponents. In the late 1980s, the Soviet Union's Mikhail Gorbachev had announced *glasnost*¹⁹⁹ and

prompted the establishment of the EBRD . . . are therefore peculiar to this institution and should not be confused with the different provisions of the [IBRD's] Articles
Id. at 58.

194. Head, *IMF Third Amendment*, *supra* note 144, at 621 & nn.129-33 (citing 1967 U.N. Jurid. Y.B. 109, 110-11, 112, 115-18, 121-31).

195. *Id.*; see also SHIHATA I, *supra* note 153, at 77-78, 103-04.

196. For an overview of the procedures approved by the European Bank's board of directors to implement its political mandate, see EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, POLITICAL ASPECTS OF THE MANDATE OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (1992).

197. U.N. CHARTER art. 2, para. 7.

198. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, 1883d plen. mtg. at 121, 123, U.N. Doc. A/8082 (1970), reprinted in 9 I.L.M. 1292, 1295 (1970). Although the other high-profile IFI, the IMF, does not have in its charter an explicit "political activities" prohibition, the charter provisions setting forth the IMF's purposes have been "authoritatively read as forbidding the [IMF] from taking political considerations into account" in its operations. SHIHATA I, *supra* note 153, at 64 (citing Sir Joseph Gold, *Political Considerations Are Prohibited by Articles of Agreement When the Fund Considers Requests for Use of Resources*, 1983 IMF SURV. 146).

199. "We want more openness about public affairs in every sphere of life. People should know what is good, and what is bad, too, in order to multiply the good and to combat the bad. That is how things should be under socialism." MIKHAIL GORBACHEV, PERESTROIKA: NEW THINKING FOR OUR COUNTRY AND THE WORLD 75 (1987).

perestroika,²⁰⁰ and by early 1990, when the European Bank's charter was being formulated, Gorbachev was speaking of a democratization of the Soviet Union.²⁰¹ Democracy was seen—accurately, as later events proved—to be an irrepressible force moving across Europe.²⁰²

200. "The essence of perestroika lies in the fact that it unites socialism with democracy and revives the Leninist concept of socialist construction both in theory and in practice." *Id.* at 35 (emphasis omitted). The aim of perestroika is "transition from an excessively centralized management system relying on orders, to a democratic one, based on the combination of democratic centralism and self-management." *Id.* at 34. "Perestroika means mass initiative. It is the comprehensive development of democracy, socialist self-government, encouragement of initiative and creative endeavor, improved order and discipline, more glasnost, criticism and self-criticism in all spheres of our society." *Id.*

201. "In short, we need broad democratization of all aspects of society. That democratization is also the main guarantee that the current processes are irreversible." *Id.* at 31-32 (emphasis omitted). "Perestroika itself can only come through democracy." *Id.* at 32.

202. By 1991, according to the European Bank's annual report:

[n]ew systems of local government, featuring institutional and operational autonomy and immediate accountability to constituents, were established in most central and eastern European countries. . . . New constitutional provisions were a priority for all countries in the region. Using the accumulated experience of democratic societies and international standards for human rights, legislators based the drafting process on wide-ranging popular participation. . . . [G]uarantees covering a broad range of civil and political rights, including freedom of religion, speech, the media, equality under law and local self-government, were enacted.

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, 1991 ANNUAL REPORT 25 (1992) [hereinafter 1991 EBRD ANNUAL REPORT]. For an account of political developments in central and eastern Europe at the turn of the 1990s involving the adoption of democratic regimes, see generally JEAN J. KIRKPATRICK, *THE WITHERING AWAY OF THE TOTALITARIAN STATE . . . AND OTHER SURPRISES* (1990). Kirkpatrick surveys some of the enormous changes that swept central and eastern Europe in just the last three months of 1989:

October 18, 1989: Parliament abolishes the Hungarian People's Republic, founded in 1949, and approves the Constitution of the new Republic of Hungary. The new charter contains no reference to the Communists' leading role or commitment to maintain socialism, and it establishes a powerful new presidency.

Id. at 303 (Hungary).

November 8, 1989: Politiburo resigns. . . .

November 9, 1989: The Berlin Wall is opened and citizens are allowed to travel freely. . . .

. . . .

December 1, 1989: The East German Parliament eliminates the constitutional guarantees of control by the Communist party and lifts the immunity of deputies from corruption investigations.

Id. at 310 (East Germany).

November 29, 1989: A Communist official declares that free elections could take place within a year. The Communist-dominated Parliament votes unanimously to eliminate the Communist party's constitutionally guaranteed leading role in society

Id. at 307 (Czechoslovakia).

December 22, 1989: [A] group known as the Council of National Salvation announces that it has overthrown the Ceausescu regime. The council pledges to form a provisional government, try regime leaders, and restore democracy.

The second special mandate of the European Bank's charter is economic in character. Like the political mandate, the economic mandate identifies one economic system—the market system—as superior to any other. As noted above,²⁰³ Article 1 of the European Bank's charter provides that the bank will “foster the transition towards open market-oriented economies” in its countries of operation.²⁰⁴

Economic considerations have been relevant, of course, to the operations of the other IFIs for many years.²⁰⁵ Those IFIs, however, do not have specific economic mandates. For them, such things as privatization and sectoral reforms are merely forms of lending; for the European Bank, those operations are required functions.²⁰⁶

Again, the break with the past in this regard is due in part to timing. Central planning was the key ingredient in the economic system of one of the two superpowers until Gorbachev started questioning that structure and letting it erode. By early 1990, the Soviet Union had greatly expanded the opportunities for private ownership.²⁰⁷ Like the move toward greater popular involvement in government, the early steps toward a market-based economic system proved to be irreversible.²⁰⁸

In both of these respects—the political mandate and the economic mandate—it is important to appreciate the role of the Soviet Union. In preparing the European Bank's charter, it was not as if the market-economy countries were able to force their way past Soviet objections because the Soviet empire appeared to be unraveling. Instead, the Soviet Union was an active participant.²⁰⁹ Unlike the case with any

Id. at 313 (Romania).

December 13, 1989: The Communist party Central Committee renounces its constitutionally guaranteed monopoly on political power and expels [former Bulgarian President Todor] Zhivkov from the Party.

Id. at 315 (Bulgaria).

203. See *supra* text accompanying note 189.

204. EBRD CHARTER, *supra* note 185, art. 1.

205. The IMF, for example, takes economic considerations into account in making its resources available to a member. Head, *Environmental Conditionality*, *supra* note 149, at 21-22.

206. Shihata makes this distinction: Although the IBRD has engaged in economic reform-based lending in recent years, SHIHATA II, *supra* note 185, at 44-45, such reform itself is for the European Bank “the function of the institution, not a form of lending,” *id.* at 46.

207. Private ownership was permitted in the Law on Ownership in the USSR, 11 *Vedomosti SND SSSR*, item 164 (1990), translated in BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 269 (W.E. Butler ed. & trans., 2d ed. 1991). For more recent legislation on privatization, see selected materials in PRACTICING LAW INSTITUTE, THE IMPLICATIONS OF ECONOMIC AND LEGAL REFORMS ON DOING A DEAL IN RUSSIA AND UKRAINE 119-87 (1993).

208. For an account of moves toward market-economy principles in other parts of central and eastern Europe, see KIRKPATRICK, *supra* note 202, at 308 (Czechoslovakia, January 1, 1990), 303-04 (Hungary, October 6-7, 1989, June 21, 1990).

209. The role of the Soviet Union was, however, a sensitive issue during the negotiations to establish the European Bank; the United States preferred at first that the Soviet Union have no

of the other IFIs, the Soviet Union was a founding member of the European Bank.²¹⁰

Joining the political mandate and the economic mandate is a third mandate—the environmental mandate. Article 2(1)(vii) of the European Bank's charter requires that the institution “promote in the full range of its activities environmentally sound and sustainable development.”²¹¹ As the European Bank's environmental policy paper points out, “[t]his is the first time that an [IFI] has been given a clear and proactive operational mandate in its founding Charter on environmental protection and restoration.”²¹²

These three special mandates—political, economic and environmental—make the European Bank unique among the IFIs and unique among all international organizations. For the first time, an international organization has been established to promote a particular form of government and a particular economic system, and to undertake economic development in an environmentally prudent way. In all of these respects, the European Bank is allowed, indeed required, to be intrusive into the policies of its member states in a way that has not been permitted before.

Extending the metaphor of the family, the European Bank may be seen as a third-generation IFI. The first generation, consisting of the two Bretton Woods institutions (the IMF and the World Bank), was designed to rebuild Europe and repair an international economic system gone haywire.²¹³ In that first generation, no explicit rules were agreed upon regarding the political character of the institutions' members,²¹⁴ nor about their economic systems or their national policies on environ-

more than observer status. MENKVELD, *supra* note 190, at 55-58; Aron Broches, *Origin and Role of the European Bank for Reconstruction and Development*, by Paul A. Menkveld, 87 AM. J. INT'L L. 180, 181 (1993) (book review).

210. The Soviet Union's initial stake in the European Bank's capital was 60,000 shares—six percent of the total subscribed capital. See EBRD CHARTER, *supra* note 185, at Annex A. The Soviet Union was never a member of the World Bank Group or any of the regional development banks, although it did participate in the Bretton Woods conference from which the IBRD emerged. 1991 WORLD BANK ANNUAL REPORT, *supra* note 163, at 12. Shortly before the Soviet Union collapsed in December 1991, it entered into a special relationship with the IMF; but that relationship did not amount to actual membership. *U.S.S.R. Signs Accord Providing for Special Association with IMF*, 20 IMF SURV. 289, 293 (1991).

211. EBRD CHARTER, *supra* note 185, art. 2, para. 1(vii).

212. EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, ENVIRONMENTAL MANAGEMENT: THE BANK'S POLICY APPROACH 1 (1992); see also SHIHATA II, *supra* note 185, at 48-49. See generally Wold & Zaelke, *supra* note 190; Guyett, *supra* note 190.

213. See *supra* notes 138-56 and accompanying text.

214. Indeed, the IMF and IBRD charters, unlike the United Nations Charter, do not even require that a state be “peace-loving” in order to be a member. See U.N. CHARTER art. 4, para. 1.

mental protection. Moreover, the Bretton Woods institutions paid little attention at their inception to the developing world. Although the IBRD's charter includes a brief reference to LDCs,²¹⁵ and the last word in its name is "Development," the principal point of focus was clearly Europe, whose reconstruction following World War II was considered highest priority. The World Bank was able to turn its attention fairly soon to the LDCs of Africa, Asia and Latin America, but largely because the Marshall Plan, not the World Bank, carried the main financial load of this reconstruction effort.²¹⁶

The increase in the number of LDCs, resulting largely from the decolonization of Africa in the 1960s, prompted the birth of the second generation of IFIs. These IFIs fall into two groups. In the first group are the two new members of the World Bank Group of that era—the International Finance Corporation and the International Development Association.²¹⁷ The International Finance Corporation was established in 1956 to encourage private sector development in LDCs,²¹⁸ both through loans and through equity investments.²¹⁹ The International Development Association was established in 1960 as an acknowledgment of the special needs of most of the world's LDCs. It makes long-term interest-free loans, called "soft loans," to those member countries having annual per capita incomes below a prescribed level.²²⁰

Like the International Development Association, the regional multilateral development banks all make soft loans, in addition to loans on market-based terms.²²¹ By doing so, these institutions reflect a key development of the 1960s: the rising number and visibility of LDCs and increasing demands that they be given special treatment because of

215. See IBRD CHARTER, *supra* note 162, art. I, para. i.

216. See PHILIPPE LE PRESTRE, *THE WORLD BANK AND THE ENVIRONMENTAL CHALLENGE* 12 (1989); CHERYL PAYER, *THE WORLD BANK: A CRITICAL ANALYSIS* 23-24 (1982).

217. The term "World Bank Group" is used to refer collectively to the IBRD, the International Finance Corporation, the International Development Association and the Multilateral Investment Guarantee Agency (MIGA). *THE WORLD BANK, THE WORLD BANK* (1992) (describing the four institutions comprising the World Bank Group on the front inside cover). MIGA is designed to help encourage foreign investment in LDCs "by providing guarantees to foreign investors against loss caused by noncommercial risks." *Id.*

218. INTERNATIONAL FINANCE CORPORATION, 1992 ANNUAL REPORT foreword (1992).

219. *Id.*

220. See *THE WORLD BANK*, *supra* note 217, at 6. Most funds lent by the International Development Association go to countries with annual per capita incomes below \$540. *Id.*; see also Head, *Environmental Conditionality*, *supra* note 149, at 16. IBRD loans, called "hard loans," carry market-based interest rates. Head, *Environmental Conditionality*, *supra* note 149, at 16.

221. See, e.g., *FACTS ABOUT THE IDB*, *supra* note 168, at 7; see also 1992 ASDB ANNUAL REPORT, *supra* note 169, at foreword, 7.

their special status as former colonies faced with survival in a world governed by rules they did not help to write.²²²

None of these second-generation IFIs, however, had political, economic or environmental mandates of the type given to the European Bank. The same political and economic neutrality provisions appear in the charters of the International Finance Corporation, the International Development Association, the Inter-American Development Bank, the African Development Bank and the Asian Development Bank as were written into the IBRD charter in 1944.²²³ Likewise, the charters of the second-generation IFIs are silent on environmental concerns. It was not until the 1970s, and especially the 1972 Stockholm Conference,²²⁴ that the international environmental movement gained much momentum.²²⁵ Even then, that momentum met resistance from many governments on the claim that environmental issues are strictly domestic matters protected by the principle of state sovereignty against any external intrusion.²²⁶ Only in the latter part of the 1980s did the World Bank and some of the regional development banks begin incorporating environmental considerations into their operations in an organized fashion.²²⁷

222. Another manifestation of the decolonization process was the demand for a new international economic order (NIEO). For a discussion of decolonization and the call for a NIEO, see CASSESE, *supra* note 101, at 70-73. Another outgrowth of the same process was the establishment of the Generalized System of Preferences (GSP) to provide duty-free entry to goods imported from LDCs into economically developed countries. For an overview of the background to the GSP, see Rachel McCulloch, Note, *United States Preferences: The Proposed System*, 8 J. WORLD TRADE L. 216 (1974), *excerpt reprinted in* RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS* 314 (2d ed. 1991).

223. SYZ, *supra* note 168, at 162.

224. For an overview of the Stockholm Conference and the United Nations Environment Programme that emerged from it, see John W. Head, Note, *The Challenge of International Environmental Management: A Critique of the United Nations Environment Programme*, 18 VA. J. INT'L L. 269, 269-77 (1978).

225. LE PRESTRE, *supra* note 216, at 21-22.

226. Principle 21 of the Stockholm Declaration on the Human Environment asserts that "[s]tates have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies" *Declaration of the United Nations Conference on the Human Environment*, princ. 21, in *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, at 3 (1972), *reprinted in* 11 I.L.M. 1416, 1420 (1972). At the 1992 United Nations Conference on Environment and Development, the same principle was reasserted. See *Rio Declaration on Environment and Development*, princ. 2, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874, 876 (1992).

227. ASIAN DEVELOPMENT BANK, ENV'T PAPER NO. 10, ENVIRONMENTAL LOAN COVENANTS: HELPING ENSURE THE ENVIRONMENTAL SOUNDNESS OF PROJECTS SUPPORTED BY THE ASIAN DEVELOPMENT BANK 11-16 (1992); THE WORLD BANK, THE WORLD BANK AND THE ENVIRONMENT: FISCAL 1992, at vii (1992); see also LE PRESTRE, *supra* note 216, at 198-201; Head,

This quick history of the first- and second-generation IFIs illustrates by comparison how different the European Bank is and why it may be said to represent a third generation of IFIs. The European Bank is a merger of the two forms of "multilateralization" discussed above,²²⁸ in that it is both a new multilateral organization and a new multilateral set of substantive rules on matters bearing directly on member states' exercise of sovereignty. Until now, these two forms of "multilateralization" have been largely separate: most IFIs, and the agreements establishing them, have not imposed important substantive rules on their members.²²⁹ Even the United Nations Charter, which obviously imposes important substantive rules on its member states (for example, disallowing unilateral use of force except in self-defense²³⁰), has proven largely ineffective in enforcing these rules. Indeed, as noted above, some international legal scholars claim that the prohibition on the use of force has been disregarded so often and with such impunity that it has been displaced entirely, or at least transformed, by new rules of customary international law.²³¹

Given that (i) other IFIs have generally avoided imposing important substantive rules on their member states and (ii) when an IFI (or even the United Nations) has done so, the rules have been widely disregarded, an obvious question arises: Why would anyone think the European Bank could succeed in carrying out its political, economic and environmental mandates? As noted above, the answer is partly historical. The economic and political landscape in Europe was undergoing a fundamental change in 1989 and 1990 with the rejection of Soviet-style central planning and control.²³²

There is, however, more to the answer than that. The efforts at "multilateralization" over the past fifty years, while not always successful, have yielded enough benefits that many states see it in their interest to join in those efforts. In other words, many states have a much higher "comfort level" now with international organizations and multilateral rules than they did a half century ago, or even thirty years ago when the second-generation IFIs were born. The reasons for that increased comfort level are examined more fully in Part IV of this

Environmental Conditionality, *supra* note 149, at 17-18.

228. *See supra* part II.B.

229. The exception is the IMF, whose charter originally imposed strict rules about exchange rates. Those rules were abandoned, however, with the breakdown in practice of the Bretton Woods system, and were replaced by much less onerous rules that are confined largely to consultation requirements. *See supra* notes 138-45 and accompanying text.

230. U.N. CHARTER art. 2, para. 4.

231. *See supra* notes 130-31 and accompanying text.

232. *See supra* notes 199-208 and accompanying text.

Article. First, though, it will be instructive to examine how that comfort level has manifested itself in the operations of the EBRD over the past three years.

B. Responding to Changed Circumstances

The story of the European Bank so far has been a story of responding to changing circumstances. The idea of such a bank was first proposed by French President Mitterrand in late October 1989 as a response to developments in eastern Europe.²³³ Six weeks later the European Council endorsed that proposal, and by mid-January 1990 negotiations on establishing the European Bank began in Paris.²³⁴ By the end of May 1990, the European Bank's charter had been finalized and signed by numerous states, the European Economic Community and the European Investment Bank.²³⁵

Once established on paper, the bank had to be put into operation. Doing so took about a year. After intense negotiations over the site of the bank's headquarters (London was selected) and over who would serve as the bank's first president (a Frenchman, Jacques Attali, was selected), the inauguration ceremonies for the Bank took place in April 1991.²³⁶ Two months later the bank's Board of Directors approved the bank's first financing for a project.²³⁷

The gestation period of the European Bank—exactly twenty months from the initial proposal to the first loan—was extremely short²³⁸ and illustrates the importance and urgency that many attached to the idea.²³⁹ No sooner had the bank been established, however, than the

233. 1991 EBRD ANNUAL REPORT, *supra* note 202, at 18.

234. *Id.*

235. *Id.*; Attali, *supra* note 188, at v. The participation of the European Economic Community and the European Investment Bank serves as a further illustration of the unusual status of the European Bank. "It is unusual for two international organizations to become members of a third in partnership with states." Dunnett, *supra* note 186, at 593. With only one exception, no other major IFI has members that are not states or dependencies of states. The exception is the African Development Fund, in which the African Development Bank holds a share. SHIHATA II, *supra* note 185, at 79; *see also* Dunnett, *supra* note 186, at 593-94.

236. 1991 EBRD ANNUAL REPORT, *supra* note 202, at 18.

237. This financing took the form of a loan of ECU 37.29 million to the Bank of Poznań to finance Polish heating enterprises. *Id.* at 20.

238. By contrast, the charter of the Asian Development Bank took more than a year of negotiations. Attali, *supra* note 188, at v.

239. Another illustration of the importance attached to the establishment of the European Bank, at least once the idea gained some momentum, was the number of states that became members without any prospect of borrowing from the bank. By the end of 1991 there were 32 such states (40 member states minus eight recipient countries). *See* 1991 EBRD ANNUAL REPORT, *supra* note 202, at 20-22, 140. By contrast, the Asian Development Bank at the end of 1992 had only 19 member states ineligible to borrow from that bank, out of a total membership of 52. *See*

number and even the existence of its borrowing member states began changing dramatically. In the beginning, the borrowing member countries of the European Bank (called "recipient countries"²⁴⁰ or "countries of operations"²⁴¹) were to consist of the Soviet Union and seven countries of eastern Europe: Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and Yugoslavia.²⁴² By the end of 1991, the German Democratic Republic had disappeared with the reunification of Germany,²⁴³ and the Soviet Union had disintegrated into over a dozen new states.²⁴⁴ The European Bank's 1991 Annual Report, issued in February 1992, pointed out that "the number of countries of operations of the Bank is in the process of expanding from eight to more than twenty."²⁴⁵ Contributing further to that expansion was the breakup of Yugoslavia during 1992. Slovenia became a member of the bank in 1992, and Croatia and the "Former Yugoslav Republic of Macedonia" became members in February 1993.²⁴⁶ By early 1993 the bank's countries of operations had reached twenty-five, over three times the number originally envisioned.²⁴⁷

One consequence of these radical changes is that some requirements set out in the European Bank's charter have proven impossible for the bank to meet. Two such requirements appear in Articles 8(4) and 11(3).

The first of these, although drafted in general terms, has the effect of limiting the extent of the bank's operations in the U.S.S.R. Article 8(4) gives a potential recipient country the option to request that the European Bank provide that country access to the bank's resources only for limited purposes over a three-year period beginning after entry into

AGREEMENT ESTABLISHING THE ASIAN DEVELOPMENT BANK, Dec. 4, 1965, arts. 2(ii), 8, 571 U.N.T.S. 123 (entered into force Aug. 22, 1966) (limiting the bank's lending operations to developing member countries in the region); 1992 ASDB ANNUAL REPORT, *supra* note 169, at 3 (showing 16 non-regional members and three regional members—Australia, Japan and New Zealand—that are not "developing member countries").

240. EBRD CHARTER, *supra* note 185, art. 8.

241. 1991 EBRD ANNUAL REPORT, *supra* note 202, at 8.

242. EBRD CHARTER, *supra* note 185, Annex A.

243. See Dunnett, *supra* note 186, at 577 & n.12.

244. See, e.g., Michael Dobbs & Don Oberdorfer, *Gorbachev Resignation Ends Soviet Era; U.S. Recognizes Russia, Other Republics*, WASH. POST, Dec. 26, 1991, at A1.

245. 1991 EBRD ANNUAL REPORT, *supra* note 202, at 8.

246. EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, 1992 ANNUAL REPORT 3 (1993) [hereinafter 1992 EBRD ANNUAL REPORT].

247. *Id.* at 2-3 (showing 22 countries of operation at the end of 1992 and four new countries of operation as of February 1993, two of which—the Czech Republic and the Slovak Republic—replaced the former Czech and Slovak Federal Republic). The total membership then was 57 countries plus the European Economic Community and the European Investment Bank. *Id.*

force of the European Bank's charter.²⁴⁸ Any request pursuant to this provision was to be attached to the charter,²⁴⁹ and in fact the U.S.S.R. made such a request.²⁵⁰ The main effect of the request was that the total amount of assistance to be provided by the European Bank to the U.S.S.R. could not exceed the total amount of cash disbursed and promissory notes issued by the U.S.S.R. for its shares in the bank's capital.²⁵¹ The aim of the provision and the accompanying Soviet request was to prevent that country from soaking up all or most of the European Bank's financing capacity.²⁵²

The second provision requires the bank to observe a limit on its public sector operations. Article 11(3) of the European Bank's charter requires that "[n]ot more than forty (40) per cent [sic] of the amount of the Bank's total committed loans, guarantees and equity investments . . . shall be provided to the state sector."²⁵³ In other words, at least sixty percent must go to the private sector.

Both of these limitations—the U.S.S.R. limitation and the limitation on financing of the state sector—have been relaxed in light of the bank's inability to meet them. In both cases, that inability resulted from the dissolution of the U.S.S.R. As for the limitation on operations in the U.S.S.R., the limitation became meaningless once the U.S.S.R. ceased to exist, and the bank was faced with the issue of interpreting a charter provision that no longer made sense in the changed circumstances. In deciding that the shares in the bank previously held by the U.S.S.R. would be divided among the newly independent states emerging from that state's dissolution,²⁵⁴ the bank's Board of Directors also decided to "relax" the requirement of Article 8(4).²⁵⁵

The other charter requirement—the 60%-40% ratio prescribed by Article 11(3)—was somewhat different.²⁵⁶ The breakup of the Soviet

248. EBRD CHARTER, *supra* note 185, art. 8, para. 4(i).

249. *Id.*

250. SHIHATA II, *supra* note 185, at 70; *see also* Dunnett, *supra* note 186, at 581.

251. SHIHATA II, *supra* note 185, at 71.

252. *Id.* at 71-72.

253. EBRD CHARTER, *supra* note 185, art. 11, para. 3(i). The limit applies initially over a two-year period. *Id.* Similar limits apply to the bank's loans, guarantees and equity investments for each recipient country. *Id.* art. 11, para. 3(ii). In that case a five-year period is provided for. *Id.* Neither limit, however, applies to European Bank financing of a state-owned enterprise that is "implementing a [program] to achieve private ownership and control." *Id.* art. 11, para. 3(iii)(b).

254. *See* 1992 EBRD ANNUAL REPORT, *supra* note 246, at 8.

255. The bank's 1992 Annual Report refers to the Article 8(4) limitation and explains that the Board of Directors decided to "relax the limitation on operations in the USSR." *Id.*

256. Some of the following details are drawn from the author's experience at the European Bank. *See supra* note 184. References to the 60%-40% ratio issue did appear, however, in the financial press in 1993. *See* David Marsh et al., *Bank Faces Uphill Fight To Define Way Forward*, FINANCIAL TIMES (London), June 26-27, 1993, at 2; Colin Narbrough, *Major Reinforces Call for*

Union did not make that requirement legally meaningless; it just made the requirement much more difficult to meet. Although the investment opportunities in the private sector probably did not change much after the Soviet Union's dissolution, the same was not true of the public sector, for suddenly there were over a dozen governments where there had been but one before. Not surprisingly, the bank began operations with many of these new governments. As a result, the ratio of 60% to 40% (private sector to public sector) in the amount of financing commitments had not been met by early 1993.²⁵⁷ Instead of stopping all public sector operations for failing to meet the 60%-40% ratio requirement, the bank again opted to take a flexible view of the requirement, both in terms of the definition of "private sector" operations and in the time frame over which the target must be met. By the end of 1993 the bank's operations were very close to meeting the target again, thus reinforcing the bank's focus on private sector projects.²⁵⁸

Traditionally, IFIs are reluctant to relax charter requirements. Ibrahim Shihata, the World Bank's General Counsel for the past eleven years, has emphasized and documented that institution's strict adherence to its charter provisions in the face of mounting pressure to take into account political and other considerations in World Bank operations.²⁵⁹ Sir Joseph Gold, General Counsel of the IMF from 1959 to

Tighter Rein at EBRD, THE TIMES (London), Apr. 26, 1993, at 37; Robert Peston, *De Larosière Faces Pressure To Reform*, FINANCIAL TIMES (London), Aug. 19, 1993, at 2; *Private Sector Investment Pledge*, FINANCIAL TIMES (London), Apr. 28, 1993, at 2; *Next Steps at the EBRD* (editorial), FINANCIAL TIMES (London), June 28, 1993, at 15 (urging a flexible interpretation of the 60%-40% ratio requirement).

257. *Private Sector Investment Pledge*, *supra* note 256. Ironically, the 60%-40% ratio would have been achieved if calculated on the basis of numbers of projects or amounts disbursed, instead of amounts committed. The ratio in Article 11(3), however, is expressed clearly in terms of amounts committed. EBRD CHARTER, *supra* note 185, art. 11, para. 3(i).

258. This solution to the problem of the 60%-40% ratio requirement was achieved against the backdrop of serious public relations problems for the European Bank. Earlier in 1993 the bank's president, Mr. Attali, had been criticized both for extravagance in outfitting the bank's London headquarters offices and for personal financial misconduct. Colin Narbrough & Christopher Elliott, *Bank Battle on Immunity Deal as Attali Goes*, THE TIMES (London), July 17, 1993, at 1. Mr. Attali resigned in June 1993, and Mr. Jacques de Larosière was elected in August to replace him. *U.S. Official Cautions Congress Against Suspension of EBRD Funding*, 10 Int'l Trade Rep. (BNA) No. 36, at 1527 (Sept. 15, 1993).

259. See generally SHIHATA I, *supra* note 153. "[I]t has always been recognized that the [World Bank] and its affiliates must maintain at all times consistency of their actions with their own respective basic laws . . ." *Id.* at 2. On the application of this principle to environmental matters, see *id.* at 179-80. See also John W. Head, *The World Bank in a Changing World; Selected Essays by Ibrahim F.I. Shihata*, 87 AM. J. INT'L L. 351, 351-52 (1993) (book review).

1979, has made similar observations about that institution's fidelity to its charter.²⁶⁰

The challenge that the European Bank faced respecting the requirements of Articles 8(4) and 11(3) was greater than most faced by the World Bank and the IMF,²⁶¹ particularly in terms of the causes of the bank's inability to meet those requirements. No other IFI has witnessed as tumultuous a change in its membership as the European Bank has. The bank's response to these changes—relaxing the charter provisions—would not have been possible if the states with the greatest influence in the bank²⁶² had felt uncomfortable with the “multilateralization” that the bank represents. Three or four decades ago, such a sweeping change in the political landscape, and especially in the number and character of borrowing countries, might well have prompted a call for an entirely new charter to be written. Indeed, that is precisely what happened in the late 1950s when the International Development Association was established.²⁶³ By 1990, however, as posited above, the “comfort level” of most states regarding the role of IFIs had risen substantially, and apparently no new charter was deemed necessary either as a political matter or as a legal matter.²⁶⁴ Thus instead of treating the upheaval in its membership as a crisis, the European Bank treated it as an opportunity.

260. JOSEPH GOLD, INTERPRETATION BY THE FUND 16-25 (IMF Pamphlet Series No. 11, 1968).

261. An exception is the breakdown in the par value system established under the original version of the IMF charter. *See supra* notes 143-45 and accompanying text.

262. The bulk of the bank's capital is owned by the United States (10%), France, the United Kingdom, Germany and Japan (each about 8.5%). *See* 1992 EBRD ANNUAL REPORT, *supra* note 246, at 59. The European Economic Community and the European Investment Bank together hold about 6% of the capital, and Russia holds about 4% of the capital. *See id.*

263. *See supra* text accompanying notes 217-20. Similarly, the IMF charter was rewritten in the late 1970s with the breakdown of the Bretton Woods par value regime of exchange rates. *See supra* text accompanying notes 143-44.

264. From a legal perspective, a “relaxation” of both charter requirements—the limitation on operations in the Soviet Union and the 60%-40% ratio requirement—can be viewed as a matter of treaty interpretation. Article 31 of the 1969 Vienna Convention on the Law of Treaties, which is commonly thought to codify customary international law regarding treaty interpretation, is relevant in this respect. It provides that treaty interpretation is to be guided by a reading of the words of the treaty in their context and in view of the “object and purpose” of the treaty. 1969 Vienna Convention, *supra* note 181, art. 31, para. 1. A key purpose of the European Bank's charter is to facilitate the move of its member states toward market economies. EBRD CHARTER, *supra* note 185, art. 1. It could be argued that this purpose would be contravened by a reading that would disallow any further public sector lending upon the bank's failure to meet the 60%-40% ratio requirement merely because the number of governments had unpredictably tripled.

IV. THE PROSPECTS FOR SUPRANATIONAL LAW

The discussion of the European Bank in Part III of this Article illustrates the momentum that the trend toward "multilateralization" has now achieved and identifies a growing level of comfort among states with that trend. Faced with the crumbling of an economic and political ideology, a large number of states quickly established a new, third-generation IFI with substantially wider mandates than its predecessors. As the ground continued shifting rapidly, those countries permitted that new IFI to respond to changes by relaxing the requirements imposed by certain key charter provisions.

This section examines more closely some of the reasons for the growing comfort level that these developments reveal. It then considers whether the trend toward "multilateralization" will continue to gain momentum and result in an effective system of supranational law.

A. The Appeal of Supranational Law: Veils and Voices

Why would the world's rich and powerful industrialized states—the "North," to use the term appearing in much of the current literature²⁶⁵—favor the trend toward "multilateralization" of institutions and rules? The answer is, in a word, power. A feature of international organizations and multilateral sets of rules that the countries of the North find appealing is that those countries are able to control the organizations and rules without having individual accountability or

265. One of the most influential contributions to the literature about the differences between rich, industrialized states and LDCs is *The Report of the Independent Commission on International Development Issues Under the Chairmanship of Willy Brandt*, published as INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES, NORTH-SOUTH: A PROGRAM FOR SURVIVAL (1980). For a discussion of the terms "North" and "South," see *id.* at 31. Although it is unclear what the criteria are for a country to be classified as "North" or "South," especially following the economic and political unraveling of the Soviet Union, the "North" presumably includes the United States, Japan, Germany, France, the United Kingdom, Canada and Italy (the so-called "Group of 7"); most other Western European countries; probably Russia (despite its current economic crisis); Australia and New Zealand; and perhaps a few more. This amounts to about 25 or 30 states—35 at the most—which is less than one-fifth of the nearly 200 states now in existence. Another means of classifying states is by the terms "First World," "Second World" and "Third World." The last of these is used most commonly to refer to LDCs; these would include all or most states of the South. The First World includes the rich, industrialized, economically developed, free-market states of the North. Although the term "Second World" is rarely used, its meaning can be determined by the process of elimination. It includes the socialist states of the former Soviet bloc. These have now largely disappeared. For references to these and similar distinctions, see CASSESE, *supra* note 101, at 115-25; 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 101, at 1017; A.A. Fatouros, *International Law and the Third World*, 50 VA. L. REV. 783, 793-94 (1964); Levy, *supra* note 78, at 87 n.26.

attracting direct criticism that could complicate those countries' conduct of foreign relations.

There are many such means of control. In the case of international organizations, control by the North usually takes the form either of weighted voting or a two-tier structure of membership. The IMF exemplifies the first of these. The voting strength of a handful of IMF member countries of the North far outweighs the voting strength of the entire South.²⁶⁶ Voting power is not directly relevant to all IMF decisions, since the IMF operates largely on the basis of consensus. Nevertheless, voting power forms an important backdrop to the formation of that consensus.²⁶⁷ Moreover, certain types of actions in the IMF—for example, amending the charter or expelling a member—require special majorities that effectively provide a few countries with veto power over such actions.²⁶⁸

The United Nations exemplifies the second of these forms of control: a two-tier structure of membership. Although each member country has one vote in the General Assembly,²⁶⁹ it is the Security Council that has most of the important powers and responsibilities in the United Nations, including the power to recommend states for admission to membership or for suspension or expulsion,²⁷⁰ responsibility for maintaining international peace and security,²⁷¹ the power to take

266. As of April 1993, the combined voting strength of the United States, Japan, Germany, the United Kingdom, France, Belgium, Italy, the Netherlands and Canada amounted to about 49% of the total votes in the IMF. See INTERNATIONAL MONETARY FUND, 1993 ANNUAL REPORT 166-69 (1993) [hereinafter 1993 IMF ANNUAL REPORT]. These same countries have a combined voting strength in the IBRD of about 50%. See 1993 WORLD BANK ANNUAL REPORT, *supra* note 150, at 199-202. Weighted voting also applies to the regional development banks. For example, more than 45% of the voting strength in the Asian Development Bank is held by the United States, Japan, Canada, Australia, Germany, the United Kingdom and France. See 1992 ASDB ANNUAL REPORT, *supra* note 169, at 130-31. For details on weighted voting in the IMF, see William N. Gianaris, *Weighted Voting in the International Monetary Fund and the World Bank*, 14 FORDHAM INT'L L.J. 910, 918-27 (1991). A member country's voting power in the IMF is based on its "quota" in the IMF. *Members' Quotas Guide Their Access to IMF Resources*, IMF SURV.: SUPPLEMENT ON THE IMF, Sept. 1992, at 5. For details on quotas, see INTERNATIONAL MONETARY COLLABORATION, *supra* note 139, at 12-16; Lawrence H. Officer, *Are International Monetary Fund Quotas Unfavorable to Less-Developed Countries? A Normative Historical Analysis*, 10 J. INT'L MONEY & FIN. 193 (1991).

267. See generally Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566 (1980) (identifying a connection between the formal voting procedures of international economic organizations and the decisions they make).

268. See IMF CHARTER, *supra* note 144, art. XXVIII(a), (b) (charter amendment requires special majority), art. XXVI, § 2(c) (compulsory withdrawal requires special majority).

269. U.N. CHARTER art. 18, para. 1.

270. *Id.* art. 4, para. 2, arts. 5, 6.

271. *Id.* art. 24, para. 1.

military action to fulfill that responsibility,²⁷² the power to enforce judgments of the International Court of Justice²⁷³ and the power to nominate the Secretary-General of the United Nations.²⁷⁴ The Security Council is dominated by the North in that four of the Security Council's five permanent members, each of whom has veto power over any substantive matter,²⁷⁵ are the United States, the United Kingdom, France and Russia.²⁷⁶ Hence, although the membership of the United Nations is dominated by the South, control of the key functions of the United Nations rests with the North.²⁷⁷

In the case of the many multilateral sets of rules that have emerged in recent years,²⁷⁸ the control exercised by the North is less formal but still usually effective. Without substantial support by the most powerful countries of the North, it is almost impossible for any multilateral set of rules to come into being—or, if it does come into force, for it to be viewed as binding on those countries of the North. For example, despite the fact that 125 states signed the 1982 United Nations Convention on the Law of the Sea within a few months of the conclusion of the conference that produced it,²⁷⁹ it took well over a decade to muster the sixty ratifications required to bring the convention into force.²⁸⁰ After President Ronald Reagan announced the decision of the United States not to sign the treaty,²⁸¹ most other countries of the

272. *Id.* art. 42.

273. *Id.* art. 94, para. 2.

274. *Id.* art. 97.

275. *Id.* art. 27, para. 3.

276. *Id.* art 23, para. 1. Russia now occupies the seat of the U.S.S.R. Article 23 names the Republic of China as the other permanent member of the Security Council. That seat is occupied now by the People's Republic of China.

277. For an assessment of how this distribution of power, in both the United Nations and the League of Nations, relates to the notion of equality of states, see FARIBORZ NOZARI, *UNEQUAL TREATIES IN INTERNATIONAL LAW* 89-94 (1971).

278. See *supra* notes 174-83 and accompanying text.

279. See *supra* note 181; see also BURNS H. WESTON ET AL., *BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER* 946-47 (2d ed. 1990) [hereinafter *BASIC INTERNATIONAL LAW DOCUMENTS*].

280. *United Nations: UN Law of the Sea Pact Takes Effect Next November*, Reuter Newswire, Dec. 6, 1993, available in WESTLAW, Int-News-C. The sixtieth ratification was by Guyana, and the convention will come into force on November 16, 1994. *Id.*

281. For the text of a March 1983 speech in which President Reagan explained the grounds on which the United States decided not to sign the treaty, see Statement by the President on United States Oceans Policy (Mar. 10, 1983), reprinted in 22 I.L.M. 464-65 (1983) and in WESTON ET AL., *supra* note 80, at 226-28. Some commentators have criticized that decision and predicted that it might be reversed in the foreseeable future. See Robert Ward, *Italy: Warning Against 'Vice of Maritime Nationalism'*, LLOYD'S LIST, June 27, 1992, at 3, available in WESTLAW, Int-News-C.

North did not go on to ratify it.²⁸² Those countries therefore remain, for now at least, outside that treaty regime.

Moreover, when the countries of the North do enter into multilateral sets of rules, as a practical matter those countries have the power to limit the application of whatever particular rules they dislike. In ratifying the International Sales Convention,²⁸³ for example, the United States entered a reservation to one of the key provisions governing the applicability of that treaty.²⁸⁴ Likewise, in ratifying the 1966 International Covenant on Civil and Political Rights²⁸⁵ in 1992, the United States entered reservations excluding the applicability of several provisions.²⁸⁶

The influence of the North over the establishment of multilateral sets of rules is even heavier in a more fundamental respect. Virtually all such rules reflect the values and ideologies of the North. The GATT rules reflect the North's strong bias toward free trade;²⁸⁷ the International Sales Convention closely resembles the Uniform Commercial Code in many respects;²⁸⁸ treaties on intellectual property rights²⁸⁹ reflect the view of the North that such rights should be given strong protection.²⁹⁰

In short, the North exercises control, in several forms, over the key international organizations and the multilateral sets of rules that have emerged in recent years. On these grounds, it could be expected that

282. Among those major industrialized countries signing the treaty were Australia, Austria, Belgium, Canada, Italy, Japan, the Netherlands, New Zealand, Spain and the U.S.S.R., as well as the European Economic Community. BASIC INTERNATIONAL LAW DOCUMENTS, *supra* note 279, at 946-47. As of the end of 1989, however, none of those states had ratified the treaty. *Id.* at 893, 947; see also Ward, *supra* note 281 (as of June 1992 "[n]one of the OECD [Organization for Economic Cooperation and Development, composed primarily of countries from the North] states ha[d] ratified the convention"). Some observers believe many countries of the North will not ratify the convention until the United States changes its view. *Id.*

283. See *supra* note 174 and accompanying text.

284. The U.S. reservation related to Article 1(1)(b), under which the convention would apply to transactions with non-contracting states in specified circumstances. See International Sales Convention, *supra* note 174, art. 1(1)(b); IBT NUTSHELL, *supra* note 163, at 79.

285. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *reprinted in* 6 I.L.M. 360, 368 (1967).

286. See SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 23, 102d Cong., 2d Sess (1992), *reprinted in* 31 I.L.M. 645 n.*, 658-60 (1992).

287. See Head, *International Trade*, *supra* note 156, at 43.

288. GUIDE TO THE INTERNATIONAL SALE OF GOODS CONVENTION 100.003 (William A. Hancock ed., 1993) ("The list of similarities between the [International Sales Convention] and the UCC is much longer than the list of differences.").

289. See *supra* note 178.

290. For a reference to the differing views of the North and the South on recognition and protection of property rights, see IBT NUTSHELL, *supra* note 163, at 212-14, 235.

countries of the North would not raise strenuous objections to the establishment of such organizations and rules, since they pose no threat to those countries' dominant position. There is, however, more to the story than that. By establishing international organizations, such as the United Nations or the IMF, the North can in fact exercise its dominant position with little or no individual accountability.

The analogue that comes to mind for me in this respect is the "corporate veil." Like a corporation, each of the international organizations referred to above is an artificial legal entity consisting of other entities as shareholders. In the case of international organizations, the shareholders are states (or other international organizations). In the case of a corporation, the shareholders are humans (or other corporations). A key benefit for shareholders in forming a corporation is the limitation of individual liability that comes from creating a legal entity separate and distinct from its shareholders.²⁹¹ States forming an international organization gain the same type of benefit: because the international organization is a legal entity separate and distinct from its shareholders,²⁹² those states are not individually accountable for actions of the organization. They can hide behind the "veil" of the international organization, just as the shareholders of a corporation can hide behind the veil of the corporation. That veil is seldom pierced.²⁹³

For the countries of the North, the corporate veil can be especially attractive. In the case of the North-dominated IMF, for example,²⁹⁴ financing is usually made conditional on the member country taking specified measures that the industrialized countries generally favor—for instance, limiting further external borrowing by the government and avoiding exchange restrictions on current transactions.²⁹⁵ Because the countries of the North do not need to borrow from the IMF, however,

291. 18 C.J.S. *Corporations* § 8, at 273-74 (1990).

292. For a reference to the legal personality of international organizations, see *supra* note 136. Some international organizations do not have this feature of legal personality. For a reference to organizations lacking legal personality, see BROWNLIE, *supra* note 88, at 682.

293. "Disregarding the corporate entity and piercing the corporate veil, which is an exception to the general rule of corporate separateness, will be invoked only in extreme circumstances." 18 C.J.S. *Corporations*, *supra* note 291, § 9, at 274. See also ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS IN A NUTSHELL* 81-83 (3d ed. 1991) [hereinafter *CORPORATIONS NUTSHELL*]. The notion of the "corporate veil," and the reluctance to pierce it, appears also in English law and European Community law, and has been recognized in international law as well. See, e.g., Eran Aharon Lev, *European Community Competition Law: Is the Corporate Veil Lifted Too Often?*, 2 J. TRANSNAT'L L. & POL'Y 199, 200-02 (1993).

294. See *supra* note 266 and accompanying text.

295. See Executive Board Decision No. 6838-(81/70) (April 29, 1981), reprinted as amended in INTERNATIONAL MONETARY FUND, *SELECTED DECISIONS AND SELECTED DOCUMENTS OF THE INTERNATIONAL MONETARY FUND 96-99* (17th issue 1992) (form of stand-by arrangement, showing performance criteria on external debt and currency exchange restrictions).

they are not subject to such requirements. In effect, the discipline that the IMF says is good for the goose is never required of the gander. Were it not for the corporate veil of the IMF, the existence of this apparent double standard would probably expose the North to stronger criticism, which it would prefer to avoid. With the corporate veil in place, much of the criticism is directed instead at the IMF itself.²⁹⁶

In the case of multilateral sets of rules, a different analogue comes to mind: the contract of adhesion. The argument might be raised that the North has taken advantage of its superior bargaining position to impose rules that unfairly benefit the North and exploit the South. Such a set of rules, the argument would claim, is like a contract of adhesion, which has been criticized and subjected to regulation in many legal systems.²⁹⁷

Hence it should come as no surprise that “multilateralization,” in both its forms, appeals to the countries of the North. They can exercise control over multilateral sets of rules in the same way that a dominant party can impose a contract of adhesion on a weaker party; and they can hide behind the corporate veil of international organizations to escape accountability and criticism of their behavior.

An obvious question arises here: Would it not be possible for the states of the South to object on legal grounds to the level of control that the North exercises over international organizations and multilateral rules? Are there not some grounds for “piercing the corporate veil” and for voiding the “contracts of adhesion”?

296. For a reference to one criticism of the IMF—that it fails to require “symmetry in adjustment”—see *supra* note 154. See also Head, *IMF Third Amendment*, *supra* note 144, at 637.

297. In the context of U.S. law, a contract of adhesion has been defined as “a contract that is drafted unilaterally by the dominant party and then presented on a ‘take it or leave it’ basis to the weaker party, who has no real opportunity to bargain about its terms.” 16 AM. JUR. 2D *Conflict of Laws* § 79 (1979), at 129 (footnote omitted); see also *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1981) (defining an adhesion contract as “a contract drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere”). For discussions of adhesion contracts in U.S. law, and the related issues of unconscionability and unfair bargaining positions, see JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 418-24 (3d ed. 1987); U.C.C. § 2-302 cmt. (1978), reprinted in E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *SELECTIONS FOR CONTRACTS* 34-35 (1988). For corresponding discussions of these issues in other legal systems, see MICHAEL H. WHINCUP, *CONTRACT LAW AND PRACTICE: THE ENGLISH SYSTEM AND CONTINENTAL COMPARISONS* (1990), at 150-53 (English law), 155-59 (various European legal systems); John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976) (comparing German and American approaches to standardized contracts and unconscionability); ASIAN CONTRACT LAW: A SURVEY OF CURRENT PROBLEMS 125-44 (David E. Allan et al. eds., 1969) (surveying standard form contracts and legal means for preventing harsh, oppressive or unfair contractual terms under Australian, Malaysian, Thai, Japanese, Korean, Indonesian, Philippine, New Zealand, Indian and other Asian legal systems).

There are. As a legal matter, several arguments could be advanced on behalf of the South to object to the North's control over international organizations and multilateral treaty rules. As for "piercing the corporate veil," to the extent that the domestic law analogy holds, a claim could be made that the corporate veil of an international organization should be pierced and responsibility for its actions placed instead on the dominant powers of the North in order to prevent fraud, do justice, serve the public good and achieve equity.²⁹⁸

As for the "contract of adhesion" argument, Articles 51 and 52 of the 1969 Vienna Convention on the Law of Treaties provide that coercion is a ground for invalidity of a treaty,²⁹⁹ and Article 62 embodies the doctrine of *rebus sic stantibus*, under which a fundamental change of circumstances can also give grounds for declaring a treaty void.³⁰⁰ Surely the countries of the South could claim, with some credence, that their expression of consent to be bound by, say, the IMF Charter or the United Nations Charter was induced by some form of coercion; or, alternatively, they could claim that although no coercion was involved at the time they joined the treaty regime, economic and other circumstances have changed so radically, without corresponding changes in the rules and organizations, that release from their treaty obligations is required.³⁰¹

The countries of the South do not press these legal arguments very hard, however, for two practical reasons. First, there is no court in which making the arguments is worthwhile. Even if the International Court of Justice (ICJ) were to agree that the respondent in such a case was a state (or set of states) rather than an international organization,³⁰² enforcement of an ICJ judgment against a powerful state of the North would be problematic.³⁰³

298. These are typical grounds cited in U.S. law to justify "piercing the corporate veil." See CORPORATIONS NUTSHELL, *supra* note 293, at 81-82.

299. 1969 Vienna Convention, *supra* note 181, arts. 51, 52.

300. *Id.* art. 62.

301. For a discussion of coercion and the *rebus sic stantibus* doctrine as possible grounds for voiding obligations imposed by "unequal treaties," see NOZARI, *supra* note 277, at 121, 129-33, 134-65. Nozari defines an unequal treaty as "a treaty which, through the application of direct or indirect pressure [physical, social, economic or political], is imposed . . . by a powerful State on a weaker State . . . [due to] inequality [either political or legal or both] existing between the contracting parties at the time of the inception of the treaty." *Id.* at 119.

302. Only states may be parties in cases before the ICJ. ICJ STATUTE, *supra* note 91, art. 34, para. 1. Hence the ICJ can issue only advisory opinions, not binding decisions, in cases involving an international organization. See *id.* art. 65, para. 1.

303. In this respect, note the lack of enforcement of the ICJ's judgment in the Nicaraguan case against the United States, which largely ignored the court and the case. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), reprinted in 25 I.L.M. 1023 (1986); Burns H. Weston, *The Reagan Administration Versus International Law*, 19 CASE W. RES.

The second reason is more important. What the countries of the South want is not to *destroy* the organizations (by piercing the corporate veil and declaring them fictions), or to *invalidate* the rules (by citing coercion or changed circumstances), but rather to *change* the organizations and the rules. If a state wishes to disassociate itself from the IMF, for example, that state may withdraw from the organization at any time.³⁰⁴ Doing so, however, could be suicidal for a state that needs substantial external financing.³⁰⁵ Indeed, all the major international organizations have now achieved such a degree of universality in their membership³⁰⁶ that withdrawing from membership could amount to self-imposed ostracism.

Working for change in an organization can be more fruitful than leaving or destroying it. Some changes favorable to the South have already come to international organizations. For example, both the World Bank and the IMF have established mechanisms for providing low-cost financing to LDCs.³⁰⁷ While pressing for more changes favorable to the South, it makes sense for those countries to remain engaged in the international organizations. By doing so, they maintain their right to have a voice that they would sacrifice by withdrawing.

This notion of having a voice warrants some elaboration. The charters of the main international organizations have provisions ensuring representation of member countries in the key decision-making organs of the organizations, especially when these organs are handling matters directly affecting particular states.³⁰⁸ Beyond that, all those organizations have organs in which the vast majority of participants are from the South.³⁰⁹ Even though the power in the organizations remains pre-

J. INT'L L. 295, 296 (1987). For a different perspective on the Nicaraguan case, however, see *infra* note 319.

304. IMF CHARTER, *supra* note 144, art. XXVI, § 1 ("Any member may withdraw from the Fund at any time . . .").

305. For a reference to the way in which IMF financing often triggers the availability of more sizable amounts of official and commercial financing, see *supra* note 161.

306. See *supra* note 163 and accompanying text.

307. In the case of the World Bank, this took the form of the International Development Association. See *supra* note 220 and accompanying text. In the case of the IMF, it took the form of the Structural Adjustment Facility and the Enhanced Structural Adjustment Facility, established in the late 1980s. See *Concessional Facilities Assist Low-Income Countries*, IMF SURV.: SUPPLEMENT ON THE IMF, Sept. 1992, at 19-20.

308. See U.N. CHARTER art. 31 (permitting participation by a non-member of the Security Council in discussions specially affecting that state); IMF CHARTER, *supra* note 144, art. XII, § 3(j) (providing for special representation of a member at executive board meetings discussing issues directly affecting that member); IBRD CHARTER, *supra* note 162, art. V, § 4(h) (same).

309. In the United Nations, this organ is the General Assembly, in which each member country is represented. U.N. CHARTER art. 9, para. 1. In the IMF and the World Bank, the organ is the Board of Governors, in which the same is true. See IMF CHARTER, *supra* note 144, art. XII, §

dominantly with the North, the voice of the South in these organs can be quite loud. If the organizations themselves did not exist, or if the countries of the South were not members, that voice would almost surely be weaker, less formalized and more fragmented.³¹⁰

For the South, then, there is a strong attraction to international organizations of the type described above. The same is true of multilateral sets of rules, although for somewhat different reasons. Having formalized and published rules in such areas as international trade or intellectual property is arguably much better for the South than having a system in which the powerful states of the North set the terms of their dealings on an ad hoc and discretionary basis. Being able to find and criticize the rules governing treaty interpretation,³¹¹ for example, or the rules governing intellectual property³¹²—and, better yet, being able to participate in their formulation or amendment, even with only negligible influence in the final result—is surely better from the perspective of the South than simply having the rules applied against them by the North without prior notice and negotiation.

For these reasons, the trend toward “multilateralization,” in both its forms (international organizations and multilateral sets of rules), appeals both to the North and to the South. For the countries of the North, an international organization offers a corporate veil by which those countries can direct actions for which they will not be held directly accountable; and the multilateral sets of rules largely reflect the North’s preferences. For the countries of the South, an international organization provides a voice, a forum in which to criticize and press for change while remaining in the mainstream of the international community; and the multilateral sets of rules reduce the risk of arbitrary action by the North.

B. The Incompleteness of Supranational Law

The fact that both the North and the South can find benefits in the trend toward “multilateralization” from which supranational law is

2(a) (each member state appoints one governor and one alternate); IBRD CHARTER, *supra* note 162, art. V, § 2(a) (same).

310. For a discussion of the interplay of “exit and voice” in the context of the European Communities, see J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2411-12, 2423-30 (1991). Choices between “exit and voice” arise in other areas of international relations as well. For a reference to the choice between U.S. participation in or withdrawal from economic development projects that threaten endangered species, see Coggins & Head, *supra* note 150, at 83 n.138.

311. The 1969 Vienna Convention on the Law of Treaties lays out rules on interpretation of treaties. See 1969 Vienna Convention, *supra* note 181, arts. 31, 32.

312. See *supra* note 178.

emerging might suggest that supranational law itself is destined to become a more effective system of law than international law has heretofore been considered. I doubt that will be the case. Barring some global catastrophe on the same order of magnitude as the two world wars of this century, I expect supranational law to continue suffering, at least for the next half-century, from two of the same problems that have dogged international law thus far and prevented it from maturing into a complete and fully effective legal system.

One of these problems is political, and the other is physical in character. First, as a political matter, the doctrine of state sovereignty remains too strong to permit the establishment of an effective system for enforcing rules against the most powerful states. Second, as a physical matter, our world is all we know. It is not part of some larger population or broader legal context to which we might look for a generally recognized set of fundamental rules against which the rules of supranational law can be judged valid or invalid.

The first of these two points needs little elaboration. As noted above, international law as recently as the first quarter of this century held state sovereignty to be virtually absolute.³¹³ Since then, initiatives to surrender sovereignty to international organizations have not met with great success. Despite the United Nations Charter's attempt to centralize in the Security Council the right to resort to aggressive use of force,³¹⁴ such use of force by states has been so widespread as to prompt a debate over whether the relevant United Nations Charter provision is "dead or alive."³¹⁵ The transfer to the IMF of sovereignty over exchange rates has clearly been reversed with the breakdown of the par value system and the subsequent changes in the IMF's role under the Second Amendment.³¹⁶ Even the efforts at unification in Europe—involving, for example, the establishment of a single central bank—have met formidable obstacles deriving from concerns over sovereignty.³¹⁷

313. See *supra* notes 75-84 and accompanying text.

314. See *supra* notes 126-28 and accompanying text.

315. See *supra* note 131.

316. See *supra* notes 138-45 and accompanying text.

317. In Germany, for example, the Maastricht treaty (referred to in note 167, *supra*) was nearly stalled by a challenge on grounds that the transfer of powers to the European Communities that the treaty would result in might require German involvement in election procedures inconsistent with the German constitution. *German Constitutional Court Approves Maastricht Treaty*, 10 Int'l Trade Rep. (BNA) No. 40, at 1705 (Oct. 13, 1993). The German Constitutional Court ruled in October 1993 that by ratifying the treaty, Germany was not subjecting itself to an "automatic mechanism" but instead retained adequate national control over further steps in the unification process. *Id.* at 1705-06. For further reference to the concerns over sovereignty that the Maastricht Treaty raised, see *Maastricht's Double Jeopardy*, INT'L CORP. L., May 1993, at 12.

Against this record, it seems unlikely that the dominant countries of the North will soon surrender sovereignty to such an extent that any enforcement action could be taken against them in a situation they regarded as central to their national interest. It is difficult to imagine, for example, a multilateral force being mustered by the Security Council to drive the United States out of Panama³¹⁸ or to enforce a decision of the ICJ calling for reparations for U.S. mining of Nicaraguan harbors.³¹⁹

My second point—the absence of a broader population or legal context—warrants more elaboration. I will first offer, and then briefly explain, four propositions: (i) in order for a group to have an effective legal system, there must be a rule of recognition (as defined below); (ii) in order for there to be a rule of recognition, the group must have a feeling of cohesiveness, a sense of “Us”; (iii) in order for a group to have a sense of “Us,” there must be a “Them”; (iv) since there is no “Them” apart from our world as a whole, supranational law cannot constitute an effective legal system.

In the view of H.L.A. Hart, law is the union of primary and secondary rules.³²⁰ Primary rules direct behavior, usually by imposing duties on people; secondary rules, in contrast, usually apply to public officials and tell how the primary rules can be recognized as binding, can be adjudicated and can be changed.³²¹ According to Hart, writing

318. In December 1989, two-thirds of the members of the United Nations Security Council, including two of the five permanent members, voted in favor of a resolution strongly deploring the U.S. invasion of Panama, saying that it constituted “a flagrant violation of international law.” THOMAS EHRLICH & MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* 85, 91-92 (1993) (providing the text of the draft resolution and excerpts from the Security Council debates, U.N. SCOR, 44th Sess., 2902d mtg., U.N. Doc. S/PV.2902 (1989)). The United Nations General Assembly adopted a resolution to the same effect. *Id.* at 95-96 (providing the text and recorded vote on G.A. Res. 240, U.N. GAOR, 44th Sess., Supp. No. 49, at 52, U.N. Doc. A/44/49 (1989)).

319. In June 1986 the ICJ decided by twelve votes to three that the United States had violated customary international law by (among other things) laying mines in Nicaraguan territorial waters, and that the United States was under an obligation to make reparations. *See id.* at 182-83. The Reagan Administration vetoed a 1986 Security Council Resolution calling on the United States to comply with the ICJ’s judgment. *See* Richard B. Bilder, *The United States and the World Court in the Post-“Cold War” Era*, 40 CATH. U. L. REV. 251, 255 (1991). Bilder points out, however, that despite some predictions that the disposition of the *Nicaragua* case would discredit the ICJ and discourage states from submitting cases to it, the ICJ “has never been busier.” *Id.*; accord Keith Hight, *The Peace Palace Heats Up: The World Court in Business Again?*, 85 AM. J. INT’L L. 646, 646-47, 654 (1991) (“The Court, like a phoenix, appears to have emerged from the ashes of *Nicaragua*.”).

320. H.L.A. HART, *THE CONCEPT OF LAW* 77-79, 91-96, 151 (1961); *see also* MICHAEL D. BAYLES, *HART’S LEGAL PHILOSOPHY* 57 (1992).

321. This description of primary and secondary rules is drawn from HART, *supra* note 320, at 78-79, 91-95, and BAYLES, *supra* note 320, at 60. Bayles calls Hart’s distinction between

around 1960, international law lacked secondary rules and hence constituted a set of primary rules but not a legal *system*.³²²

Some important changes have occurred since 1960. For example, the 1969 Vienna Convention on the Law of Treaties has now formalized some secondary rules of change by specifying how a treaty can be created, modified and terminated.³²³ As for secondary rules of adjudication, the last decade or two have seen the establishment of several sets of arbitration rules—some multilateral³²⁴ and some bilateral or regional in character³²⁵—as well as various attempts, many of them successful, to establish new international courts.³²⁶

primary and secondary rules “uncharacteristically quick and sloppy,” BAYLES, *supra* note 320, at 67, because Hart characterizes the distinction differently in different contexts, *see id.* at 58.

322. HART, *supra* note 320, at 209, 222, 230-31.

323. 1969 Vienna Convention, *supra* note 181, arts. 6-16, 39-41, 54-68.

324. For an explanation and comparison of some of these, including the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules of 1976, the UNCITRAL Model Law of 1985, the Rules of the London Court of International Arbitration of 1985, the Rules of the International Chamber of Commerce of 1988, the Rules of the American Arbitration Association of 1986, and others, see generally Marc Blessing, *The Major Western and Soviet Arbitration Rules*, J. INT'L ARB., Sept. 1989, at 7. For the texts of the five sets of arbitration rules named above, see ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION: SELECTED TREATIES, STATUTES AND RULES 124-39, 173-86, 111-23, 97-107, 72-96 (1993).

325. For example, the Canada-U.S. Free Trade Agreement provides for arbitration as a means of settling certain trade disputes. See Andrew Anderson & Alan Rugman, *The Canada-U.S. Free Trade Agreement: A Legal and Economic Analysis of the Dispute Settlement Mechanisms*, J. INT'L ARB., Dec. 1989, at 65, 70-72. Arbitration also will be available under the NAFTA. See North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 8-17, 1992, arts. 2008-19, reprinted in 1 N. AM. FREE TRADE AGREEMENTS (Oceana) Booklet 3, at 309-14 (April 1993). The NAFTA entered into force on January 1, 1994. *U.S. Requests Petitions for Speeding Up Some Tariff Eliminations Under NAFTA*, 11 Int'l Trade Rep. (BNA) No. 1, at 16 (Jan. 5, 1994).

326. For example, the Inter-American Court of Human Rights was established under the American Convention on Human Rights, Nov. 22, 1969, arts. 52-69, 9 I.L.M. 673, 690-93 (entered into force July 18, 1978). The older European Court of Human Rights was established under the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 38-55, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), reprinted in BASIC INTERNATIONAL LAW DOCUMENTS, *supra* note 279, at 302, 307-09; and the European Court of Justice was established by the Treaty of Rome. See Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 164-88, 298 U.N.T.S. 3 (entered into force Jan. 1, 1958), reprinted as amended in 2 Zamora & Brand, *supra* note 144, at 45, 122-28; Protocol on the Statute of the Court of Justice of the European Economic Community, Apr. 17, 1957, 298 U.N.T.S. 147, reprinted as amended in 2 Zamora & Brand, *supra* note 144, at 151. A new International Tribunal for the Law of the Sea (the “Hamburg Court”) is to be established under Article 287(1)(a) of the 1982 Law of the Sea Convention once it comes into force. See *supra* notes 181, 280; Highet, *supra* note 319, at 653. Renewed proposals for an international criminal court have attracted much attention in recent years. For a survey of these, see generally Jose A. Baez, *An International Crimes Court: Further Tales of the King of Corinth*, 23 GA. J. INT'L & COMP. L. 289 (1993).

Although these developments might be viewed as partially overcoming international law's lack of secondary rules, the most important type of secondary rule is still absent: a rule of recognition, against which the validity of every other rule in the system can be tested.³²⁷ In many countries, a written constitution amounts to or reflects a rule of recognition. In the United States, for example, if a law is promulgated in accordance with procedures laid out in the Constitution and the law has not been declared unconstitutional by a court, the law is recognized as valid and binding.³²⁸

No such constitution exists, however, for the "community" of nation-states. Hart speculated that "[p]erhaps international law is at present in a stage of transition" toward acceptance of some basic rule of recognition providing general criteria of validity for rules of international law,³²⁹ but he saw no such rule then.³³⁰

I question whether such a rule of recognition can ever exist for international (now supranational) law, since as a physical matter there is no broader context into which that body of law could fit. The legal system of a city or county fits into the broader context of the province (or, in a federal legal system, a subsidiary "state," such as the State of Kansas) of which it is a part. It is defined and legitimized, at least in part, by that larger political unit. The constitution of the State of Kansas, for example, establishes the legal framework within which cities in Kansas can be incorporated and governed.³³¹ Likewise, the legal system of a province (or a subsidiary "state") exists within the broader context of the nation-state of which it is a part. The constitution of the United States, for example, provides a legal framework for the legitimate exercise of power by the State of Kansas,³³² so long as that exercise of power is consistent with federal law.³³³ In both cases it is understood that the broader context of political organization can,

327. A rule of recognition "specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group." HART, *supra* note 320, at 92.

328. For a more complex statement of the rule (or rules) of recognition in a national legal system, see BAYLES, *supra* note 320, at 79-80.

329. HART, *supra* note 320, at 231.

330. *Id.* at 230-31.

331. KAN. CONST. art. 12, § 5.

332. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

333. The priority of federal law over state law is established in the Supremacy Clause, under which the constitution and laws of the federal government "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, para. 2.

at least as a legal matter, both define the narrower group and impose certain minimum standards on its legal system. The existence of a "Them" makes it possible to speak of an "Us" and to establish a rule (or rules) of recognition.

This pattern of gaining legitimacy from the broader context, based on the notion of "Us" and "Them," has natural limits. If Earth were, as in many science fiction stories, part of a confederation of several inhabited planets, the legal regime governing that confederation might provide legitimacy from a broader context and a set of minimal standards for governance on Earth. Within such a framework, supranational law (on Earth) would be the law of "Us" and could constitute a true legal system, with effective secondary rules³³⁴—particularly rules of recognition—to apply in confirming or denying the legitimacy of a particular nation-state's legal system or the behavior of any other international legal entity subject to supranational law. Because there is no such broader context within which supranational law fits (no "Them"), however, supranational law cannot have a rule of recognition and hence cannot constitute an effective legal system.

In this respect, there has been little change since Grotius's time. In the 1600s, the rise of the nation-state as the new fundamental political unit in Europe and the corresponding demise of Christendom spelled the end of the larger context within which political leaders operated.³³⁵ The higher authority of religious and moral principles seemed to be disappearing in favor of a regime of purely voluntary rules. Grotius tried to retain these higher principles by positing that natural law is a key ingredient of the set of rules governing relations between states,³³⁶ but his attempt proved unsuccessful.³³⁷

Since the time of Grotius's failed attempt, no replacement for natural law has emerged. Some scholars suggest that a new consensus on fundamental principles of right and wrong has begun to appear recently, reflected partly in the development of international human rights law.³³⁸ I question that assessment. The world seems to be gaining, not losing, in cultural diversity and conflict, and to be witnessing an

334. For a discussion of secondary rules, see *supra* notes 320-21, 327.

335. See *supra* notes 38-42 and accompanying text.

336. See *supra* notes 66-70 and accompanying text.

337. See *supra* notes 73-81 and accompanying text.

338. See WESTON ET AL., *supra* note 80, at 23 ("[T]here may be a newly emerging consensus on enduring values."). A similar theme was sounded 35 years ago by Wilfred Jenks, who claimed that "contemporary international law . . . must be regarded as the common law of mankind in an early stage of its development," because dramatic legal and political changes since World War II—notably the political independence of many nations, the establishment of universal rules on the law of the sea and the rise of human rights—"have given us . . . the elements of a universal legal order." C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* xi-xii (1958).

ever-widening range of views among peoples and their governments on right and wrong behavior.³³⁹ As recent events in the former Soviet republics and elsewhere illustrate, ethnicity is on the rise with a vengeance.³⁴⁰

If my assessment is the accurate one, it is difficult to harbor much hope that supranational law will mature into an effective legal system. Instead, it is likely to remain incomplete, destined to continue stumbling along in the same way international law did. This is not to say that supranational law is unimportant or illusory. Quite to the contrary. The rapid increase in the number and coverage of primary rules, especially

339. For a recent assessment of the cultural and political factionalization of the world and the rise of ethnicity, see generally DANIEL P. MOYNIHAN, *PANDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS* (1993). See also Davydd J. Greenwood, *Cultural Identities and Global Political Economy from an Anthropological Vantage Point*, 1 *IND. J. GLOBAL LEGAL STUD.* 101, 108-11, 113-14 (1993). For a discussion of the evidence of this factionalization in international law in particular, see CASSESE, *supra* note 101, at 393-94. Cassese notes that although there is "a core of very general legal standards acceptable to all States," *id.* at 32-33, international law is nonetheless "the body of rules of a deeply split community," *id.* at 393, and "there are not many areas in which the views of the three groups [of states Cassese identifies] chime in unison," *id.* at 394. He offers a long list of the areas of dissent, including the process by which international law is made, the devices for settling disputes peacefully, the mechanisms for enforcing international law, the forms of protection of human rights, the regulation of international economic relations, the ways of helping economically underdeveloped countries and the means of exploiting natural resources outside state jurisdiction. *Id.* For an illustration of the range of views on one of these topics, the protection of human rights, see Yougindra Khushalani, *Human Rights in Asia and Africa*, in Snyder & Sathirathai, *supra* note 100, at 320, 320-39. Khushalani argues that "[m]eaningful discussion of human rights problems in [Asian and African] countries can take place only when the existence is recognized in these countries of different ethnic, religious, tribal and cultural groups." *Id.* at 320. Pointing out that "cultural and philosophical traditions have important things to say about human rights and their understanding on an international basis," *id.* at 322, Khushalani posits that except for certain generally accepted principles regarding state conduct, "there can be no universal understanding of human rights," *id.* He then provides a survey of the views taken on human rights in Chinese, Hindu, Islamic, Western and traditional African culture. See *id.* at 322-34. This diversity of views on human rights manifested itself recently at the World Conference on Human Rights, held in Vienna in June 1993. See Alan Riding, *Focus of Rights Conference: Theory, Not Specifics*, N.Y. TIMES, June 14, 1993, at A3; A.M. Rosenthal, *Do Gods Get Angry?*, N.Y. TIMES, June 18, 1993, at A15 (criticizing attempts by China, Indonesia and other countries to press the view that "Western standards of justice and human dignity must be measured against 'regional particularities and various historical, cultural and religious backgrounds'").

340. Greenwood, *supra* note 339, at 109-110. Greenwood notes, for example, that totalitarianism in the Soviet Union and Eastern Europe had merely kept ethnic conflict at bay, and that "[l]ifting the yoke produced the predictable explosion," creating now almost uncontrolled ethnic feuding and reviving "sectional hatreds of decades before." *Id.* at 110. Greenwood points out that ethnicity is also emerging in the United States, *id.* at 109 (noting that the "melting pot" image of the United States has been replaced with the "salad bowl" image), and that consequently it is becoming more difficult to know who is the "Us" and who is the "Them" in the United States, *id.* at 111, 116.

through treaties, will continue to erode the distinction between national law and supranational law; and secondary rules of adjudication and change³⁴¹ will continue to give structure to those primary rules. All the same, the absence of a rule of recognition will prevent supranational law from emerging as a true legal system as Hart defines it.³⁴² In short, there are more players, more rules and more referees in the game, but the character of the game is unchanged: the strongest players will still make most of the rules, supply most of the referees and win most of the time.

Disaster might dictate a different result. As noted above, a key example of the "multilateralization" that has given rise to supranational law is the emergence of several new international organizations from the ashes of the two world wars of this century.³⁴³ That enthusiasm for multilateral solutions was grounded on some shared views as to what mistakes had caused those wars, together with a shared commitment to avoid such mistakes in the future.³⁴⁴ If another disaster of the proportions of those wars were to occur—a chilling prospect—we might witness another burst of enthusiasm for multilateral solutions and renewed attempts to establish institutions to which states might transfer sovereignty with confidence.

V. CONCLUDING OBSERVATIONS

In this Article I have advanced the following thesis: because of a dramatic increase in the role of international organizations and in the coverage of multilateral sets of rules over the past half-century, the traditional concept of international law—a set of rules governing relations between nation-states and emanating from their own free will—should be replaced by the broader concept of supranational law. In supporting this thesis, I have offered a historical survey and several illustrations of the growth of supranational law, especially the recent establishment of the European Bank and its response to changing circumstances. I have also suggested why the multilateralization from which supranational law has emerged holds some appeal both for the North and for the South, and why, notwithstanding that appeal, supranational law is unlikely to mature into a complete and effective legal system.

I have not, however, offered an analysis of whether supranational law is a good thing. Should we applaud the rise of international organiza-

341. See *supra* notes 323-26.

342. See *supra* notes 320-22.

343. See *supra* notes 119-28, 137-42, 155-56 and accompanying text.

344. See *supra* note 156.

tions and multilateral sets of rules? Should we hope that they would lead toward a world government and a world constitution? These issues lie beyond the scope of this Article, but for the present I would offer the following preliminary thoughts.

First, multilateralization is inescapable. As the world becomes figuratively smaller, the need to harmonize rules and centralize functions will only increase. Hence supranational law will continue to develop.

Second, however, there are limits to how far and how fast multilateralization and the growth of supranational law can proceed. Ours is a world of extreme differences in culture, ideology, wealth and education. Given this heterogeneity, any attempt in the near future to establish a world government and a world constitution on a consensual basis would be doomed from the outset. Indeed, as I have pointed out, it is arguable that some, perhaps most, of the multilateralization so far has not been truly consensual.³⁴⁵

Does this make that multilateralization, and the supranational law that grows out of it, illegitimate? Or instead does the North have a right, or perhaps an obligation, to establish some kind of operative supranational legal regime, even one in which the North holds all the cards, rather than to permit a more open but more chaotic legal regime? In the abstract, it might seem better to resist the development of supranational law until consensus can be reached among the people and leaders of the world to support a new world order based on democratic principles. On the other hand, perhaps this is a case of the perfect being the enemy of the good.

345. See the discussion of "corporate veils" and "contracts of adhesion," *supra* notes 291-97 and accompanying text.