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# THE NEW TREATY MAKERS

JOSE E. ALVAREZ\*

**Abstract:** The “erosion of sovereignty” that is said to characterize globalization is not generally associated with any deviation from the fundamental principle that states must freely consent before they can be said to be bound by any international agreement. With few exceptions, as with respect to Iraq in the wake of the Gulf War, states are rarely told that they must adhere to any particular treaty—despite emerging notions of “global governance.” The initiation and conclusion of modern treaties is still generally seen as the affirmation of sovereignty, rather than its diminution. Modern treaties, the only source of international obligation said to emerge from conscious attempts to make law and still requiring the unambiguous, genuine consent of states, remain the embodiment of sovereignty as classically understood. This Article challenges this view by examining how international organizations have altered the methods by which treaty negotiations are initiated as well as the final results achieved through such negotiations. If state sovereignty has been “eroded” or transformed in the wake of World War II, the new forms of treaty making and the new treaty makers are part of that story.

## INTRODUCTION

Cynthia Lichtenstein, as a scholar and teacher, is that rarity in public international law: a gifted generalist who has been equally adept in discussing human rights as trade; international monetary affairs as international courts. Her passion for addressing the “big picture”—the relative power of sovereign states and international organizations, the relative weight of law and politics—is reflected in the chosen theme for this Symposium: “Globalization and the Erosion of Sovereignty.” Professor Lichtenstein’s scholarship, which has often crossed discrete specializations within our field to consider, for example, issues of war and peace, as well as international economic law, now appears prescient, and not merely since September 11, 2001.

It is now clear that, as Professor Lichtenstein has often reminded us, there are few truly “self-contained regimes” in international law,

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\* Professor, Columbia Law School. Presented as a keynote address in a Symposium at Boston College Law School on Nov. 2, 2001 given in honor of Professor Cynthia Lichtenstein.

no clear lines separating economic concerns from those of national security, no clean boundaries between institutions of international governance or between those organizations and domestic law making mechanisms. We are becoming increasingly aware that the lines between domestic and international rule making are as porous as the borders between nations. This is a world that has the Security Council (most recently in resolution 1373 of September 28, 2001 barring and freezing financial transactions of undefined terrorists) assuming roles once reserved to the U.S. Treasury Department under the International Emergency Powers Act. The Council's authority to secure or maintain international peace has been used as a license to use force against unelected regimes, to put pressure on war lords who deny food to people, to oversee mechanisms for compensating victims of aggression as in Kuwait, to establish war crimes tribunals, and to authorize collective military action against human rights violators. Other international organizations have also expanded their institutional boundaries. For its part, the World Bank (Bank) now embraces goals such as environmental sustainability, anti-corruption, tax reform, and privatization. The Bank worries about indices of success far removed from the quality of the infrastructure projects that it was originally charged with establishing—such as levels of infant mortality, gender equality, and equitable income distribution. That financial institution, along with the International Monetary Fund (IMF) and the World Health Organization (WHO), is even now collaborating on a treaty to regulate the sale and marketing of tobacco products.

In addition, the “judicial branch” of globalization is becoming restive as well. The members of the international judiciary, now 200 members strong across some seventeen international tribunals, are also increasingly adept at crossing disciplinary divides to pass on the consistency of domestic law with international rules.<sup>1</sup> Globalization means that NAFTA arbitral panels, under Chapter 11, are beginning to issue decisions on regulatory takings that some liken to those of the U.S. Supreme Court during the *Lochner* era.<sup>2</sup> Dispute settlers charged with interpreting trade rules are now passing judgment on the customary law status of the precautionary principle as well as do-

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<sup>1</sup> See, e.g., Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 711 (1999).

<sup>2</sup> See VICKI BEEN, *THE GLOBAL FIFTH AMENDMENT: NAFTA'S INVESTMENT PROTECTIONS AND THE MISGUIDED QUEST FOR AN INTERNATIONAL 'REGULATORY TAKINGS' DOCTRINE* (forthcoming 2002) (on file with author).

mestic environmental regulations.<sup>3</sup> Even relatively weak adjudicators, such as the Human Rights Committee, charged with interpreting the International Covenant on Civil and Political Rights (ICCPR), are bold enough to suggest that the right to life in that treaty casts doubt on the legality of designing, testing, manufacturing, possessing, and deploying nuclear weapons.<sup>4</sup> Not to be left behind, a number of national courts, such as the House of Lords in the case involving Pinochet and the Second Circuit in the case against Karadzic, are increasingly engaging in trans-judicial communication of their own—with judges of other nations—while challenging formerly sacrosanct concepts of international law such as head of state immunity or the liability of non-state actors for international torts.<sup>5</sup>

These incremental expansions of the authority of international regimes, along with the increased internationalization of domestic law making and judicial processes, and the domestication of international rules and processes, are the types of phenomena that the organizers intend to capture by pairing the twin concepts of “globalization” and “eroding sovereignty” as the theme of this Symposium.

Both “globalization” and “sovereignty” are, of course, contested terms. For believers in threatening U.N. black helicopters, the erosion of sovereignty implies lack of control or undemocratic delegations of power to faceless international bureaucrats. For those in Europe who, at least prior to September 11th, bemoaned U.S. unilateralist defiance of such worthy international projects as the ban on landmines, the Kyoto Protocol, arms control treaties, and the International Criminal Court, globalization means recognizing the virtues of multilateralism and the limits of hegemonic power. Others would defend only some forms of multilateralism. There are some within the United States who regard NAFTA or the World Trade Organization (WTO) as “democracy enhancing” regimes that serve to curb the protectionist excesses of national government but have only disdain for other multilateral regimes—such as those dealing with human rights or

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<sup>3</sup> For a survey of the interplay between public international law and WTO dispute settlement decisions to date, see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001).

<sup>4</sup> *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR Hum. Rts. Comm., at 1, 18, U.N. Doc. HRI/GEN/1/rev (1984).

<sup>5</sup> See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Regina v. Bartle*, 2 W.L.R. 827, 38 I.L.M. 581 (H. L. 1999) (U.K.); see also Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1995).

environmental protection—which they regard as hostile to representative government.<sup>6</sup>

At the heart of debates over whether sovereignty is indeed being ceded—whether the state is disaggregating,<sup>7</sup> eroding, or simply becoming more porous—are intergovernmental organizations. These international organizations (IOs) have helped to alter the structures for treaty making. In this Article, I will focus on the changes in treaty making wrought since 1945 and why they matter to sovereignty.

## I. THE PROLIFERATION OF TREATIES

There is little doubt that recent decades have witnessed a striking proliferation in treaties, including multilateral agreements of ambitious substantive scope that aspire to universal participation. Since the establishment of the U.N., treaties have attempted to codify both traditional topics of international law (e.g., the law of the sea, diplomatic and consular relations, the law of treaties, the laws of war, or international humanitarian law) as well as newer subjects not previously regarded as amenable to or suitable for international regulation (such as trade, intellectual property, investment, and international criminal law). From 1970 through 1997, the number of international treaties more than tripled.<sup>8</sup> Even that ostensible unilateralist, the United States, has not been immune from being drawn into this dense treaty network. In the 1990s the United States concluded 3106 treaties, after 3690 in the 1980s, 3212 in the 1970s, and 2438 in the 1960s.<sup>9</sup> We often suggest that the primary explanation for international legalization is

<sup>6</sup> See, e.g., John R. Bolton, *Should We Take Global Governance Seriously*, 1 CHI. J. INT'L L. 205 (2000); John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT'L L. 381 (2000); see also Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI. J. INT'L L. 291 (2000).

<sup>7</sup> See Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF., Sept.–Oct. 1997, at 183.

<sup>8</sup> Stewart Patrick, *Multilateralism and its Discontents: The Causes and Consequences of U.S. Ambivalence*, in MULTILATERALISM AND U.S. FOREIGN POLICY 10 (Stewart Patrick & Shepard Forman eds., 2002).

<sup>9</sup> UNITED STATES SENATE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE—A STUDY PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS, S. Doc. No. 106-71, 106th Cong., 2d. Sess 39 (2001). A study of the treaty practices of the United States in the most recent period, after its rise to the status of sole superpower, finds traditional U.S. ambivalence towards adherence to treaties only “slightly more marked” than in prior periods. See Nico Krisch, *Weak as a Constraint, Strong as a Tool: The Place of International Law in U.S. Foreign Policy*, in INTERNATIONAL PERSPECTIVES ON U.S. UNILATERALISM AND MULTILATERALISM (David Malone & Yuen Foong Khong eds., 2002) (forthcoming 2002).

functionalism. In other words, states are driven to regulate at the international level by ever-rising movements of people, goods, and capital across borders, along with positive and negative externalities emerging from such flows—from the rise in a common human rights ideal to emerging threats to the global commons. But we should not lose sight of the fact that the proliferation of treaties is aided and abetted by the concomitant rise in intergovernmental organizations.<sup>10</sup> The age of global compacts is not incidentally also the age of IOs.

As of 1995, of some 1,500 multilateral treaties in existence, nearly half were attributable to U.N. system organizations, and the rate of production of new treaties undertaken within the auspices of international organizations appears to be steadily increasing.<sup>11</sup> A substantial number of the approximately 3500 meetings undertaken annually within the U.N. involve some kind of treaty-making activity and that organization alone has been involved in the conclusion of some 300

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<sup>10</sup> At present, there are more than 250 conventional international governmental organizations, roughly another 5200 intergovernmental bodies of various kinds, and over 1500 non-governmental organizations registered with the U.N. See Charlotte Ku, *Global Governance and the Changing Face of International Law*, 2 AUNS REP. AND PAPERS 5, 24 (2001). While these numbers are impressive, it is important to recognize that international institutions have life cycles and occasionally die. The growth in these institutions “occasionally plateau[s] following periodic organizing bursts.” *Id.* at 22 (quoting Shanks, Jacobson, and Kaplan).

<sup>11</sup> Paul Szasz, *General Law-Making Processes*, in 35 UNITED NATIONS LEGAL ORDER 59 (Oscar Schachter & Christopher C. Joyner eds., 1995). While, according to one study, there were only eighty-six multilateral treaties concluded in the 100 years between 1751–1850, there were more than 2000 concluded for the twenty-five year period between 1951–1975. Ku, *supra* note 10, at 5. This is not to suggest, however, either that the number of multilateral treaties has been raising in predictable or steady fashion over recent years or that ever greater numbers of traditional intergovernmental organizations on the model of the U.N. are being established by such treaties. Neither is true. That study reveals a drop-off in the number of new multilateral treaties being concluded in the 1976–1995 period compared to the period of 1951–1976, along with a decrease in the number of treaties that create conventional intergovernmental organizations in the model of the U.N. *Id.* at 5–23. That study also indicates that multilateral treaties intended for general participation by all states still constitute a minority of all treaties concluded annually and that the bulk of treaty making remains on a bilateral basis. *Id.* at 5. But note that the absence of growth in traditional intergovernmental organizations does not signify a withdrawal of commitment from other forms of institutionalization considered here, including the rise in unconventional forms of institutions. For a survey of these in one specialized field, see for example, Paul C. Szasz, *The Proliferation of Arms Control Organizations*, in PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 135 (N.M. Blokker & H.G. Schermers eds., 2001); see also Philippe Sands & Pierre Klein, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* 121–28 (5th ed. 2001) (discussing environmental accords).

multilateral agreements.<sup>12</sup> The U.N. and other comparable institutions have helped to create a “gigantic treaty network . . . regulating all major international activities.”<sup>13</sup> Some international organizations—such as the U.N. itself, the International Labor Organization (ILO), and the WTO—were intended to be what they have become: virtual treaty machines. Whole areas of modern international law, including human rights, would be unimaginable absent treaties concluded under IO auspices.<sup>14</sup>

## II. THE ROLE OF INTERNATIONAL ORGANIZATIONS

How have IOs changed the realities of treaty making to help bring about multilateral regimes that are both decried and praised for eroding sovereignty?

In the 19th century, the fundamental mechanism for multilateral treaty making was the ad hoc conference. Before the advent of IOs, multilateral treaty making required the initiative of a state sufficiently aroused about an issue that it was willing to devote scarce diplomatic resources to motivate others and to convene such a conference on its territory. Usually, the initiator state determined which states to invite and the negotiating agenda. Once convened, the success or failure of such conferences turned on the acumen and leverage exercised by the government representatives present. In accordance with the principle of sovereign equality, decisions were usually taken on the basis of unanimity. The governments present determined whether there would be subsequent efforts to complete the treaty or, if the treaty was concluded, whether there would be any procedures for follow-up. In the usual case, enforcement was left to reciprocal action by the individual state parties. Except in unusual circumstances, each multilateral treaty negotiation was a freestanding and entirely ad hoc undertaking, with no necessary connection to any other treaty arrangement.

The shortcomings of such conferences are, in retrospect, obvious.<sup>15</sup> Since they were dependent on the willingness of a particular

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<sup>12</sup> Roy Lee, *Multilateral Treaty-Making and Negotiation Techniques: An Appraisal*, in *CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARTZENBERGER ON HIS EIGHTIETH BIRTHDAY 157* (Bin Chang & Edward Brown eds., 1998).

<sup>13</sup> *Id.* at 158.

<sup>14</sup> *See id.* at 177–216.

<sup>15</sup> *See, e.g.*, Sands & Klein, *supra* note 11, at 1–4. This is not to deny the impact, over the long term, of conferences such as the First Hague Peace Conference in 1899 which, in the views of some, helped to usher in the modern period devoted to building international

state host, treaty making was haphazard and proposals for negotiations on such compacts usually came long after the need for international regulation had become acute. Even when treaty conferences were convened, there were no guarantees that all states needed to resolve the underlying problem or that would be affected by any proposed solution would be present. Complications could ensue due to the failure either to include all relevant state parties or all interests not adequately represented by state delegations. Those invited and present at those conferences could not be sure that the full dimensions of an issue, much less related questions that might be of interest only to some states, would be aired—especially if such issues were deemed outside the scope of the host state's agenda or would raise prickly issues for the gracious host. Since preparations for such conferences were typically left to each state that managed to send a delegation, there was no assurance that negotiations would be based on all available technical or factual data or that all states would have equal access to any such information or to applicable legal precedents. Individuals at such negotiations may have met for the first time at the negotiating site and, given the absence of instantaneous communications, were relatively cut-off from their national capitals during the negotiation period. All of these factors led to rigidities in states' negotiating positions. All of them dampened the likelihood of success.<sup>16</sup>

In game theoretic terms, the ad hoc conferences of the 19th century resembled single play prisoners' dilemmas, lacking the benefits that we might achieve with repeated play or long term association, including reductions in transactions costs and uncertainty, and mutual reliance on long term reputation over short term calculations of interest. There were few sunk costs involved in such forms of treaty making. No international civil servants existed to serve as repositories of knowledge, to transmit information or to propose compromise formulations; without international institutions, there were fewer mechanisms to enable states to pool their resources. There were few established rules of bureaucratic procedure that could be relied upon at the international level to encourage what economists and others have called "path dependencies."<sup>17</sup>

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institutions, culminating in the establishment of the League of Nations. See, e.g., Ku, *supra* note 10, at 14–15.

<sup>16</sup> See, e.g., Sands & Klein, *supra* note 11, at 3–4.

<sup>17</sup> For a survey and critique of path dependency theory, see S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-in, and History*, 11 J. L. ECON. & ORG. 205 (1995). For consideration of the relevance of path dependency to the evolution of the common law,



Further, multilateral treaties were, in the 19th century at least, not very multilateral. If a treaty was, despite evident deficiencies, concluded, the state designated as the state of registry was in a position to deny attempts to ratify by governments that it did not wish to associate with, thereby discouraging actual universal participation. Nor was this an entirely academic concern: this was a time, after all, when many states of the world were considered to be beneath the notice of “civilized states.” Worse still, in the absence of on-going mechanisms for follow-up, treaty regimes failed to deepen and could even become obsolete due to changing needs or technology.

The establishment of organizations aspiring to universal or nearly universal membership corrected many of these shortcomings and have made the ad hoc treaty conference unconnected to an established IO a less preferred venue for treaty making. Most multilateral treaty regimes of any depth today are the product of one or more of the following four organizational patterns for treaty making: (1) IO (especially U.N. sponsored) treaty making conferences; (2) expert treaty making bodies; (3) “managerial” forms of treaty-making; or (4) what some have called institutional mechanisms for “treaty making with strings attached.” Each will be briefly described below.

U.N. treaty making conferences—such as the massive 1998 negotiations at Rome to establish an International Criminal Court (ICC), involving approximately 160 states, 33 intergovernmental organizations, over 200 NGOs, and over 400 journalists on site—usually occur after a canvassing of views, occasionally exhaustive, and often convene with a draft text in hand. Modern treaty making conferences operate on the basis of flexible determinations of consensus rather than rigid unanimity rules. They follow established organizational patterns, such as division between a plenary and more specialized bodies and formal versus informal sessions. They rely as well on reasonably clear rules of procedure that avoid the need to reinvent the wheel on such topics as the credentials of delegates or rules for submitting proposals or quorums.<sup>18</sup> Often they rely upon familiar groupings of states seen elsewhere in the U.N.—associations that encourage issue linkage and package deals. They use IO secretariats to conduct advance preparations (such as circulating detailed questionnaires among participants) to formulate manageable work plans, and to encourage reliance on

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see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 622–30 (2001).

<sup>18</sup> ROBBIE SABEL, *A STUDY OF THE RULES OF PROCEDURE OF CONFERENCES AND ASSEMBLIES OF INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS* (1997).

final standard clauses as with respect to reservations and entry into force. IO staff also serve as legitimating conduits for proposals made by unpopular or isolated states. Members of the international civil service even on occasion assist in drafting compromise language.

The second organizational pattern relies on experts—as with respect to public international law (such as the International Law Commission (ILC)), international economic law (such as the United Nations Commission on International Trade Law (UNCITRAL)), or more specialized topics (such as the International Civil Aviation Organization's (ICAO) legal committee). Expert treaty making bodies generally adhere to carefully delineated, predictable procedures that produce large volumes of information, as with respect to the current practices and opinions of states. Usually working in tandem with U.N. conferences, these institutionalized experts produce drafts that, at their best, achieve technocratic legitimacy because of their source and quality. For example, ILC commentaries and draft provisions for proposed treaties that have yet to be concluded have sometimes been relied upon by states and others as reliable accounts of existing custom.

Managerial forms of treaty-making, in areas such as trade, the environment, and human rights, attempt to secure the benefits of institutionalization on an on-going basis and not only when treaties are initially concluded. They establish entities that are authorized to elaborate standards, as well as monitoring bodies charged with enforcement and interpretation, including, in the cases of regional human rights and trade, binding forms of dispute settlement. Thus, environmental framework conventions establish committees of the parties and other working groups for on-going norm elaboration, interpretation, and “soft” enforcement, such as consideration of states’ reports of implementation. These framework conventions establish “living” treaty regimes without recourse, in the usual case, to formal international organizations with distinct legal personality or substantial secretariats. Whether or not they resort to harder forms of enforcement such as binding dispute settlement, several of these managerial regimes have deepened over time and all offer “the prospect of a virtually continuous legislative enterprise”<sup>19</sup> capable of responding to changes in technology or to the needs of the parties. The success of these modern treaty regimes can no longer be judged the way we

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<sup>19</sup> Gunter Handl, *Environmental Security and Global Change: The Challenge of International Law in ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW 199* (W. Lang et al. eds., 1991).

judged the 19<sup>th</sup> century compact— through a snapshot frozen at a single moment in time. The success of these living treaties is now best measured through a modern motion picture, which is able to record their evolutionary development across time. The twelve protocols of the European system of Human Rights, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the Uruguay Round are all products of managerial regimes and are characteristic of how they function.

Finally, there is treaty making that is constitutionally sanctioned, even mandated, under the charter of a formal full-fledged IO that tries to pressure its members to ratify the treaties produced by the regime. The clearest manifestation of such “treaty making with strings attached” is the ILO. The ILO’s Constitution incorporates a highly structured, relatively rigid set of procedures that produce, at predictable intervals, treaty instruments—at last count over 170 of them. The ILO’s Constitution ties “strings” to its instruments, requiring ILO members to bring the conventions to the attention of their legislatures and requiring periodic follow-up reports on implementation. A variety of ILO expert bodies thereafter engage in monitoring and dispute settlement, though not clearly with binding effect. The ILO attempts, with mixed success, something of an end-run around sovereign consent. The reporting and other obligations imposed under the ILO’s Charter mobilize shame on behalf of treaty ratification.

Of course, these four organizational patterns for treaty making are not invariably successful. Some organizational venues have delegitimized treaty negotiation efforts. During the bad old days of the New International Economic Order (NIEO), for example, endorsement of an economic treaty by the General Assembly was the kiss of death—at least among western business constituencies. IO bureaucracies, like bureaucracies elsewhere, may also prove inefficient or ineffective at encouraging agreement; they may develop their own agendas at the expense of the state principals they ostensibly serve. Ritualized institutional precedents may sometimes limit negotiators’ field of vision; path dependencies, such as an infatuation with decisions by “consensus” however cosmetic, may lock negotiations onto the wrong historical path or result in meaningless lowest common denominator solutions. Modern international law is strewn with the wreckage of package deals that fail to secure the rates of ratification expected within a reasonable time—even when these result from the efforts of experts as in the ILO. And there is no guarantee that even when IOs promulgate widely ratified treaties, what IOs produce are any better at taking care of the underlying problems sought to be

solved. As with respect to domestic law, more law or more treaties is not necessarily a good thing. Quantity should not be confused with quality.

But, these four organizational patterns have changed the landscape of treaty making in at least five respects that are essential to understanding both the nature of globalization as well as perceived erosions of sovereignty.

First, IOs have dramatically expanded the diversity of actors involved in treaty making. The winners have been less powerful governments, NGOs and other interest groups, the international civil service and experts, including public international law scholars. Due to the use of IOs as venues, it is now far more likely that even small or less powerful states will be able to make an impact on the types of issues that are subject to treaty negotiations, as well as with respect to the substance of what is ultimately concluded. Thanks to such venues, less powerful governments are more likely to be able to secure the benefits of a treaty obligation with powerful states. Without IOs, powerful states would be freer to engage bilaterally or multilaterally only with those states with whom they have an interest in contracting. IOs, even if only by making the neutral U.N. and not a host state the depository of treaty ratifications, have made modern multilateral treaties more truly multilateral, thereby democratizing treaty making.

Structural aspects of IOs, including provisions for access to documents and for observer or other forms of non-voting status, have, in addition, provided entry points for NGOs' growing participation in various forms of interstate diplomacy, including treaty making. They permit domestic interest groups, along with relevant domestic government agencies, to direct their lobbying efforts on those IOs that are the most promising venues for their concerns. Thus, business groups in the United States whose competitive interests were threatened by the United States' Foreign Corrupt Practices Act sought to multilateralize the regulation of bribery—and thereby level the playing field—in the forum most likely to reach their main European and Japanese competitors, namely the Organization for Economic Cooperation and Development (OECD). Similarly, a transnational alliance of business leaders anxious to secure enforceable intellectual property rights, dissatisfied with World Intellectual Property Organi-

zation's (WIPO) efforts, were able to frame this issue as a proper matter for the WTO.<sup>20</sup>

In addition, the conception of an international civil service as a breed apart, distinct from the governments from which these individuals emerge, has legitimized the participation of IO secretariats in treaty making. The power of such individuals to become active in treaty making, only sometimes explicitly conferred—as in a resolution inviting secretariat participation in the compiling of state views or in drafting an initial negotiating text—has been generally assumed to be part of a secretariat's "implied powers."

Expert treaty-drafting bodies have opened the door to yet another type of non-state actor: the individual legitimized by their expertise and claim to independence. In other organizations, such as the ILO, the participation of distinct constituencies—namely employers and labor unions—is built into the constitutional structure of treaty making. In these respects as well the involvement of IOs in treaty making has "democratized" the process. The wider diversity of state and non-state actors helps to explain the wider diversity of treaties concluded in the age of IOs, as well as the variety of pressures that are brought to bear on those governmental representatives who are still, in most respects, at least formally in charge of the initiation of treaty making, as well as formal ratification.

Second, IOs have either multiplied the options for treaty initiators or complicated their lives depending on one's point of view. Today, the initiation of a multilateral treaty negotiation requires, as a key and crucial decision, the matter of organizational venue. Those intent on negotiating modern international compacts need to decide not just between whether to convene a special ad hoc conference or to resort to a standing international organization. They also need to decide which international organization and which organs within them ought to be involved. In recent years, the international community has confronted a number of such choices. Treaty efforts on bribery have involved regional IOs such as the OECD, the European Union, the OAS, and the Council of Europe, as well as international financial organizations and the U.N. General Assembly.<sup>21</sup> Nuclear proliferation

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<sup>20</sup> See Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. INT'L ECON. L. 275, 282–83 (2001). Abbott goes on to explain that business interests did not pursue their interests in transnational regulation on bribery within the WTO because leveling the playing field against the smaller non-OECD competitors "was not a sufficiently high priority." *Id.* at 282.

<sup>21</sup> *Id.*

issues have involved choices as between the IAEA or the U.N. General Assembly, while foreign investment, initially considered in the OECD and in regional treaties, may yet be folded into the WTO.

Determining which organization and which sub-organ ought to be the venue in which to initiate a treaty process may determine whether the process will involve time-consuming and exhaustive analysis of the current state of the law by general legal experts,<sup>22</sup> more superficial examination of the need for a treaty by those attentive to the political desires of states,<sup>23</sup> or thorough examination of the need for a treaty relegated to technical experts in relatively narrow specialties.<sup>24</sup> Alternatively, treaty initiators may opt for processes that contain elements of all of these, such as the ILO. Organizational venues may also determine whether negotiators will be able to take advantage of a credible dispute settlement process<sup>25</sup> or other supervisory procedures, be able to engage in a gradualist strategy that relies initially on soft law and soft enforcement, or be able to secure efficacious regional credibility.<sup>26</sup> The choice of organizational venue may determine whether treaty negotiations will be more or less transparent since distinct IOs have different traditions in this respect. Given this range of choices, the ability to choose among organizational venues implicitly forces treaty initiators to consider matters relating to the substance of the proposed treaty even before formal negotiations begin.

The choice of organizational venue speaks volumes concerning the intent of principal treaty backers. Those who attempt to insert a new issue in a WTO trade round, for example, would appear to be suggesting that the issue has an implicit link to trade, since that is the WTO's domain, and that it is an issue that can be appropriately made the subject of WTO dispute settlement as well as WTO-sanctioned trade retaliation if necessary, since these remedies have, at least since the Uruguay Round, been assumed to be applicable to all or most matters within the WTO. Anticipation that both the linkage to trade and enforcement issues will need to be addressed casts a shadow—a positive and a negative—over the prospect of initiating negotiations

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<sup>22</sup> Such as the ILC.

<sup>23</sup> E.g., in the assemblies of various IOs representing the full membership.

<sup>24</sup> Such as in ICAO's Legal Committee.

<sup>25</sup> As in the WTO.

<sup>26</sup> See, e.g., *id.* at 289–90 (noting how the U.S.'s strategy with respect to the regulation of bribery was highly congenial to the OECD given that organization's tendency to act through a variety of both hard and soft instruments, as well as reliance on peer review and public pressure rather than litigation).

within the WTO.<sup>27</sup> While it might be assumed that the prospect of binding dispute settlement would tend to discourage adding new issues to the trade regime, it would appear that in at least some cases, such organizational realities may enhance the attractiveness of the WTO. Certainly the pressure to link some issues to the trade regime, such as labor rights or environmental concerns, stems in part from penance-envy:<sup>28</sup> the perception, accurate or not, that WTO dispute settlement constitutes the most effective enforcement tool available at the global level and that such a potentially effective tool ought to be made applicable to these other concerns. At the same time, IOs develop distinct institutional cultures that may hinder attempts to use them as negotiating venues in some cases. The WTO's tradition of including issues in trade rounds only if these can be the basis of reciprocal concessions, for example, may make it difficult to build into that regime treaty commitments less amenable to such trades.<sup>29</sup>

Third, because IOs increase the number of actors involved as well as the options available to treaty makers, they have a third impact: they alter the role of state power. The involvement of IOs may decrease the salience of traditional state power. Unlike in the 19th century, a serious multilateral treaty negotiation today does not require a hegemonic prime mover. Suggestions for such negotiations may be and are made even by the least powerful state representatives to an international organization, as in the U.N. General Assembly or comparable plenary bodies where the formal rules for voting (one state/one vote), can secure majority support for proposed treaty making over the opposition of a minority of powerful states. The 1990 action by the General Assembly that ultimately led to the successful conclusion of the Rome Statute for the ICC on July 17, 1998 stemmed from a 1989 initiative by Trinidad and Tobago, for example. Thanks to IOs, smaller or less powerful states are also more likely to find allies in a common cause, thereby permitting some leverage to be asserted even as against powerful states.

The access rights given to NGOs also increase the proportionate power of these purported representatives of international civil society

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<sup>27</sup> *Id.*

<sup>28</sup> I owe this colorful turn of phrase to Joel Trachtman.

<sup>29</sup> See, e.g., Abbott, *supra* note 20, at 286, 291. Abbott contends that the WTO's culture of focusing on market access to the exclusion of more normative dimensions as well as emphasis on hard law rather than softer obligations, made it an unlikely forum for focusing on the normative aspects of the bribery and corruption issue in the ways that the OECD was able to do. *Id.* at 286–291.

over treaty making decisions. Intense and successful NGO lobbying efforts on behalf of some treaties—as with respect to land-mines or to establish an individual complaints mechanism for the Convention on the Elimination of Discrimination Against Women (CEDAW)—are the predictable result.<sup>30</sup> The increasing attention given to the power of NGOs misses part of the picture if it fails to acknowledge that inter-governmental organizations are often the conduit for the growing clout of NGOs.<sup>31</sup>

The very existence of IOs conditions the traditional use of state power. In theory, governments retain the option of starting treaty negotiations the old-fashioned way, namely through a diplomatic approach to select states and invitations to a special ad hoc conference to conclude a stand-alone treaty. In practice, while such ad hoc conferences continue to be used for some treaty negotiations, many modern multilateral treaty negotiations have been authorized by an IO, such as the U.N. General Assembly, and many of these treaties establish bodies that function much like IOs even after a text is concluded, as in environmental regimes. The reasons are straightforward: most treaty initiators want to secure the advantages of an organizational setting, and even when key players do not, there may be considerable political pressure brought to bear to secure the endorsement of the organizational body whose established competence appears most directly relevant. Today, even a powerful state would find it difficult to attempt a major multilateral treaty making effort regarding international civil aviation, for example, without at least attempting to involve ICAO or presenting credible reasons why that institution's involvement would be inappropriate. In addition, should the relevant organs of ICAO, including the expert bodies normally involved in such efforts, reject such a proposal, the prospects for a successful negotiation involving a credible number of participants are

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<sup>30</sup> For a discussion of the early evolution of an Optional Protocol to CEDAW, and the impact of U.N.-sponsored human rights conferences at Vienna (1993) and Beijing (1995), see Lilly Scharipa-Behrmann, *An Optional Protocol to CEDAW: A Further Step Towards Strengthening of Women's Human Rights*, in LIBER AMICORUM: PROFESSOR IGNAZ SEIDL HONHENVELDERN IN HONOUR OF HIS 80TH BIRTHDAY 683 (Gerhard Hafner et al. eds., 1998). For a critical view of the significant role played by NGOs with respect to the landmines convention, see Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91 (2000).

<sup>31</sup> Indeed, some believe that international society has entered a new post-institutionalist period dominated by international civil society. See, e.g., Ku, *supra* note 10, at 26–34 (noting the far larger rise in the numbers of NGOs relative to the more modest increase in the numbers of traditional intergovernmental organizations).



considerably diminished. Where an IO exists with jurisdiction over a matter that is proposed for treaty making, its mere existence affects the decision of whether, when, and where to initiate such a negotiation.

At the same time, IOs remain vehicles for the assertion of state power. The choice among organizational venues is often influenced, not to say determined, by the continuing realities of relative power. It was important in the now comparatively innocent 1960s and 1970s, when airline hijackings first dominated the headlines, for example, for the primary movers of anti-terrorism conventions, like the United States, to have these negotiations initiated in the relatively efficient confines of ICAO rather than in the U.N. General Assembly. Western preferences have also prevailed with respect to other choices of venue—as respect to the trade regime (over WIPO) for intellectual property; the International Atomic Energy Agency (IAEA) (over the General Assembly) for certain proliferation conventions; and the OECD (over the WTO) for the aborted Multilateral Agreement on Investment (MAI). Power still matters to modern treaty making but it is often exercised to a distinct end: to favor one organizational forum for negotiations over another.<sup>32</sup>

Even when powerful states prevail in their choice of organizational venue, that choice may constrain them. Particular organizational venues often constrain even the powerful. The United States paid a price for the various anti-terrorism conventions that it successfully and speedily concluded under ICAO auspices some thirty years ago. While the United States would have preferred a comprehensive treaty regime leading to the suppression of the most serious acts of terrorist violence regardless of setting, the ICAO setting for such negotiations, while far preferable to the U.S. standpoint than the U.N. General Assembly, compelled a narrower and more piecemeal approach. It virtually ensured criminalization only for acts directly relating to civil aviation, namely violence on board aircraft, the targeting of aircraft for destruction, aircraft hijacking, and offenses at interna-

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<sup>32</sup> Nor, of course, does power cease to be relevant once negotiations begin or a treaty is concluded. As ICAO's anti-terrorism conventions remind us, use of an organizational venue for purposes of negotiation does not ensure that organizational mechanisms will be used for enforcement. Those conventions avoid the use of established ICAO fora, including the methods of dispute settlement within ICAO's constitution (resort to the ICAO Council and to the ICJ). Instead, the extradition and prosecution regime effectively puts the onus of enforcement back on state parties, thereby giving powerful states, capable of exerting leverage on others, considerable free rein.

tional airports.<sup>33</sup> In addition, while the United States initially wanted a regime that would permit joint enforcement action such as an international civil aviation boycott against a state that failed to honor its obligations to extradite terrorists, it quickly abandoned this goal when negotiators realized that such a hard sanction was a non-starter in an organization with an ethos that identifies the right to engage in civil aviation as a fundamental sovereign right.<sup>34</sup> Today, in the wake of September 11th, the United States appears to be scrambling back to an organization that it sought to avoid in the 1970s, namely the U.N., since that organization now offers the better prospect for achieving broader anti-terrorism goals, including treaties that fill gaps remaining in the wake of ICAO's efforts.

In addition, since states rightly assume that the choice of organizational forum matters, they expend considerable resources to make sure the right one is chosen. Strenuous and diplomatically costly efforts were necessary to make sure that, for example, foreign investment negotiations were initiated in the OECD, and not the WTO. In that instance, while the United States and many of the other leading exporters of capital would have preferred a regime for foreign investment with global reach, the decision to negotiate the MAI within an organization with a more limited membership was a calculated, ultimately unsuccessful, gamble to forego geographical reach in favor of presumptive depth of obligation.

Fourth, international organizations have vastly increased the amount of information available to treaty initiators. The information supplied by organizational venues may encourage the initiation of treaty making directly, as through proposals made by IOs, or indirectly, by inspiring certain governments to act. Many have contended that the negotiations leading to the 1987 Montreal Protocol would never have been initiated, for example, but for the level of scientific data concerning ozone depletion generated by the various entities established by the preceding Vienna Convention for the Protection of

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<sup>33</sup> See Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, ICAO Doc. 9518, 27 I.L.M. 627.

<sup>34</sup> See GEOFFREY M. LEVITT, *DEMOCRACIES AGAINST TERROR* 10–11 (1988) (discussing history of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft).

the Ozone Layer.<sup>35</sup> The supply of information may alter not only the decision of whether to initiate treaty making, but how and where to do so. Today, decisions to pursue particular topics in a distinct organizational setting are likely to be taken with full awareness of the prior history of that forum with respect to the topic in question and may reflect an intention to affect the substantive result on many matters—and not merely enforcement method, as in the WTO example above. A decision to attempt to initiate today the subject of foreign investment in the next WTO trade round, for example, would appear tantamount to a decision to give up on certain investment protections. This would certainly be the implication a prospective treaty initiator would take from the WTO's extensive reports on its diverse membership's views on the subject, as well as that organization's prior efforts, as in connection with Trade Related Investment Measures (TRIMs) or the General Agreement on Trade in Services (GATS).<sup>36</sup> Those who, desiring a successful conclusion to such a negotiation, propose adding investment issues to the next WTO Round would presumably be doing so because they want investment guarantees to extend to the WTO's global membership, because even the "lesser" investor rights, and possible duties, would presumably be subject to binding WTO dispute settlement open only to GATT parties (and not directly to investors themselves as under bilateral investment treaties (BITs) and the NAFTA's Chapter 11) because the failure of the OECD's prior efforts leaves no other credible organizational option, or because of some other presumed benefit, such as possible trade offs with respect to other issues anticipated within the same trade round. As this suggests, organizational venues and the information they produce considerably enhance the likelihood of "nesting" issues in a broader con-

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<sup>35</sup> See, e.g., Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000). For a more critical view of managerial regimes, see George W. Downs et al., *The Transformative Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465 (2000).

<sup>36</sup> See General Agreement on Trade in Services, Apr. 15, 1974, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1167 (1994) [hereinafter GATS]; Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81 (1994) [hereinafter TRIMs]; see also INTERNATIONAL TRADE LAW HANDBOOK 387, 531 (Raj Bhala ed., 2001). These Agreements are also available on the WTO web site, at <http://www.wto.org> (last visited Feb. 21, 2002).

text so that the “fabric of one provides the foundation of another”<sup>37</sup> as well as with respect to making links between issues that facilitate package deals. It is also important to recognize that information produced by one organizational venue in the course of one treaty negotiation, such as the lengthy negotiations to conclude the U.N. Convention on the Law of the Sea, have had important spillover effects on other negotiations, as with respect to later dealings with respect to environmental accords; such effects are increasingly anticipated, thereby influencing interstate reactions in both the earlier and later sets of negotiations.

A decision to pursue negotiations in a particular organization might also be tantamount to a decision *not* to conclude a full-scale multilateral treaty on the subject but some other kind of instrument. Thus, decisions to initiate discussions in, for example, UNCITRAL, are taken with the full knowledge that, given the practices of that body, this may be tantamount to deciding in favor of either a “model law” that can inspire the harmonization of domestic laws or non-binding “guidelines” instead of a binding treaty.<sup>38</sup> Certain organizational settings are suited to regulatory or recommendatory action and not the initiation of binding treaty instruments—and prove themselves attractive negotiating sites precisely for that reason. Indeed, we are becoming increasingly aware that IOs are dramatically changing the other primary source of international obligation—custom—as well as treaties. The new treaty makers are also generating new custom that differs markedly from the slow, laborious accumulation of bilateral practices and expressions of *opinio juris* that characterized traditional customary international law.<sup>39</sup>

As this suggests, international organizations may occasionally have an adverse impact on the possibility that particular multilateral negotiations will be initiated. Judging from the large number of multilateral efforts sponsored annually under their auspices, however, it would appear that the existence of permanent organizational venues for such negotiations has generally made states more amenable to

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<sup>37</sup> For a description of nesting, see Duncan Snidal, *The Game Theory of International Politics*, 38 *WORLD POL.* 25, 45 (1985).

<sup>38</sup> For a recent report of UNCITRAL's efforts, see *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Second Session*, U.N. GAOR, 54th Sess., Supp. No. 17, U.N. Doc. A/54/17 (1999).

<sup>39</sup> New custom may emerge from consciously created norms applicable even with respect to non-parties to a widely ratified convention; it may also result from information generated in plenary organizational fora such as the U.N. General Assembly. See Jonathan I. Charney, *Universal International Law*, 87 *AM. J. INT'L L.* 529, 536–42 (1993).

multilateral treaty making—or at least made it more likely that a shrewd initiator will be able to find a forum that favors treaty negotiations.

This implies a fifth and final change from 19th century treaty making efforts: particularly to the extent anticipated treaty negotiations are to take place within established organizational fora and not through the convening of a special ad hoc conference, support for initiating treaty negotiations may emerge much more easily and quickly than in an earlier age when states were required to mobilize and devote substantial diplomatic and other resources for such efforts. Treaty negotiations are, in short, more likely when they can take advantage of organizational venues whose “sunk costs” have already been absorbed by their members. Voting in favor (or more commonly merely refusing to disturb consensus) in favor of a resolution that directs that international civil servants ought to study “topic x” with respect to the “propriety of concluding an international convention” on said topic is often seen as an anodyne or a relatively cost free decision. Even when a state’s delegate to the IO in question realizes that such a decision is not really cost free and that it may begin a process whose momentum may prove difficult to stop, it is usually less painful politically to join consensus in favor of initiating treaty negotiations than to resist. In addition, to the extent organizational venues with a diverse membership tend to expand the potential negotiating agenda and increase the potential for nesting and package deals, these realities increase the numbers of states willing to engage in negotiations or for whom such negotiations are of interest.

### CONCLUSION

Increased treaty making amidst proliferating conventional and less conventional intergovernmental organizations suggests nascent structures of international governance. For some, these regimes serve as vehicles for exporting America’s regulatory New Deal to the world.<sup>40</sup> I would suggest, more humbly, that if anything is to be drawn from the New Deal era in the United States it might be inspiration from the legal discipline that it spawned— administrative law. Felix Frankfurter’s influential casebook of 1932 on that subject as well as Walter Gellhorn’s of 1940 set forth three major inquiries for the then

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<sup>40</sup> See, e.g., Anne Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in *MULTILATERALISM MATTERS: THE THEORY AND PRACTICE OF AN INSTITUTIONAL FORM I* (John G. Ruggie ed., 1993).

new scholars of administrative law; they were urged to examine: (1) the extent of legislative authority to delegate power to administrative agencies; (2) the nature of judicial review of agency action; and (3) the formal aspects of agency procedure.<sup>41</sup> Today, even with the new treaty makers in relative infancy, international lawyers appear to be groping towards the three types of inquiries suggested by Frankfurter and Gellhorn.

At the global level we are also beginning to inquire about the legitimacy of the delegated authority we are apparently granting to some of our international institutions—whether it is the Security Council or the Executive Directors of the IMF. Indeed, we are debating whether there is or ought to be a concept of “improper delegation” in international law.<sup>42</sup> We are asking whether the failure to provide in a treaty a precise rule instead of a vaguer standard ought to be seen as invariably a delegation to a relevant dispute settler to legislate or to fill in gaps to avoid a finding of non-liquet<sup>43</sup> and indeed, whether findings of non-liquet are even permissible for our new international judiciary.<sup>44</sup>

We are also beginning to consider whether some of our multilateral regimes have been or are being “constitutionalized” such that it is relevant to consider whether their stakeholders constitute a “demos.”<sup>45</sup> This necessarily raises questions of the scope of judicial review or the scope of authority of international judicial bodies over relevant constituencies. Should the World Court be able to judicially review the acts of the Security Council?<sup>46</sup> Should a NAFTA Chapter 11 panel be able to review a state court judgment issued by a state

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<sup>41</sup> See, e.g., ROBERT L. RABIN, PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 1–2 (1979).

<sup>42</sup> For a detailed examination of the delegation issue in the context of the U.N., see DANESH SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE U.N. SECURITY COUNCIL OF ITS CHAPTER VII POWERS (1999).

<sup>43</sup> Cf. Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L. J. 333, 346 (1999).

<sup>44</sup> See, e.g., Prosper Weil, *The Court Cannot Conclude Definitely . . . Non Liquet Revisited*, 36 COLUM. J. TRANSNAT'L L. 109, 110 (1997) (“[t]he view prevailing among writers is that there is no room for non liquet in international adjudication because there are no lacunae in international law”).

<sup>45</sup> Cf. Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law?: Contributions by the World Trade Organization Appellate Review System*, 1 J. INT'L ECON. L. 25 (1998); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 907 (1995); Joseph Weiler & Joel P. Trachtman, *European Constitutionalism and its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 372 (1996–1997).

<sup>46</sup> See, e.g., Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996).

party?<sup>47</sup> What are the democratic or other checks on the WTO Appellate Body when it engages in judicial review over a state's regulatory action?<sup>48</sup> Should we worry about a threat to the uniformity of international rules as international tribunals proliferate?<sup>49</sup>

Finally, as the protestors of Seattle remind us, we are entering into an increasingly heated debate over the formal aspects of agency action at the international level and most specifically about the democratic legitimacy of such action. Should NGOs have greater access to WTO working groups, WTO documents, and dispute settlement?<sup>50</sup> Should international civil society be given an opportunity for notice and comment on the proposed agenda for new trade rounds or before the Human Rights Committee issues interpretations of considerable general import? Is transparency a principle of international law that ought now be imported into all institutions of global governance, such that it applies as much to the permanent members of the Security Council as to states subject to the investment guarantees of Chapter 11 of NAFTA?<sup>51</sup>

All of these difficult—but eerily familiar—questions characterize the age of “globalization” amidst “eroding sovereignty.” We can only hope that we will be able to answer them with the same ingenuity that non-international lawyers have used to solve their domestic analogues.

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<sup>47</sup> For an example of a case brought under Chapter 11 that raises this question, see Robert E. Lutz & Russell C. Trice, *NAFTA at Five and the Loewen Case: Is NAFTA the Blood Relative of Lady Justice or the Angel of Death for State Sovereignty*, 2 *TRANSLEX: TRANSNATIONAL LAW EXCHANGE* 1 (Oct., 1999).

<sup>48</sup> Cf. Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 *AM. J. INT'L L.* 193, 202 (1996) (discussing the potential relevance of U.S. Supreme Court's Chevron standard within the WTO context).

<sup>49</sup> For a detailed discussion of this issue, see Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 *RECUEIL DES COURS* 101 (1998).

<sup>50</sup> For suggestions along these lines, see Steve Charnovitz, *Economic and Social Actors in the World Trade Organization*, 7 *ILSA J. INT'L & COMP. L.* 259 (2001).

<sup>51</sup> For opposing views concerning the applicability of transparency within the NAFTA's Chapter 11, compare *Metalclad Corp. v. United Mexican States*, 40 *I.L.M.* 36 (2001) (finding that foreign investors are entitled to the benefits of transparency under Chapter 11), with *United Mexican States v. Metalclad*, [2001] *B.C.L.R.*2d 664 (Can.), available at <http://www.worldbank.org/icsid/cases/awards.htm> (finding that the state parties to NAFTA did not commit themselves to transparency under Chapter 11).