

Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law

By
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INTRODUCTION

Following the end of the Cold War and the subsequent proliferation of international rules, processes, and organizations, some international law scholars argued that there was no longer a need to debate the existence of international law.¹ It was, as Thomas Franck coined it, a “post-ontological era,” where international lawyers could turn their attention away from debating “whether international law is law” and focus instead on evaluating the law’s substantive content.² New work soon followed, exploring patterns of compliance with international law, methods for predicting its effectiveness, and standards for evaluating its fairness.³

Despite the important contributions of such scholarship, recent developments suggest that the pronouncement of a post-ontological age was premature. Issues as diverse as terrorism, hegemony, and globalization all demonstrate that the international lawyer cannot yet dispense with the question of what makes international law “law” and where one looks to find it.

Realpolitik, and with it the ghosts of Austin and Bentham, have returned to prominence in certain circles since September 11, 2001, and the U.S. invasion of Iraq. Many proponents of this approach question the obligatory nature of long-recognized legal regimes ranging from the U.N. Charter to the Geneva Conventions.⁴ These proponents argue for the primacy of national security interests—

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1. See, e.g., Jose Alvarez, *Foreword: Why Nations Behave*, 19 MICH. J. INT’L L. 303, 303 (1998) (“[A]n ever increasing number of scholars are going beyond well-worn debates about whether international law is truly ‘law’ to undertake ‘post-ontological’ inquiries appropriate to the new ‘maturity’ of the international legal system.”); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 205 (1993).

2. THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 6 (1995).

3. See, e.g., *id.*; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

4. See, e.g., Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 540 (2002) (“[I]nternational ‘rules’ concerning the use of force are no longer regarded as obligatory by states.”).

particularly, efforts to combat terrorism and the proliferation of weapons of mass destruction—even if pursuing those interests requires discarding or dismissing existing regimes of international law.⁵

Others view the dramatic demonstration of U.S. power in Iraq differently, suggesting that it raises the specter of international hegemonic law. Such a system would replace the rule of equally sovereign states creating law through consent and practice with a system whereby a single actor, the hegemon, dictates new rules of law.⁶ While advocates of realpolitik would likely dismiss international law as such, opponents and proponents of a system of international hegemonic law instead analyze whether U.S. predominance is somehow transforming the existing international legal order into something new and quite different.

A separate strain of scholarship has raised the question of globalization's impact on state sovereignty.⁷ Unlike the consolidation of power which is central to the realpolitik and hegemonic law perspectives, globalization arguably functions as a decentralizing influence that diminishes the importance of sovereign states as other actors—international organizations, multinational corporations, non-governmental organizations (NGOs), and even individuals—exercise increased influence in the creation, implementation, and enforcement of international law.⁸

Responding to each of these issues may well involve post-ontological analyses, such as investigating patterns of compliance with international humanitarian law and U.N. Security Council resolutions or assessing the fairness

In early 2002, the White House Counsel described the Geneva Convention provisions on treatment of prisoners of war as “quaint” and “obsolete” in light of the new war on terrorism. See Draft Memorandum from White House Counsel Alberto Gonzales, to President George W. Bush 2 (Jan. 25, 2002), available at http://msnbc.com/modules/newsweek/pdf/gonzales_memo.pdf (last visited Jan. 27, 2005).

5. Although not addressing the implications for ontological analysis specifically, Thomas Franck has recognized the more general implications of these developments. See Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 610 (2003) (describing certain U.S. policymakers' “plan to disable all supranational institutions and the constraints of international law on national sovereignty. If, as now seems all too possible, this campaign succeeds . . . what sort of world order will emerge from the ruins of the Charter system?”).

6. See, e.g., Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001); Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003).

7. See, e.g., STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 3 (1999). Although subject to no strict definition, globalization encompasses notions of increasing transboundary movements, whether of capital, goods, people, pollution, diseases, or ideas. *Id.* at 12.

8. See, e.g., Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 235-236 (2002) (discussing the debate over globalization's impact on sovereignty in terms of the decrease in subjects excluded from international regulation and the increase in non-state actors' participation); Phillip Trimble, *Globalization, International Institutions and the Erosion of National Sovereignty*, 95 MICH. L. REV. 1944, 1946 (1997) (citing “globalism” as a “visible challenge[] to national sovereignty”); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 959 (2000) (acknowledging that some perceive “[n]ational sovereignty . . . to have diminished significantly in the past half century as a result of economic globalization” and other manifestations of globalization).

of non-state actor participation in international fora. However, these issues cannot be addressed solely from that perspective. Scholars and practitioners alike must also engage these issues on the so-called ontological level. Asking whether international humanitarian law or U.N. Charter provisions on the use of force continue to have legal effect in an age of terrorism requires attention to the most basic question of what it means to qualify something as “international law.” Similarly, asking whether international hegemonic law reflects the future of the international legal order or whether globalization means the inevitable decline of state sovereignty requires analysis of whether the very foundations of the international legal order are themselves undergoing change. These issues have traditionally been the subject of the doctrine of sources of international law. As such, whether or not one views this as an era that values post-ontological analysis, new scholarship is needed to determine whether the sources of international law are changing in fundamental ways.

Of course, the difficulty in taking up the subject of sources (and perhaps one reason some sought to declare victory and move past it) is that scholars and practitioners have never been able to agree on a definitive list of what sources contain the rules of international law, let alone what method, or methods, provide the basis of obligation for such rules.⁹ It is, therefore, difficult to evaluate whether recent developments reflect changes to the sources of international law. Indeed, competing views on the operation of international law have long deadlocked sources doctrine.

The stalemate over sources doctrine does not mean, however, that all efforts to evaluate change in the international legal order are doomed to fail. By shifting the frame of reference, new opportunities may emerge to break the deadlock. This article seeks to engender such a shift by proposing that sources doctrine incorporate considerations of authority. It argues that international lawyers must go beyond the traditional lines of inquiry, such as what makes international law binding (the basis of obligation) and where one finds it (the sources of international law), to ask who is making the law. In doing so, a new perspective is presented for evaluating whether and how the international legal order is changing. Investigating whether the actors making international law have changed may, in turn, offer new insights into the longstanding inquiries regarding the basis of obligation and sources of international law themselves.

9. See, e.g., PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 35 (7th ed. 1997) (“The changes in international society since 1945 have led to basic disputes on the sources of international law and it must be noted at the outset that they have become an area of considerable theoretical controversy.”). The situation seems little altered from 1981 when Sir Robert Jennings wrote, “I doubt whether anybody is going to dissent from the proposition that there has never been a time when there has been so much confusion and doubt about the tests of the validity—or sources—of international law, than the present.” Robert Y. Jennings, *What is International Law and How Do We Tell It When We See It?*, *SCHWEITZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT* 37, 60 (1981), reprinted in *SOURCES OF INTERNATIONAL LAW* 28 (Matti Koskenniemi ed., 2000).

This article begins with a brief review of the longstanding debates over the sources of international law. It then explains why the issue of authority should form a key component of any study of sources and provides an overview of the ways in which the authority to make, interpret, and apply treaties has changed. Specifically, this article evaluates whether the role non-state actors play in making, applying, and interpreting treaties has changed who is truly authorized to form treaties. It finds that, although non-state actors have a proven capacity to make treaties and participate in their application and implementation, the treaty paradigm generally continues to be pre-conditioned on the presence of state consent. The article argues that evidence of state consent to non-state actor participation in treaties demonstrates a need for sources scholarship to focus as much attention on changes in who makes international law as has previously been devoted to the issue of changes in where one looks to find the law.

Finally, the article concludes that a sources doctrine that considers existing distributions of legal authority may serve as a useful tool for assessing the impact of recent developments such as globalization and hegemony on the international legal order. Such an authority-based approach ultimately provides a less dynamic picture of international law than these developments might suggest, one where state consent still matters. At the same time, it provides a baseline for future analysis; a way to compare whether and how states could give the power to create and apply international law to other entities; and a way to assess whether a single actor's influence has grown so large as to effectively usurp the role of other actors in making and applying the law. In looking at what states are consenting to, moreover, an authority-based approach offers a perspective on international law *as it is practiced*—a perspective that may serve to counterbalance the views of those who argue against the law's very existence.

II.

THE STALEMATE OVER SOURCES

The debate over the sources of international law still engages age-old arguments between positivists dedicated to law created through the consent of states and naturalists supporting international law as divined from moral dictates existing independent of state consent.¹⁰ Other candidates have arisen over the

10. See, e.g., MALCOLM N. SHAW, INTERNATIONAL LAW 40-44 (4th ed. 1997); ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW 6 (1997). This debate is complicated as proponents of both positivist and naturalist positions adopt widely divergent methodologies. Thus, positivism has advocates who focus on demonstrating international law as the reflection of state consent, others who focus on divorcing international law from its ethical elements, and those who defend the law's normativity and prescriptive force. See Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 303-304, 307 (1999); S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 17) ("[T]he rules of law binding upon States . . . emanate from their own free will."); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 4 (R. Tucker ed., 2d ed. 1967) (distinguishing legal orders from moral and social orders); Prosper Weil, *Towards Relative Normativity in International*

years, each identified as *the* source of obligation in international law.¹¹ At the same time, whole new methodologies have emerged such as the New Haven School, International Law and Economics, International Law and International Relations, and the New Stream movement, each of which suggests new ways to look at or argue about international law.¹²

Most international lawyers, however, rely on the articulation of sources in Article 38 of the Statute of the International Court of Justice—treaties, custom, and recognized general principles—to identify what legal rules to apply in a particular case.¹³ Similarly, most international lawyers continue to explain how these rules constitute law by referring to the notion that “the general consent of states creates rules of general application.”¹⁴

Law?, 77 AM. J. INT'L L. 413, 421 (1983) (arguing for uniformity of treatment of the rules of international law). Similarly, naturalist scholars derive their version of international law from sources ranging from divine dictates to more secular bases. See, e.g., Alfred Verdross & Heribert F. Koeck, *Natural Law: The Tradition of Universal Reason and Authority*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 31 (R. St.J. Macdonald & Douglas Johnston eds., 1983) (noting that Christian defenders of natural law, including Grotius, relied on the Bible to demonstrate legal norms); FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 2 (1998) (articulating a Kantian conception of international law based on certain “morally legitimate” principles).

11. Writing in 1971, Oscar Schachter identified 11 other possible bases of international legal obligation in addition to state consent and natural law, and one can say with some certainty that the candidate rolls have only expanded in the ensuing thirty years. Oscar Schachter, *Towards a Theory of International Obligation*, in THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 9-10 (Stephen Schwebel ed., 1971) (citing consent of states; customary practice; a sense of “rightness”—the juridical conscience”; natural law or natural reason; social necessity; the will of the international community; “direct (or ‘stigmatic’) intuition”; common purposes of the participants; effectiveness; sanctions; “systemic goals”; shared expectations as to authority; and rules of recognition).

12. See generally Symposium, *Method in International Law*, 93 AM. J. INT'L L. 291 (1999). For more comprehensive treatments of these methods, see MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (1981) (representing the New Haven School); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999) (representing the International Law and Economics approach); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998) (representing the International Law and International Relations outlook); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Lakimieläntö Kustannus ed., 1989) (representing the New Stream perspective).

13. Article 38(1) of the ICJ Statute provides that “[t]he 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. subject to the provisions of Article 59, 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.”

Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031, 1060 [herein after ICJ Statute].

14. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (6th ed. 1995); Louis Henkin, *General Course on Public International Law*, in IV RECUEIL DES COURS 46 (1989) (“State consent is the foundation of international law. The principle that law is binding on a State

A. Disputing the Traditional Sources

Challenges abound to Article 38's identification of treaties, custom, and recognized general principles as an exhaustive list of the sources of international law. Sir Gerald Fitzmaurice noted the difficulty of referring to treaties as a source of law because they only bind the parties to the treaty.¹⁵ Sir Robert Jennings considered it "an open question whether [Article 38] is now itself a sufficient guide to the content of modern international law," proposing other sources such as the results of treaty negotiating conferences as well as the decisions and recommendations of international organizations.¹⁶ Still others question Article 38's failure to acknowledge the so-called "relative normativity" of international law, most apparent through doctrines such as *jus cogens*, obligations *erga omnes*, and the whole generation of soft-law principles.¹⁷

Nor has the concept that state consent serves as the exclusive source of obligation in international law escaped censure. Scholars question what gives legal force to the consent of states expressed through treaties. Do treaties bind states because they consent to the treaty's binding effect? Such a construction leads to an infinite logical regression of states consenting to consent. Or, does a treaty's legal force derive from a non-consensual basis such as natural law? If so, consent cannot be the only basis for creating international law.¹⁸

Notwithstanding such criticism of Article 38 and state consent, most international lawyers still rely on them as international law's operating framework. Martti Koskenniemi opines that we do so "by default" because there is "such a wide variety of theories about the point of international law, and such profound disagreement over them . . . that no such theory can plausibly be used as a reference point for reaching acceptable resolutions in normative problems."¹⁹ Indeed, past efforts to identify alternatives to state consent, much like the efforts to

only by its consent remains an axiom of the political system, an implication of State autonomy.").

15. Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SYMBOLAE VERZIJL* 153, 157 (1958).

16. Jennings, *supra* note 9, at 59, 61, 70-73, 80-83, reprinted in *SOURCES OF INTERNATIONAL LAW*, *supra* note 9, at 27, 29, 38-41, 48-51.

17. See Jose E. Alvarez, *Positivism Regained, Nihilism Postponed*, 15 *MICH. J. INT'L L.* 747, 747-48 (1994) (reviewing G.M. DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* (1993), and critiquing his attempt to rescue the positivist doctrine of international law, specifically Article 38, from the threats posed by relative normativity).

18. See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 187 (1990) ("Why are treaties binding?" is a question usually answered by the superficial assertion that 'treaties are binding because states have agreed to be bound' But the binding force . . . cannot emanate solely from the agreement of the parties. It must come from some ultimate unwritten rule of recognition, the existence of which may be inferred from the conduct and belief of states."); RUBIN, *supra* note 10, at 15 ("An asserted rule that makes 'consent' to the legal order a constitutive fact is itself either a natural law rule or a rule that rests on prior consent, thus introducing an infinite regress."); Fitzmaurice, *supra* note 15, at 164 ("the rule *pacta sunt servanda* . . . does not require to be accounted for in terms of any other rule. It could neither not be, nor be other than what it is. It is not dependent on consent, for it would exist without it.").

19. Martti Koskenniemi, *Introduction*, in *SOURCES OF INTERNATIONAL LAW*, *supra* note 9, at xii.

establish consent itself as the only basis for international law, have attracted adherents without crowning a new normative basis for the law.²⁰ Nor have efforts to suggest sources beyond those in Article 38 had better luck. True, some states, academics, and jurists have identified new “sources” of international law such as certain General Assembly resolutions, the work of the International Law Commission, and even aspirational texts such as the American Declaration of the Rights of Man.²¹ Others, however, just as definitively deny them such independent status.²²

In some sense then, Article 38 and the principle of state consent have come to represent a “common denominator.” Alfred Rubin puts it more eloquently, noting that if one envisions the path from morality to law as leading through a fairly well-defined swampy area that is dangerous to those who get lost, our major signpost is the summary of sources now found in Article 38.²³

Assessing whether the sources of international law are changing, however, requires that we step off this path to explore for new routes to the creation of in-

20. See, e.g., *id.*; Schachter, *supra* note 11, at 9.

21. See, e.g., T. Olawale Elias, *Modern Sources of International Law*, in *TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP* 34, 41, 50-51 (1972) (identifying the International Law Commission as a “law-making body” and concluding that votes on General Assembly resolutions are binding); Alvarez, *supra* note 17, at 774-75 (asking, “[c]an anyone today afford to ignore the General Assembly’s role in norm creation?” and citing instances where international and domestic courts have relied on General Assembly resolutions as sources of law); *Report No. 75/02 Mary and Carrie Dann*, Case 11.140 (Dec. 27, 2002), at ¶ 163, compiled in *Annual Report of the Inter-American Commission of Human Rights 2002*, Organization of American States, OEA/Ser.L/V/II.117, Doc. 1, rev. 1 (Mar. 7, 2003), available at <http://www.cidh.oas.org/annual-rep/2002eng/USA.11140b.htm> (last visited Jan. 27, 2005) (citing “well-established and long-standing jurisprudence and practice of the inter-American system according to which the American Declaration is recognized as constituting a source of legal obligation for OAS member states”).

22. The United States, for example, has rejected any legal obligations under the American Declaration. See *Indigenous People*, 2002 DIGEST § H, at 378-82 (U.S. views on the Petition of Mary and Carrie Dann). In the context of General Assembly resolutions, many, including the United States, continue to emphasize that such resolutions are not binding on Member States by themselves, but may have weight as evidence of a rule of customary international law. See, e.g., BROWNIE, *supra* note 14, at 14; United Nations General Assembly Declarations 1978 DIGEST § 2, at 9 (quoting Stephen Schwebel on the legal force of General Assembly resolutions, including statements he made on behalf of the United States as Deputy Legal Adviser of the Department of State in 1975). Others, meanwhile, take a middle path, emphasizing the normative influence of documents that do not fall within the Article 38 framework, but admitting they are not true “sources” of international law. See, e.g., Oscar Schachter, *The Nature and Process of Legal Development in International Society*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY*, *supra* note 10, at 745, 788 (“It is, of course, true that such [General Assembly] resolutions are not a formal source of law within the explicit categories of article 38(1) . . . [y]et few would deny that General Assembly resolutions have had a formative influence in the development of international law in matters of considerable importance to national states.”); Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT’L L. J. 445, 477 (1981) (“while General Assembly resolutions are not *ipso facto* new sources of international law, they can contribute to the normative process of law-creation.”).

23. RUBIN, *supra* note 10, at 192. The same could presumably be said if one views law as a derivation of politics separate from, or in addition to, morality.

ternational law beyond state consent, or new places to look for the law beyond treaties, custom, general principles, and the judicial and academic opinions that accompany them. Yet, given the doctrinal confusion over both the existing sources of international law in Article 38 and the basis of their obligation, we can question the utility of such an endeavor. To continue with Professor Rubin's analogy, in venturing off the existing path, we inevitably risk getting stuck in the swamp.

B. Integrating Questions of Authority into the Doctrine of Sources

Given the existing, horizontal distribution of authority in international law, it is not altogether surprising that the doctrine of sources has bogged down in varied and conflicting assertions of what constitutes a source of international law, let alone what makes such law obligatory. The international legal order continues to lack universal, centralized, legislative and adjudicatory bodies that could definitively delineate the sources of law and judge their content. As Leo Gross noted a half century ago, we are left in a situation where, in the absence of such authorities, "each state has a right to interpret the law, the right of auto-interpretation, as it might be called."²⁴ A state's view, however, remains just that—one interpretation, not a final decision on the law's content or applicability. Only if all concerned parties consent, whether by treaty, adjudication, or arbitration, does an actual determination of the legal norm, at least with respect to those parties, become possible.²⁵ Absent that consent, controversies over what the law is, or even what the sources of law are, may continue indefinitely.

Viewed from this perspective, debates over the sources of international law too frequently overlook one essential part of the inquiry: Who has the authority to decide where to find the law and label it as such?²⁶ In reality, many jurisprudential debates that on the surface involve questions of what gives international law an obligatory character and where one looks for its content may be recast as debates about authority—debates about which entities or persons have the authority to determine what constitutes international law and where to look for it.²⁷

In looking at the sources of international law, therefore, we need to ask not merely "what" and "where", but also "who" —not merely what element gives law its legal force and where do we find it, but also, who is it that makes this law? First, who makes the law itself; who creates legal obligations, be it by

24. Leo Gross, *States as Organs of International Law and the Problem of Autointerpretation* (1953), reprinted in *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 386 (1984).

25. *Id.* at 386-88.

26. See RUBIN, *supra* note 10, at 24-25. Other scholars in the post-ontological context have suggested the need to address the "why" question—why do the subjects of international law comply with it? See, e.g., Alvarez, *supra* note 1, at 306 (introducing a symposium on compliance scholarship dedicated to studying why states generally obey international law).

27. RUBIN, *supra* note 10, at 24-25, 165.

treaty, custom, or recognized general principles? Second, who has authority? Who is it that the law-creators have consented to apply, interpret, or even modify the law for them?

By integrating such a search for authority into the doctrine of sources, we may find a framework for moving beyond the old and unresolved debate about the sources of international law. Asking “who” in addition to “what” and “where” allows us to shift the debate away from arguments about whether state consent forms the only basis or merely one of several bases of obligation in international law. Similarly, an authority-based analysis does not require the identification of an exclusive list of the sources of international law, be they in Article 38 or some larger listing. We can evaluate changes in who exercises authority to make and apply international law even if only within those “common denominator” sources of obligation (state consent) and law (Article 38) on which all agree. Moreover, in doing so, we may gain a fresh perspective on the traditional debate. For example, if we found state consent had operated to change who participates in the formation of the traditional sources of international law that would demonstrate an expansion of the generally accepted basis of obligation from state consent to a situation where the consent of states *and* non-state actors together creates the law. Thus, if asking whether the sources of international law have changed, we can, and should, be asking whether we have changed who it is that states have consented to make treaties, to create custom and to recognize general principles of law and who it is that is authorized to apply, interpret or even modify them.

III.

NON-STATE ACTOR TREATY-MAKING: A CASE STUDY OF AUTHORITY IN INTERNATIONAL LAW

To demonstrate how this approach might operate, consider the law of treaties. An authority-based approach examines the treaty-makers themselves. Avoiding such well trodden ground as what gives treaties their legal force and which categories of treaties constitute a source of law, it seeks to identify actors who have authority to make, implement, interpret, or modify treaties in addition to the sovereign states that have traditionally exercised such authority.²⁸ If such actors exist, this approach asks how does their authority inform our understanding of treaties as a source of law and state consent as a basis for obligation?²⁹

28. States, by definition, are considered to possess the capacity to make treaties. *See, e.g.*, Vienna Convention on the Law of Treaties, May 23, 1969, art. 6, 1155 U.N.T.S. 331, 334.

29. It is important to distinguish from the outset that this line of inquiry into who makes the law is distinct from the separate issue of the “subjects” of international law—those states, international organizations, and other entities, including individuals, whose conduct may be regulated by international law. It is true that evidence of a treaty-making capacity may demonstrate that a particular entity is a subject of international law whose conduct may thus be regulated by international law. The focus of the current line of analysis, however, lies in looking at who concludes treaties as evidence of a capacity to make international law rather than simply asking who is subject to it.

Jose Alvarez has already highlighted how shifting the fora of treaty negotiations from ad hoc conferences to international institutions increased the influence of various non-state actors such as NGOs, international civil servants, and experts in the treaty-making process.³⁰ For purposes of sources doctrine, however, the issue is not merely one of influence; if it were, we would long-ago have had to dispense with the idea that equally sovereign states make treaties and custom to account for what Philip Jessup called the “inescapable fact of power differentials” among states.³¹ Instead, sources doctrine involves a description of the distribution of formal legal authority, as distinct from the distribution of political or even moral authority, both of which may help explain why those with legal authority act in a certain way.³² An authority-based approach thus focuses on who can actually create international law or authorize its definitive interpretation or application. Under this approach, three candidates emerge as potential sources of authority in addition to sovereign states: sub-state actors, supranational actors, and extra-national actors.

A. Sub-State Actors

Sub-state actors are semi-autonomous territorial entities that are legally dependent upon, or associated with, independent sovereign states.³³ They include sub-national components of federal states, overseas territories, and other dependent territories of existing states. In reality, although often thought of as anomalies, states have afforded these entities a role in treaties for some time. In the earliest international organizations—the Universal Postal Union and the International Telecommunications Union—states gave colonial administrations separate and full membership in the respective organizations.³⁴ In rare cases, a sub-state actor could join a treaty directly; for instance, Ukraine and Belarus joined the U.N. Charter while part of the Soviet Union. India and the Philippines did the same prior to their independence.³⁵

30. See generally Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213 (2002).

31. PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 30 (1948).

32. The difference between exercises of legal and political authority may be demonstrated through consideration of how a domestic legislative body operates. Laws are usually enacted through a process that includes a certain majority vote of the legislators. A single legislator, however, may have political authority that far exceeds his or her single vote; his or her decision-making may influence dozens of votes on any particular issue. Nevertheless, the existence of such political authority does not necessarily alter or change the distribution of legal authority where each legislator has a single vote and where a certain majority of those votes is required to pass a law. Of course, at some point, distributions of legal authority may become so divorced from the political reality of how law-making occurs that the entire legal system requires reconsideration. This is the case, for example, for those concerned with international hegemonic law.

33. Oliver J. Lissitzyn, *Territorial Entities in the Law of Treaties*, III RECUEIL DES COURS 66-71 (1968).

34. *Id.* at 64-65; HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 52 (3d ed. 1995).

35. Lissitzyn, *supra* note 33, at 6; SCHERMERS & BLOKKER, *supra* note 34, at 50; ANTHONY

It would be a mistake, however, to write these precedents off as the peculiar products of colonial and Cold War environments.³⁶ More than ever, sub-state entities now directly participate in both bilateral and multilateral treaties on matters in which they claim competence. Swiss Cantons, German and Austrian Länder, Hong Kong, Bermuda, Jersey, The Cook Islands, New Caledonia, Quebec, Puerto Rico, Tatarstan, and Flanders all serve as examples of sub-state actors that have concluded treaties in recent years.

On what basis do sub-state actors participate in treaties? Their ability to conclude treaties is largely a function of whether they have been authorized to do so.³⁷ In his 1968 Hague Lectures on Territorial Entities in the Law of Treaties, Oliver Lissitzyn explained this authorization requirement by suggesting that international law imposes only two prerequisites on sub-state entity treaty-making: (1) the consent of the state responsible for the sub-state actor; and (2) the willingness of the sub-state actor's treaty partners to regard it as capable of entering into treaties.³⁸ The contemporary treaty-making practice of sub-state

AUST, MODERN TREATY LAW AND PRACTICE 47 (2000).

36. Although he recognized his conclusion wasn't inevitable, Lissitzyn thought sub-state treaty-making was in decline. Lissitzyn, *supra* note 33, at 87 (“[T]he extent to which dependent entities appear as distinct partners in treaty relations will continue to fluctuate in the future as it has in the past, although the present over-all trend seems to be in the direction of diminishing it. But, the growing complexity of transnational relations and concerns may yet reverse this trend.”).

37. Such direct “participation” in treaties should be distinguished from the separate, and often equally important, role that sub-state actors play in determining the extent to which a sovereign state can exercise its own treaty-making authority. Depending on the constitutional distribution of authority, sub-state actors may have authority to accept or reject whether the sovereign state can assume treaty obligations in certain areas where the sub-state actor exercises competence. *See, e.g.*, J.G. Brouwer, *The Netherlands*, in NATIONAL TREATY LAW AND PRACTICE 133, 144 (Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington, eds., 1999) [hereinafter 1999 NATIONAL TREATY LAW AND PRACTICE] (describing Netherlands Antilles and Aruba's “absolute veto” authority on treaties involving economic and financial matters affecting their interests); Hans D. Treviranus & Hubert Beemelmans, *Federal Republic of Germany*, in NATIONAL TREATY LAW AND PRACTICE 43, 55 (Monroe Leigh & Merritt R. Blakeslee eds., 1995) [hereinafter 1995 NATIONAL TREATY LAW AND PRACTICE] (noting a *modus vivendi*—the Lindau arrangement—where the German Federal Government seeks the agreement of its Länder before concluding a treaty affecting their legislative competence). As a result, the state may not be able to ratify the treaty or may, if available, need to invoke territorial or federal clauses to exclude obligations under the treaty with respect to the non-consenting sub-state entity. Maurice Copithorne, *Canada*, in NATIONAL TREATY LAW AND PRACTICE 1, 6-7 (Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington, eds., 2003) [hereinafter 2003 NATIONAL TREATY LAW AND PRACTICE] (describing consequences of Canadian provinces' authority to accept or decline participation in treaty regimes implicating areas of provincial competence). In some cases, the role the sub-state component plays in how a state exercises the state's treaty-power may also explain why the sub-state actor is authorized to conclude treaties independently. *See, e.g.*, 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 183 (Myron Nordquist ed., 1989) [hereinafter UNCLOS COMMENTARY] (noting that, in the context of the 1982 Law of the Sea Convention, several metropolitan states and sub-state actors argued for separate sub-state participation in the treaty on the grounds that the metropolitan states had “renounced [certain] . . . powers and transferred them, together with the appurtenant treaty-making competences, to the representatives of the territories concerned.”).

38. Lissitzyn, *supra* note 33, at 84; *Report of the International Law Commission on the Work of Its Eighteenth Session*, (draft) art. 5.2, [1966] 2 Y.B. Int'l L. Comm'n 172, 191, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (providing that “States members of a federal union may possess a ca-

actors is consistent with both of these requirements. However, questions remain about the “independent” capacity of these actors and the consequences of “unauthorized agreements.”

1. *Internal Authorization of Sub-State Treaty-Making*

In most cases where a sovereign state does not authorize its political subdivision to make treaties, that sub-state actor will not negotiate and conclude treaties independently.³⁹ In India, for example, sub-state actors have no capacity to conclude international agreements and there is little practice of them doing so.⁴⁰ A state that is unwilling to authorize a sub-state actor to pursue independent treaty-making may, however, be willing to conclude a treaty on its behalf.⁴¹

In other cases, sovereign states authorize their sub-state components to enter into treaties directly and in their own name. Frequently, this authorization will only apply to a single agreement. For example, in 1981, Canada concluded a social security agreement with the United States. In this agreement, Canada authorized its province, Quebec, to conclude a separate subsidiary agreement with the United States in light of Quebec’s distinct pension system.⁴² Quebec and the United States concluded that agreement in 1983.⁴³ For its part, the United Kingdom has used an “Instrument of Entrustment” to authorize certain overseas territories such as Bermuda, the British Virgin Islands, and Jersey to enter into specific treaties with the United States and Canada.⁴⁴ Even the

capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.”). This provision was deleted during negotiations of the 1969 Vienna Convention on the Law of Treaties. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 21 (2d ed. 1984).

39. *But see infra* notes 57-61 and accompanying text (discussing “unauthorized agreements” concluded by sub-state actors).

40. K. Thakore, *India*, in 1995 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 79, 101.

41. Thus, the Kingdom of the Netherlands may conclude an agreement for the benefit of one of its constituent parts such as Netherlands Antilles or Aruba. Brouwer, *supra* note 37, at 144. *See also* Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, For the Exchange of Information Relating to Taxes, Nov. 21, 2001, U.S.-U.K., Treaties and International Agreements Online, CTIA No. 15989.000; AUST, *supra* note 35, at 53 (citing an agreement between New Zealand and the United Kingdom on behalf of the Channel Islands).

42. Agreement With Respect to Social Security, Mar. 11, 1981, U.S.-Can., art. XX, 35 U.S.T. 3403, 3417.

43. Understanding and Administrative Arrangement with the Government of Quebec, Mar. 30, 1983, U.S.-Quebec, T.I.A.S. No. 10,863.

44. Ian Sinclair & Susan Dickson, *United Kingdom*, in 1995 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 244. For example, on September 12, 2002, the United Kingdom informed the United States that it had “entrusted” the Insular Authorities of Guernsey, Jersey and the Government of the Isle of Man to negotiate and conclude Tax Information Exchange Agreements with the United States on the understanding that the United Kingdom remained responsible for the international relations of these territories. *See, e.g.*, Press Release, U.S. Treasury Department, Treasury Secretary O’Neill Signing Ceremony Statement: United States and Jersey Sign Agreement to Exchange Tax Information (Nov. 4, 2002), at <http://www.treas.gov/press/releases/po3595.htm>

United States sometimes authorizes its dependent territories to join treaties on a case-by-case basis. For example, in 1986 the United States authorized Puerto Rico to join the Caribbean Development Bank.⁴⁵

Increasingly, however, states have formalized the treaty-making authority of certain sub-state components through domestic laws. In most cases, this sub-state entity authorization remains subject to a residual level of state supervision. In 1988, for example, Austria amended its Constitution to authorize Austrian Länder to conclude international treaties with neighboring states and their constituent parts with respect to matters falling within the Länder's exclusive competence.⁴⁶ This approach mirrors that under the German Constitution ("Basic Law"), which authorizes German Länder to make treaties. Germany's authorization has led to some 80 agreements between German Länder and neighboring European countries.⁴⁷ Similarly, Swiss Cantons have concluded some 140 international agreements, although these agreements have been mainly administrative in nature.⁴⁸ Since 1993, Belgium's law has authorized its component "regions" to enter into treaties on matters within a region's exclusive competence (e.g., each region's water and environmental resources).⁴⁹ Under this authority, Belgium's three regional governments—Flanders, Wallonia, and Brussels-Capital—have entered into two multilateral agreements with France and the Netherlands, one for the protection of the Sheldt river and the other for that of the Meuse river.⁵⁰ Moreover, the development of the European Union may lead to more frequent and significant exercises of such sub-state treaty-making powers.⁵¹

Sub-state treaty making is not simply a European phenomenon, however. Through the Russian Constitution and internal agreements among the subjects of

(last visited Jan. 27, 2005).

45. Self-Governing and Non-Self-Governing Territories, 1981-1988 CUMULATIVE DIGEST, vol. 1, § 5, at 436, 438-40 [hereinafter Kozak] (regarding testimony of Michael G. Kozak, then-Principal Deputy Legal Adviser to the U.S. Department of State, before the House Committee on Interior and Insular Affairs on July 17, 1986, regarding international activities of U.S. territories and commonwealths). Subsequently, Puerto Rico withdrew from the Caribbean Development Bank.

46. Franz Cede & Gerhard Hafner, *Federal Republic of Austria*, in 1999 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 1, 12.

47. Treviranus & Beemelmans, *supra* note 37, at 54. The Federation retains the authority to approve these agreements, although to date it has not denied any proposed agreements by the Länder. *Id.*

48. Luzius Wildhaber et al., *Switzerland*, in 1995 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 117, 125-26, 151-153. Articles 10(1) and 102(7) of the Swiss Constitution require that the Federal Council approve such cantonal agreements. *Id.* at 153.

49. AUST, *supra* note 35, at 50.

50. *Belgium (Brussels-Capital, Flanders, Wallonia Regional Governments)-France-Netherlands: Agreements on the Protection of the Rivers Meuse and Scheldt, done at Charleville Mezieres, France, Apr. 26, 1994*, 34 I.L.M. 851 (1995). Article 9 of both agreements requires each of the regional governments to separately notify France upon the completion of their required domestic procedures for entry into force. *Id.* at 858.

51. See Treviranus & Beemelmans, *supra* note 37, at 54 (discussing the treaty-making authority of German Länder and noting that the "development of the European Union will . . . increase the importance of the treaty-making power of the Länder.").

the Russian Federation, Russia has authorized certain of its sub-state components, such as Yaroslav and Tatarstan, to conclude treaties.⁵² Tatarstan has concluded agreements concerning commerce, science and technology, and culture with Azerbaijan, Bulgaria, and apparently even a few Polish provinces.⁵³ In 1991, Mexico enacted a law authorizing centralized agencies of both Mexico's state and municipal public administrations to enter into international agreements.⁵⁴ Similarly, although the U.S. Constitution denies U.S. states the right to enter into "treaties" as that term is defined under U.S. law, it does authorize them to enter into "compacts" with foreign powers, provided that the U.S. state obtains the approval of the U.S. Congress.⁵⁵ Historically, this authority has been exercised rarely by U.S. states and even more infrequently in recent years.⁵⁶

What U.S. states are doing, however, is concluding unauthorized agreements with foreign powers.⁵⁷ For example, in 2000, the U.S. state of Missouri concluded a Memorandum of Agreement with the Canadian province of Manitoba on water issues without Congressional authorization.⁵⁸ Other sovereign states are experiencing similar problems; the requirement of state authorization appears to have driven some sub-state actors to make more frequent use of unauthorized arrangements with foreign states, other sub-state actors, and interna-

52. W. E. Butler, *Russia*, in 2003 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 151, 152-53 (citing Yaroslav region's agreements with Belarus, Kazakhstan, Moldova, Uzbekistan, Ukraine, and individual German Länder).

53. Babak Nikravesh, *Quebec and Tatarstan in International Law*, 23 FLETCHER F. WORLD AFF. 227, 239 (1999).

54. Luis Miguel Díaz, *Mexico*, in 2003 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 101, 104. Although not considered treaties under Mexican law, these inter-institutional agreements are defined as being governed by "public international law." *Id.* at 117 (citing article 2(II) of the Law regarding the Making of Treaties).

55. U.S. CONST. art. 1, § 10, cl. 1 ("No State shall enter into any Treaty"); U.S. CONST. art. 1, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power.").

56. Among the most well-known examples are a 1956 New York-Canada agreement to establish a port authority for the Niagara River bridge, a 1958 Minnesota-Manitoba highway agreement, 1949 and 1952 Forest Fire Compacts between northeastern U.S. states and Canadian provinces, and various compacts authorized under the 1972 International Bridge Act. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 153 (2d ed. 1996); International Bridge Act, 33 U.S.C. § 535a (1972). Unlike Mexico's law, however, the applicable law for compacts between U.S. states and foreign powers is unclear. *See* Lissitzyn, *supra* note 33, at 29 (finding considerable evidence that compacts are legally binding, but that "the evidence for the view that compacts of States of the Union with foreign entities are governed by the law of treaties is inconclusive").

57. *See, e.g.*, AUST, *supra* note 35, at 48-49.

58. At the request of Senator Byron Dorgan of North Dakota, William H. Taft IV, Legal Adviser to the U.S. Department of State, wrote a letter to Senator Dorgan that analyzed the constitutional questions posed by the unauthorized agreement where Missouri and Manitoba undertook to cooperate in opposition to inter-basin water transfers between the Missouri River and Hudson Bay basins, despite federal policy supporting at least some such transfers. *See* Capacity to Make: Role of Individual States of the United States: Analysis of Memorandum of Understanding Between Missouri and Manitoba, 2001 DIGEST § A, at 179-98 [hereinafter Taft Letter].

tional organizations.⁵⁹ Quebec has concluded some 230 “ententes” with foreign governments, nearly 60% of which were with foreign states.⁶⁰ South Africa had similar problems with its provinces concluding “international agreements” despite constitutional provisions giving the national government exclusive authority over such agreements.⁶¹

The conclusion of such unauthorized agreements by sub-state actors might suggest that these actors have become truly independent treaty-making “authorities.” There are, however, several problems with such a proposition. First, very little information exists concerning these unauthorized instruments; they are rarely published or consolidated in ways that allow for an evaluation of their legal character.⁶² Second, the sovereign state will frequently step in post hoc to rectify the absence of authority. Mexico, for example, enacted its law authorizing sub-state entities’ “international agreements” to provide a legal foundation for what was an existing practice.⁶³ In 1986, the Swiss Federal Council authorized the Swiss Ambassador to sign an agreement on cultural and technical cooperation between itself “acting for the canton of Jura” and the Republic of the Seychelles. In doing so, it rebuked the canton of Jura for having independently negotiated the agreement, and insisted on the Swiss Federal Council’s exclusive power to negotiate such international agreements.⁶⁴

Finally, where unauthorized sub-state arrangements are available, their legal status is often murky.⁶⁵ This may be because the commitments in the texts of these arrangements are often political, rather than legal, in nature.⁶⁶ The am-

59. See, e.g., Treviranus & Beemelmans, *supra* note 37, at 56 (discussing use by German Länder of Joint Declarations and Protocols); Copithorne, *supra* note 37, at 2. States are likely to view such activity as problematic because it means that they are not able to exercise full control over the international activities of their sub-national units in a manner befitting their sovereign status. States may also have concerns about legal responsibility for the actions of their sub-state units, even where those actors operated without authority from the states themselves.

60. Nikraves, *supra* note 53, at 239.

61. Neville Botha, *South Africa, in* 2003 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, at 199, 219.

62. See, e.g., Wildhaber et al., *supra* note 48, at 153 (“It is difficult to get hold of all [Swiss] cantonal agreements. More than half of them have not been officially published.”).

63. Díaz, *supra* note 54, at 104.

64. Wildhaber et al., *supra* note 48, at 154.

65. AUST, *supra* note 35, at 50 (declaring the legal status of unauthorized agreements “problematical”); Lissitzyn, *supra* note 33, at 84 (discussing how the “validity of an agreement made by a dependent entity without the consent of the dominant State is one on which little guidance is available in practice”).

66. This is frequently the case with Quebec’s “ententes.” See Nikraves, *supra* note 53, at 250-51 (noting that Quebec ententes rarely require legally mandated performance); Copithorne, *supra* note 37, at 2; Treviranus & Beemelmans, *supra* note 37, at 56 (discussing use by German Länder of non-legal arrangements). In the United States, the practice is to permit sub-state actors to conclude arrangements that do not involve international commitments or to work out modifications that ensure that result. See, e.g., Kozak, *supra* note 45, at 435; Taft Letter, *supra* note 58. For example, on April 22, 1999, the U.S. state of North Carolina signed a “Memorandum of Intent” with the Republic of Moldova that detailed cooperation between, among other entities, North Carolina’s National Guard and Moldova’s military. Memorandum of Intent Between the Republic of Moldova and the State of Carolina, Apr. 22, 1999, available at <http://www.secretary.state.nc.us/Partner->

biguity may also result from a sovereign state's refusal to recognize the validity of the agreements entered into by one of its sub-state entities. Canada, for example, refuses to recognize its provinces' international arrangements as international agreements unless it has consented to them.⁶⁷ Notwithstanding Canada's position, France views all of its "ententes" with Quebec as binding under international law.⁶⁸

2. *External Consent to Sub-State Treaty-Making*

France's willingness to regard its agreements with Quebec as binding under international law illustrates that a sovereign state's decision to authorize its sub-state entities to make treaties is not the only criterion for such treaty-making. A second prerequisite is the potential treaty partners' willingness to accept the sub-state actor as a treaty partner. This element must also be satisfied before authorized, let alone unauthorized, treaty-making can occur.

In practice, most states take a more conservative approach than France. A would-be treaty partner usually seeks confirmation that a sub-state actor has the authority to conclude treaties and the competence to undertake obligations with respect to the treaty's subject matter. Israel, for example, consults with foreign governments to confirm that the sub-state actor has the authority to conclude the envisaged treaty. If the sub-state actor does not have this authority, Israel will redraft the document to ensure that the text does not constitute a binding international agreement.⁶⁹ In 2001, the United States took the same approach with the United Kingdom, confirming first with the United Kingdom that the Governments of Guernsey, the Isle of Man, and Jersey had the authority to conclude bilateral tax information exchange agreements with the United States.⁷⁰ When the United States determined that the Cayman Islands lacked the necessary entrustment to sign a similar tax information exchange agreement in its own name, the

ship/memorandum.htm (last visited Jan. 27, 2005). In doing so, however, the Memorandum was specifically crafted to indicate in Article 6 that it did not constitute an international agreement. *Id.*

67. Copithorne, *supra* note 37, at 11-12. For example, Canada consented to an education entente concluded by France and Quebec on February 27, 1965. Nikraves, *supra* note 53, at 235. Similarly, the United States and Canada both stepped in to "consent" to and indemnify an agreement concerning the Ross Dam on the Skaggit River on behalf of the city of Seattle and British Columbia, where the two sub-state entities had originally concluded an agreement on the subject by themselves. Treaty Between the United States of America and Canada Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, U.S.-Can., T.I.A.S. No. 11,088.

68. Nikraves, *supra* note 53, at 242.

69. Ruth Lapidot, *Israel*, in 2003 NATIONAL TREATY LAW AND PRACTICE, *supra* note 37, 65, 78. Furthermore, before concluding a 1980 maritime boundary treaty with the Cook Islands, the United States sought and received confirmation from New Zealand of the Cook Islands' treaty-making power and competence over maritime matters. See Treaty on Friendship and Delimitation of the Maritime Boundary Between the United States and the Cook Islands, June 11, 1980, U.S.-Cook Islands, 35 U.S.T. 2061; Conclusion and Entry into Force, 1981-1988 CUMULATIVE DIGEST, vol. 1, § 1, at 1207-08.

70. See *supra* note 44.

United States concluded the agreement with the United Kingdom, which acted on behalf of the Cayman Islands.⁷¹

Notwithstanding the increased frequency of their bilateral treaty-making, few sub-state actors participate in multilateral agreements because the states negotiating these agreements generally refuse to consent to the sub-state actor's participation. The reasons for these objections vary from a concern that sub-state actors might merely act as proxies for a sovereign state that is already a party to the treaty to a more general objection to opening up treaties to non-state actors. For example, attempts to expand sub-state territorial participation in negotiations for a South Pacific Regional Environmental Program (SPREP) met strong resistance. In one noted exchange between the United States and Guam, the latter demanded that the treaty grant sub-state actors the same right to form and block consensus as states for matters over which they had competence.⁷² At the end of the negotiations, however, the states gave territories only limited membership rights and retained consensus powers for themselves.⁷³

More recently, France argued that New Caledonia should be allowed to join the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Central and Western Pacific Ocean. France took this position because its 1999 constitutional amendment afforded New Caledonia a separate treaty-making capacity, and France had promised New Caledonia greater autonomy in its foreign relations.⁷⁴ At the same time as it lobbied for New Caledonia's right to join the treaty, however, France also indicated it would join the

71. See, e.g., Press Release, U.S. Treasury Department, Treasury Secretary O'Neill's Signing Ceremony Statement: United States and United Kingdom Sign Agreement to Exchange Tax Information With Respect to the Cayman Islands (Nov. 27, 2001), at <http://www.treas.gov/press/releases/po823.htm> (last visited Jan. 27, 2005).

72. See SOUTH PACIFIC REGIONAL ENVIRONMENT PROGRAMME, REPORT OF THE PLENIPOTENTIARY MEETING ON THE SPREP TREATY (June 14-16, 1993), available at http://www.sprep.org.ws/publication/pub_detail.asp?id=86 (last visited Jan. 27, 2005).

73. Agreement Establishing the South Pacific Regional Environmental Program, June 16, 1993, 1993 U.S.T. Lexis 105, available at CENTER FOR INTERNATIONAL EARTH SCIENCE INFORMATION NETWORK, <http://sedac.ciesin.org/entri/texts/acrc/SPEnviro.txt.html> (last visited Jan. 27, 2005). Article 4(3) of the Agreement provides that work "shall be conducted on the basis of consensus of all Members, taking into account the practices and procedures of the South Pacific region," but that "[i]n the event that a decision is required in the SPREP Meeting, that decision shall be taken by a consensus of the Parties. The consensus of the Parties shall ensure that the views of all Members of the SPREP Meeting have been properly considered and taken into account." *Id.*, 1993 U.S.T. Lexis at *18. Article 3 provides that meetings are open to parties to the agreement and, where they have "appropriate authorization of the Party having responsibility for their international affairs," the following territories—American Samoa, French Polynesia, Guam, New Caledonia, Northern Mariana Islands, Palau, Tokelau, and Wallis and Futuna. *Id.*, 1993 U.S.T. Lexis at *16-17.

74. Article 77 of the French Constitution authorizes French law to transfer powers "definitively" to New Caledonia. LA CONSTITUTION [CONST.] tit. XIII, art. 77. Certain treaty-making powers were included among the powers transferred. See Law No. 99-209 of Mar. 19, 1999, arts. 21, 22, J.O., Mar. 21, 1999, p. 4197, 4198-99, *La Gazette du Palais*, May-June 1999, Legislation, 304, 305-06 (giving New Caledonia authority to conclude international conventions in specific areas such as regulation and exercise of the rights of exploration and exploitation and conservation of marine resources in the Exclusive Economic Zone).

treaty. Other states objected to separate French and New Caledonian membership where the Convention contemplated decision-making by a supermajority vote of the parties.⁷⁵ Like SPREP, the final version of the treaty was not open to direct sub-state participation and such actors were denied direct voting rights.

In a few notable cases, however, states have shown a willingness to open up treaties to direct sub-state actor participation. Article 305 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) allows three categories of associated states and territories to sign and ratify the Convention with all the attendant rights and obligations afforded to states under the Convention.⁷⁶ In all three cases, the entity must have competence over the matters governed by the Convention, including the competence to enter into treaties in respect of those matters.⁷⁷ The same approach has been followed in the related United Nations Fish Stocks Agreement.⁷⁸

The Agreement establishing the World Trade Organization (WTO) approaches sub-state actor participation slightly differently. Article XII authorizes any “customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements” to accede on terms agreed to between it and the WTO.⁷⁹ Prior to their reversion to the People’s Republic of China from

75. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, *opened for signature* Sept. 5, 2000, INTERNET GUIDE TO INTERNATIONAL FISHERIES LAW, available at <http://www.oceanlaw.net/texts/westpac.htm> (last visited Jan. 27, 2005). These same states, including the People’s Republic of China, however, were willing to give Taiwan greater voting rights. As adopted, the Convention allows Taiwan to agree to the Convention with full voting rights. *See, e.g., id.* (Arrangement for the Participation of Fishing Entities).

76. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, arts. 305(1)(c)-(e), 306, 1833 U.N.T.S. 396, 517-18 [hereinafter UNCLOS] (authorizing ratification or acceptance of the Convention by (1) “self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations”; (2) “self-governing associated States . . . [with] instruments of association”; and (3) “territories that enjoy full internal self-government, recognized as such by the United Nations, but [which] have not attained full independence”).

77. *Id.* These two criteria were considered fundamental to determining which participants would be allowed to join the Convention. UNCLOS COMMENTARY, *supra* note 37, at 184. To date no qualifying territories have joined the Convention, although a number of self-governing associated states such as the Cook Islands and Niue have done so. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, U.N., STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA ET AL.: TABLE RECAPITULATING THE STATUS OF THE CONVENTION AND OF THE RELATED AGREEMENTS, at http://www.un.org/Depts/los/reference_files/status2005.pdf (last visited Jan. 27, 2005).

78. *See* Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, arts. 1(2)(b), 37-40, 2167 U.N.T.S. 88, 90, 125-26. *See also* DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, U.N., CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND THE RELATED AGREEMENTS, at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Jan. 27, 2005).

79. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. XII, 1867 U.N.T.S. 3, 162 [hereinafter WTO Agreement]. Thus, Macau joined the WTO before the

the United Kingdom and Portugal respectively, both Hong Kong and Macau joined the WTO pursuant to Article XII. Hong Kong and Macau have since continued their independent membership despite China's accession to the WTO.⁸⁰

What does this practice generally mean for sub-state actor treaty participation? Do we need to add sub-state actors as a new category under the list of "who" is entitled to conclude treaties? Such an addition appears premature given that sub-state treaty-making remains a function of state consent; sub-state actors remain dependent on authorization to make treaties from the responsible sovereign states as well as from their would-be treaty partners. As demonstrated above, states continue to oversee and regulate the conditions, if any, under which their sub-state components can conclude treaties. These conditions may be case-specific or based in law. Moreover, states generally take the view that, where a sub-state actor concludes a treaty within the conditions laid down by the state, it is the state, not the sub-state component, that bears international legal responsibility under the resulting agreement.⁸¹ Some states even take the view that they may terminate their sub-state entities' international agreements.⁸²

Because sovereign states control sub-state actor participation and execution of international agreements so tightly, it is hard to consider them much more than agents or designees of the state.⁸³ It is unlikely that a sub-state actor would have the same right of autointerpretation as state actors in cases where the sovereign state has a different interpretation of a treaty. Even in cases where a sub-state actor negotiates outside the scope of any existing authority, states have

People's Republic of China did.

80. See WTO, UNDERSTANDING THE WTO: THE ORGANIZATION: MEMBERS AND OBSERVERS, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 27, 2005). In addition, although it would not necessarily qualify as a sub-state actor as defined in this essay, Taiwan also relied on Article XII to join the WTO in 2002. *Id.*

81. See, e.g., AUST, *supra* note 3, at 49 (regarding federal states such as Germany and Switzerland as legally responsible for treaties of sub-federal units); *id.* at 52 (considering the United Kingdom as ultimately responsible for the performance of treaties by its overseas territories); Kozak, *supra* note 45, at 431 ("the Federal Government is responsible internationally for the affairs of the territories and commonwealths in precisely the same manner as for the states of the Union. Thus the Federal Government is held responsible for meeting commitments relating to them and for ensuring that the obligations of other nations towards them are met."). When signing the Amsterdam Treaty in 1997, Belgium clarified that it would bear full responsibility for compliance with all treaty obligations, even though it characterized its signature of the treaty as one by which it *and* its regions "entered into an undertaking at the international level." AUST, *supra* note 35, at 51. *But see* Díaz, *supra* note 54, at 111 (noting Mexico does not view sub-national international agreements as binding on the Mexican federation).

82. Cede & Hafner, *supra* note 46, at 12 (noting that the Federal Government can require the Land to terminate its treaties).

83. Lissitzyn, *supra* note 33, at 15 (noting that while treaty conclusion by a dependent entity may lead to the determination that the sub-state actor is an international person possessing its own treaty-making capacity, whether or not it is a "State," a second juridical explanation is also possible where the sub-state actor may be regarded as having no distinct international personality or capacity of its own, but merely the authority to act as an agent or organ of the dominant state which retains the requisite capacity).

taken steps to either affirm or reject the results of those negotiations. Moreover, as the SPREP and New Caledonia cases suggest, treaty-making by sub-state actors remains derivative of not only the consent of the states to which they are a part but also the consent of other states parties to the treaty.

Nevertheless, the trend by which some sub-state actors are concluding international agreements outside the conditions laid down by their states merits attention. Moreover, the fact that certain treaty regimes now allow sub-state actors to participate separate from and in addition to the states with which they are associated (e.g., the Cook Islands and New Zealand in UNCLOS; China, Hong Kong and Macau in the WTO) suggests that an agency theory of sub-state actor treaty-making is not a sufficient explanation. Therefore, although we cannot yet categorize sub-state actors as a new class of “authorities” in the treaty context, depending on how these trends progress in the future, it is possible that states will authorize sub-state participation in treaties in ways that allow them to achieve such a status.

B. *Supranational Actors*

Just as states may be subdivided into various sub-state components, so too may they organize themselves into a “supranational” entity. The creation of such an actor involves more than the mere investment of powers in some organization or grouping of states, which frequently occurs in the creation of an international organization.⁸⁴ Although there is no fixed definition for what constitutes a supranational entity, at least two criteria distinguish it from other actors.⁸⁵ First, states must transfer to the entity powers that they themselves previously exercised over their nationals.⁸⁶ Second, in exercising these previously

84. Even though supranational organizations can in some ways be viewed as a category of international organizations, this essay treats them as separate and distinct actors because of the different authorities that they have been allowed to exercise internationally, particularly in the treaty context. See *infra* notes 118-119, 130-134 and accompanying text.

85. See Francesco Capotorti, *Supranational Organizations*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 737, 737 (2000) (indicating that the term “supranational” has not acquired a distinct legal meaning). In the absence of an agreed definition, scholars have, as here, used different criteria to give the term meaning. See, e.g., *id.* at 739-40 (identifying a supranational organization according to whether the entity has independent decision-making authority, direct relations with individuals in member states, and the existence of a legal system with its own judicial body); Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 287 (1997) (describing a supranational organization as a particular type of international organization empowered to exercise directly some of the functions otherwise reserved to states); SCHERMERS & BLOKKER, *supra* note 34, at 41-42 (listing six descriptive factors for supranational organizations, including the power to bind member states; the power to make rules binding on inhabitants of member states; decision-making that is not entirely dependent on cooperation of all member states; the ability to enforce its decisions; financial autonomy; and restrictions on unilateral withdrawal without the consent of the organization).

86. Thus, rather than merely investing an entity with powers to bind member states, a supranational organization will actually take over competence on certain matters previously exercised by the member states, and its exercise of such competences will bind not only member states but also their nationals. See, e.g., Capotorti, *supra* note 85, at 738-39.

national powers, a supranational actor must have independent authority from its member states.⁸⁷

The European Union (“EU”) is the paradigmatic example of a supranational actor.⁸⁸ In the treaty context, however, the EU has not traditionally played a direct role in making treaties. Rather, its component communities—the European Community (“EC”) and the European Atomic Energy Community (“Euratom”)—have traditionally performed such functions.⁸⁹ The EC now has an extensive network of international agreements; as of May 2002, it had concluded roughly 600 bilateral agreements.⁹⁰ Moreover, as of April of 2003, the EC had joined approximately 90 multilateral treaty regimes ranging from the Food and Agriculture Organization (“FAO”) to the WTO.⁹¹

As with sub-state actors, the ability of a supranational actor to join a treaty depends on the extent to which sovereign states have consented to its participation. First, the supranational actor’s member states must transfer competence to it over all or part of the treaty’s subject matter and authorize it to enter into international agreements on such matters. The EC Member States have in fact done this through the treaty establishing the European Community.⁹² In that treaty, the Member States transferred competence over certain matters to the EC, which entitles the EC to exercise those competences internationally.⁹³ This

87. See, e.g., *id.* at 739 (looking to the “actual ‘independence’ of the decision-making machinery”); SCHERMERS & BLOKKER, *supra* note 34, at 41 (identifying “independence” in terms of binding decisions adopted by majority decision or composing a decision-making organ of independent individuals).

88. Helfer & Slaughter, *supra* note 85, at 287.

89. Until recently, the European Union was only a political organization, organized into three pillars: (i) its communities, namely the European Community (EC), Euratom, and the European Coal and Steel Community (ECSC), the last of which expired in 2002; (ii) the Common Foreign and Security Policy (CFSP); and (iii) Justice and Home Affairs (JHA). Although its Member States had previously granted the EC and Euratom international legal personality, including the authority to enter into treaties, they did not do so with respect to the EU until more recently. See, e.g., AUST, *supra* note 3, at 55-56; DOMINIC MCGOLDRICK, INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION 13, 37 (1997); I. MACLEOD ET AL., THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES 25 (1996). For a discussion of the EU’s new treaty-making authorities, see *infra* notes 99-101 and accompanying text.

90. See, e.g., EUROPEAN COMMISSION, ANNOTATED SUMMARY OF AGREEMENTS LINKING THE COMMUNITIES WITH NON-MEMBER COUNTRIES 5 (updated through May 13, 2002) (listing “current agreements . . . which have been signed but have not yet entered into force, interim or provisional measures applying them in practice and a reference to sectoral measures which are not strictly international agreements but which (independently) cover one or more aspects traditionally covered by agreements.”).

91. See *id.*; Constitution of the United Nations Food and Agriculture Organization, as Amended, Nov. 20, 1959, art. II(3), 12 U.S.T. 980, 987-88 [hereinafter FAO]; WTO Agreement, *supra* note 79, art. XIV, 1867 U.N.T.S. at 163.

92. MCGOLDRICK, *supra* note 89, at 29-30, 43 (discussing articles of the EC Treaty granting the EC authority to enter into agreements on matters ranging from the environment to development cooperation to the role of the European Court of Justice’s interpretation of the Treaty to grant the EC wide treaty-making powers); MACLEOD ET AL., *supra* note 89, at 38, 56-57 (reviewing areas of EC competence, including fisheries, transport, common commercial policy, education, vocational training and youth, culture, public health, and the environment).

93. The Member States’ transfer of various competences in the EC Treaty can be either ex-

transfer can result in either “exclusive” EC treaty-making authority, where the EC but not its Member States may conclude treaties, or “mixed” authority, where Member States retain the freedom to also conclude treaties on the same subject.⁹⁴ For example, Member States have transferred to the EC all of their competence with respect to fisheries. In this context, therefore, the EC now joins fish treaties in lieu of its Member States and participates in those treaties with a single vote.⁹⁵ In other areas, where the EC only has shared competence (e.g., the environment and transportation), the EC and its Member States participate jointly, exercising votes according to the number of Member States that have joined the treaty.⁹⁶

The EC only has the power to join treaties the subject matter of which falls within the competence accorded to it by its Member States. Member States may challenge whether the EC is acting within the scope of its authority in concluding a particular treaty.⁹⁷ For example, a number of Member States contested the EC’s ability to join the European Convention on Human Rights before the European Court of Justice (“ECJ”). The ECJ concluded that the EC did not yet have competence over the enforcement of human rights and prevented it from joining

placit or implicit. MCGOLDRICK, *supra* note 89, at 43-66. Under the EC Treaty, “competence” refers not simply to particular subject areas but, more accurately, to objectives spelled out under the Treaty, such that it is not a subject matter but the attainment of the objective within the powers authorized under the EC Treaty that characterizes “competence.” MACLEOD ET AL., *supra* note 89, at 38. The notion that the EC’s external competence stretches to the same extent as its internal competence is known as the “doctrine of parallelism.” MCGOLDRICK, *supra* note 89, at 48. Moreover, the EC may engage in treaty-making even for those areas of its competence that are available, although not yet exercised internally. *Id.* at 58.

94. AUST, *supra* note 35, at 55-56; MCGOLDRICK, *supra* note 89, at 78. Mixed competence is also possible in cases where the EC has potentially exclusive competence, but has yet to exercise it, leaving residual competence in the Member States. This appears to be the case, for example, in the area of aviation safety, where the creation of the European Aviation and Space Agency (EASA) potentially gives the EC exclusive competence, but where, for the time being, the EC appears willing to allow its Member States’ bilateral aviation safety agreements to continue, pending further development of the Agency. *EASA Implementation to Impact Certification of Europe-Bound Products*, 93 BUS. & COMMERCIAL AVIATION 53 (2003); David Kaminski-Morrow, *Transition to New Safety Agency Going Smoothly: EASA Chief*, AIR TRANSPORT INTELLIGENCE (Oct. 3, 2003), available at <http://www.airtransportintelligence.com> (last visited Jan. 27, 2005).

95. For example, the parties to the 1949 Convention establishing the Inter-American Tropical Tuna Commission recently amended the Convention to authorize EC participation and ban participation by EC Member States unless those Member States represented a territory lying outside the EC Treaty’s geographic scope. *See, e.g.*, Protocol to Amend the 1949 Convention on the Establishment of an Inter-American Tropical Tuna Commission, June 11, 1999, 40 I.L.M. 1494.

96. Indeed, “[f]rom a strictly legal perspective, in relation to an agreement over which competence is shared, neither the EC nor the member states should become a party without the other. Neither of them in isolation is capable of fulfilling all of the obligations under the agreement.” MCGOLDRICK, *supra* note 89, at 80-81. In practice, the situation of mixed agreements is more muddled with both the EC and its Member States frequently coordinating to delineate a common position in lieu of alternative assertions of authority. *Id.* at 81.

97. *Id.* at 94-97 (explaining that the Member States may bring a case to the European Court of Justice, which may, as a matter of Community law rather than international law, determine whether the EC can enter into an agreement).

the treaty.⁹⁸

In addition to the EC, the EU Member States have amended the Treaty on European Union to authorize the EU itself to conclude agreements in the areas of foreign affairs and justice.⁹⁹ The EU recently concluded its first two agreements with the United States on extradition and mutual legal assistance.¹⁰⁰ There are even plans for a consolidation of all EU, EC, and Euratom treaty-making powers within the EU through the new Treaty Establishing a Constitution for Europe.¹⁰¹

The fact that Member States authorize the EC and EU to enter into treaties in certain areas does not, of course, guarantee that such agreements will be concluded.¹⁰² Other treaty partners must also agree (that is, they must give their external consent). They have done so for the EC with increasing frequency in the multilateral context through the use of the so-called REIO clause.¹⁰³ Treaties containing this clause permit REIOs—regional economic integration organizations—that have competence in respect of matters governed by the treaty and that have been duly authorized to join the treaty to sign and consent to be bound by the treaty.¹⁰⁴ The REIO then has similar rights and obligations as states parties, although limitations are included to ensure that the REIO and its member states do not collectively enjoy any additional rights unavailable to states that have chosen not to organize supranationally.¹⁰⁵ Examples of EC participation in international treaties through a REIO clause include the

98. *Id.* at 99-100.

99. AUST, *supra* note 35, at 56; Treaty of Nice Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, art. 1(4), Feb. 26, 2001, O.J. (C 80) 1 (2001) (amending art. 24 of the Treaty on European Union).

100. GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN UNION, EUROPEAN UNION, FACTSHEET: EXTRADITION AND MUTUAL LEGAL ASSISTANCE (June 25, 2003), at http://europa.eu.int/comm/external_relations/us/sum06_03/extra.pdf (last visited Jan. 27, 2005).

101. *See, e.g.*, Treaty Establishing a Constitution for Europe, Oct. 29, 2004, arts. III-323 to III-326, 47 *EUR-Lex* C 310 (Dec. 16, 2004), available at <http://europa.eu.int/eur-lex/lex/JOhtml.do?uri=OJ:C:2004:310:SOM:EN:HTML> (last visited Jan. 27, 2005); Angelo Petroni *Your Liberty is at Risk in the EU's New Constitution*, WALL ST. J. EUR., Oct. 7, 2003 (describing push to give EU full "legal personality").

102. Member States may, however, be under an obligation as a matter of EC law to push for EC membership in treaties where the EC has mixed or exclusive competence. MCGOLDRICK, *supra* note 89, at 87.

103. *Id.*; MACLEOD ET AL., *supra* note 89, at 32. The EC has no ability to join multilateral treaties in its own right; the treaties are open only to participation by states and REIOs.

104. An example of such a clause is found in Article 53(2) of the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. TREATY DOC. 106-45, at 24 (2000), 1999 U.S.T. Lexis 175, at 72-73 [hereinafter Montreal Convention] ("[t]his Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a 'Regional Economic Integration Organisation' means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention.")

105. A REIO's participation will generally be accompanied by provisions that allow the REIO to vote on matters for which it has competence with the number of votes of its member states, but only where its member states do not exercise their own votes (i.e., there is no additional vote). *See* Convention on Biological Diversity, June 5, 1992, art. 31, 1760 U.N.T.S. 142, 161 [hereinafter

in international treaties through a REIO clause include the Convention on Biological Diversity ("CBD"), the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, the United Nations Framework Convention on Climate Change ("FCCC"), the Constitution of the United Nations Food and Agriculture Organization ("FAO"), the Vienna Convention for the Protection of the Ozone Layer, the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the Convention on Nuclear Safety.¹⁰⁶ Even in those cases where there is no REIO clause, treaties such as UNCLOS allow international organizations that meet certain criteria to join the treaty, and the EC has been able to satisfy such criteria.¹⁰⁷

The willingness of sovereign states to authorize EC and EU participation in treaties is not, however, uniform. Particularly with respect to older treaties such as the United Nations Charter and the International Labor Organization, states are unwilling to consider treaty amendments that would allow membership by non-state actors.¹⁰⁸ Recent calls by the EU to join treaty regimes such as the International Monetary Fund (IMF) and the International Civil Aviation Organization (ICAO) have met with a cool reception.¹⁰⁹

Although both the internal authorization of and external consent to EC treaty-making are similar to the prerequisites for sub-state treaty-making, the EC appears to operate with much greater independence than its sub-state counter-

CBD]. Similarly, acceptance of a treaty by a REIO is not usually counted for "entry into force" purposes. *See id.*, art. 36(5), 1760 U.N.T.S. at 163. Finally, although the EC is often reluctant to define the scope of its competence, some REIOs require it to declare its competence under the treaty in order to join the treaty. *See, e.g., id.*, art. 34(3), 1760 U.N.T.S. at 162; MCGOLDRICK, *supra* note 89, at 115.

106. CBD, *supra* note 105, arts. 2, 31, 33, 34-36, 1760 U.N.T.S. at 146-47, 161, 162-63; Montreal Convention, *supra* note 104, art. 52, S. TREATY DOC. 106-45, at 43, 1999 U.S.T. Lexis 175, at 112; United Nations Framework Convention on Climate Change, May 9, 1992, arts. 1(6), 20, 22, 23, S. TREATY DOC. 102-38, at 5, 24, 25, 26, 31 I.L.M. 849, 853, 870-71 [hereinafter FCCC]; FAO, *supra* note 91, art. II, 12 U.S.T. 980, 987-88; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, arts. 1(6), 12-17, T.I.A.S. No. 11,097, at 5, 14-17, 1513 U.N.T.S. 323, 325, 331-33 [hereinafter Vienna Ozone Convention]; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, arts. 26-29, 28 I.L.M. 493, 523-24; Convention on Nuclear Safety, June 17, 1994, arts. 30-31, 1963 U.N.T.S. 293, 328-29.

107. UNCLOS, *supra* note 76, Annex IX, art. 1, 1833 U.N.T.S. at 578 (laying out detailed provisions for participation by "international organization[s]," which are defined as "intergovernmental organization[s] constituted by States to which [their] member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters").

108. *See, e.g.,* AUST, *supra* note 35, at 56; MCGOLDRICK, *supra* note 89, at 82.

109. *See, e.g.,* Paul Hofheinz, *EU Urged to Revamp Voting at IMF to Counterbalance U.S.*, WALL ST. J. EUR., Apr. 19, 2002 (discussing the EU Commissioner's call for the EU Member States to be represented at the IMF by a single representative); Press Release, European Commission, Strength through Unity: The Commission Asks for the European Community's Accession to the ICAO and the IMO, Reference IP/02/525 (Apr. 9, 2002), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/525&format=HTML> (last visited Jan. 27, 2005) (announcing European Commission request for authorization to negotiate amendments to the constituent treaties of the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO) to allow EC participation).

parts. An individual Member State is unable to revoke its transfer of competence to the EC.¹¹⁰ Unlike sub-state actors, the EC itself takes on legal responsibility for its treaty obligations.¹¹¹ Given this legal responsibility, the EC has a corresponding right of autointerpretation with respect to its treaties that sub-state actors do not likely enjoy. Moreover, mechanisms to access legal fora such as the ECJ exist within the EU to resolve disputes between Member States and the EC over the scope of their respective treaty-making competences. Although sub-state actors' unauthorized treaties may be ignored or rejected by sovereign states, even an unauthorized EC treaty will create international legal obligations for the EC, a point confirmed by the ECJ in *France v. Commission*.¹¹² As the recent debate over EC Member States' "Open Skies" treaty commitments demonstrates, the EC may also challenge whether its Member States improperly exercised treaty-making authority that they had previously transferred to the EC.¹¹³

A strong case can be made for adding supranational actors such as the European Community—and soon perhaps the European Union itself—to the list of the entities that are capable of entering into international treaties independently. What remains to be seen, however, is whether the EC represents a truly new class of actors with treaty-making authority or simply a case *sui generis*. The REIO clause is formulated in such a way that, if other regional groupings of states were to follow the EC example and transfer competence to supranational bodies authorized to act internationally, those entities could utilize REIO clauses in much the same way as the EC. At the present time, however, although bodies such as ASEAN and Mercosur have demonstrated a limited treaty-making capacity,¹¹⁴ the REIO clause is generally understood to refer only to the EC.¹¹⁵

110. MACLEOD ET AL., *supra* note 89, at 40.

111. *Id.* at 124-25; *supra* notes 81-82 and accompanying text (indicating that sovereign states are legally responsible for the treaty commitments of their sub-state entities). It is unclear, however, where legal liability rests in the case of mixed agreements, where both the EC and Member States together accept responsibility to perform the treaty. The reluctance of the EC and its Member States to delineate their respective competences under a treaty may suggest both should be held jointly liable. MACLEOD ET AL., *supra* note 89, at 158-60.

112. AUST, *supra* note 35, at 253.

113. Press Release, European Commission, Commission Takes Action to Enforce 'Open Skies' Court Rulings, Reference IP/04/967 (July 20, 2004), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/967&format=HTML> (last visited Jan. 27, 2005) (announcing the Commission's issuance of a "letter of formal notice under Article 228 of the Treaty [on European Union] against eight Member States—Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the United Kingdom—over their failure to comply with the judgments of the European Court of Justice issued against them on 5 November 2002 in the so-called 'open skies' cases").

114. For example, the EC has concluded an Interregional Framework Cooperation Agreement between the EC and its Member States and the Southern Cone Common Market (Mercosur). Interregional Framework Cooperation Agreement Between the European Community and its Member States, of the One Part, and the Southern Common Market and its Party States, of the Other Part, Oct. 2, 1995, 1996 O.J. (L 069) 4. The United States and ASEAN concluded an agreement establishing an ASEAN Agricultural Development and Planning Center. Exchange of Notes Constituting an Agreement Concerning an Agricultural Development and Planning Centre, June 28, 1980, U.S.-

C. Extra-National Actors

“Extra-national” actors comprise a third category of entities that may constitute a distinct source of authority in the treaty context. Unlike the sub-state actor that gains its authority from the sovereign state with which it is associated or the supranational actor that exercises competences transferred to it by its member states, the extra-national actor exists separate from nation-state systems. Comprising a category that is vast in quantity and kind, extra-national actors include international organizations and other international institutions created by states for a particular purpose (e.g., Conferences of the Parties and Meetings of the Parties), and even individuals to whom states designate the performance of some function.¹¹⁶ Actors in this category, like their sub-state and supranational counterparts, have the power to conclude treaties. In addition, extra-national actors may also have the authority to apply, interpret, and even modify treaty obligations.

1. Extra-National Treaty-Makers

Extra-national actors may negotiate and conclude treaties.¹¹⁷ International organizations have long possessed the capacity to conclude treaties and their practice of doing so is well-documented.¹¹⁸ The rules for such treaties are laid out in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations (“1986 Vienna Convention”).¹¹⁹

Although less well-known and more limited in practice, other extra-

ASEAN, 32 U.S.T. 1371.

115. MACLEOD ET AL., *supra* note 89, at 32; MCGOLDRICK, *supra* note 89, at 33.

116. 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, 658 (describing autonomous institutional arrangements of multilateral environmental agreements (MEAs) as a category of intergovernmental organizations).

117. For example, as of January 1, 2003, in addition to sub-state and EU-related treaties, the United States listed bilateral treaties in force with no less than 45 international organizations, institutions, and tribunals. *See generally* U.S. DEP'T OF STATE, TREATIES IN FORCE (2003).

118. SCHERMERS & BLOKKER, *supra* note 34, at 1096, 1099 n.214 (noting, by 1983, publication in the United Nations Treaty Series of 2000 agreements to which international organizations were parties); AUST, *supra* note 35, at 54; PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 480 n.49 (2001) (noting estimates of more than 10,000 treaties concluded by international organizations by 1973). This practice of treaty-making by extra-national actors should be distinguished from cases where they serve as sponsors or the negotiating forum for treaties solely between states. *Id.* at 483-84.

119. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, U.N. Int'l L. Comm'n, U.N. Doc. A/CONF.129/15, reprinted in UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS, OFFICIAL RECORDS, DOCUMENTS OF THE CONFERENCE, vol. II, 94 (1995), available at <http://www.un.org/law/ilc/texts/trbtstat.htm> (last visited Jan. 27, 2005) [hereinafter 1986 Vienna Convention]. The rules track the 1969 Vienna Convention on the Law of Treaties with modifications to accommodate the different nature of international organizations. AUST, *supra* note 35, at 54.

national actors have also demonstrated a capacity to conclude treaties. For example, even though the Comprehensive Nuclear Test Ban Treaty Organization does not yet exist, its Preparatory Commission has concluded a number of treaties.¹²⁰ International institutions and tribunals that were never intended to qualify as international organizations have engaged in treaty-making as well. For example, treaty-based regimes such as the Multilateral Fund of the Montreal Protocol and the Conference of the Parties to the Climate Change Convention have concluded agreements with their host states.¹²¹ Similarly, the Organization for Security and Cooperation in Europe—which, despite its name, does not constitute an international organization—concludes agreements with states hosting its missions such as a 1998 Agreement with the Federal Republic of Yugoslavia on the OSCE Kosovo Verification Mission.¹²² Even international tribunals may conclude treaties; both of the International Tribunals established by the U.N. Security Council for prosecuting war crimes in Rwanda and the Former Yugoslavia have concluded agreements relating to the surrender of persons to each Tribunal.¹²³

Examining the basis for this practice, we find that the same prerequisites previously identified for sub-state and supranational treaty-making—internal authorization and external consent—also apply to extra-national actors making treaties. The internal authorization can be explicit or implicit. States and other actors (for example, the U.N. Security Council) that create an extra-national actor or designate it to fulfill some function can explicitly authorize it to conclude

120. See, e.g., Agreement Between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the Government of the Islamic Republic of Mauritania on the Conduct of Activities, Including Post-Certification Activities, Relating to International Monitoring Facilities for the Comprehensive Nuclear-Test-Ban Treaty (Sept. 16-17, 2003) (copy on file with author); Agreement Between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Sept. 18, 2002) (copy on file with author).

121. Churchill & Ulfstein, *supra*, note 116, at 651-655 (citing the “1998 Agreement between the Multilateral Fund for the Implementation of the Montreal Protocol and Canada” and the “1996 Agreement between the United Nations, the Federal Republic of Germany, and the secretariat of the Climate Change Convention”).

122. See Agreement Between the Organization for Security and Cooperation in Europe and the Federal Republic of Yugoslavia on the OSCE Kosovo Verification Mission (Oct. 16, 1998) (copy on file with author). Although the text uses the term “will” rather than “shall,” it otherwise evidences an intention to create legal obligations. It provides, *inter alia*, that Yugoslavia will accept the OSCE Verification Mission as a diplomatic entity in the terms of the Vienna Convention on Diplomatic Relations and assign it responsibility to verify compliance by all parties in Kosovo with U.N. Security Council Resolution 1199.

123. See, e.g., U.S. DEP’T OF STATE, TREATIES IN FORCE (2003), at 139 (referencing agreements on the surrender of persons with the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of Humanitarian Law in the Territory of Rwanda (Jan. 24, 1995) (International Criminal Tribunal for Rwanda, or ICTR) and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia (Oct. 5, 1994) (International Criminal Tribunal for the Former Yugoslavia, or ICTFY)).

treaties on particular subjects.¹²⁴ Alternatively, the extra-national actor may rely on the doctrine of implied powers to establish the existence and scope of its treaty-making capacity.¹²⁵ As articulated in the Preamble to the 1986 Vienna Convention, international organizations have the capacity to conclude those treaties “necessary for the exercise of their functions and the fulfillment of their purposes.”¹²⁶ Thus, even though many international organizations, institutions, and tribunals have no explicit authority to conclude treaties, they still do so where necessary. Necessary functions for these actors range from headquarters agreements establishing their status in host states and relationship agreements coordinating activities with other international institutions.¹²⁷

Regardless of whether the extra-national actor’s treaty-making authority is explicit or implicit, it does have limits. Extra-national actors may only conclude treaties in those areas in which they are competent to act.¹²⁸ As the International Court of Justice reasoned in the *Reparations* case, “the rights and duties of an entity such as the [United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”¹²⁹ In practice, these limitations have operated to prevent most international organizations from joining multilateral treaties that either create rules of general application or establish other international actors.¹³⁰ As Schermers and

124. See, e.g., U.N. CHARTER arts. 57, 63 (envisaging relationship agreements between the United Nations and its specialized agencies); U.N. CHARTER art. 43 (addressing agreements on contributions of armed forces, assistance, and facilities to the Security Council); SCHERMERS & BLOKKER, *supra* note 34, at 1098-1100; SANDS & KLEIN, *supra* note 118, at 480-81.

125. SANDS & KLEIN, *supra* note 118, at 480-81 (citing examples of UN agreements on technical assistance and UNICEF implementing Chapter IX of the Charter even though there is no specific grant of power to conclude those agreements within the Charter); SCHERMERS & BLOKKER, *supra* note 34, at 1100-1101. The doctrine of implied powers has evolved in international institutional law as the principle that an organization must be “deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.” *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. Rep. 174, 182 (Apr. 11). See also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47, 57 (July 13) (same). These powers are clearly “subsidiary” to those conferred on the organization in its constituent instrument. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 66, 79 (July 8).

126. 1986 Vienna Convention, *supra* note 119.

127. See, e.g., SANDS & KLEIN, *supra* note 118, at 480 (citing the example of Council of Europe inter-governmental agreements); SCHERMERS & BLOKKER, *supra* note 34, at 1097, 1100 (noting that the rules of an international organization could limit its power to conclude treaties, but that the development of international institutional law otherwise appears to generally allow organizations to do so); Churchill & Ulfstein, *supra* note 116, at 649 (applying the implied powers doctrine as a basis for the treaty-making authority of autonomous institutions created by multilateral environmental agreements).

128. See, e.g., SANDS & KLEIN, *supra* note 118, at 481; SCHERMERS & BLOKKER, *supra* note 34, at 1097.

129. 1949 I.C.J. at 180. See also *id.* at 198 (“Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are ‘necessary’ to the exercise of powers expressly granted.”) (Hackworth, J., dissenting).

130. See, e.g., SANDS & KLEIN, *supra* note 118, at 484; SCHERMERS & BLOKKER, *supra* note 34, at 1101, 1119.

Blokker observed in their classic treatise, *International Institutional Law*, “[o]rganizations which cannot make binding rules even in their own field of competence—and most international organizations cannot do so—are incompetent to make binding agreements in those fields with others.”¹³¹

In the same vein, the external consent of other treaty partners may also affect the treaty-making power of extra-national actors. Although provisions have been made to accommodate treaty participation by sub-state and supranational actors, states have been reluctant to do the same for extra-national actors, most likely on the ground that extra-national actors lack competence to perform the treaties’ obligations.¹³² But, this reluctance is also visible even where extra-national actors actually engage in the conduct regulated by the treaty. For example, even though NATO, an extra-national actor, is authorized by its members to use force in certain circumstances, it is not entitled to become a party to international humanitarian law treaties.¹³³ These limitations help explain why the vast majority of treaties concluded by extra-national actors are bilateral agreements that seek simply to define the organizations’ activities and legal status or to provide for cooperation with other organizations.¹³⁴

When they do conclude treaties, extra-national actors, like supranational actors, operate independently. International organizations and other autonomous international institutions concluding treaties bear international legal responsibility for the obligations undertaken.¹³⁵ The treaties are not binding or enforceable against the organization’s members.¹³⁶ In this respect, extra-national actors may possess the same right of autointerpretation as states that are parties to the treaty. Thus, extra-national actors certainly fall within the list of entities that can make treaties. However, the nature and extent of their treaty-making authority is a product of the functions assigned to these actors and the willingness of

131. SCHERMERS & BLOKKER, *supra* note 34, at 1101.

132. Even where a multilateral agreement purports to be open to participation by “international organizations” (for example, UNCLOS), closer examination demonstrates such participation is usually reserved to supranational actors who are equivalent to REIOs. *See supra* notes 102-107 and accompanying text. The one notable exception to this approach is the 1986 Vienna Convention, *supra* note 119, art. 1, at 95.

133. *See* SCHERMERS & BLOKKER, *supra* note 34, at 1116-17 (acknowledging the current absence of international organization participation in “law-making” treaties, while noting that, in the future, “[o]rganizations using military forces may have to become parties to treaties on the law of war; organizations operating a radio station or operating ships or aircraft may have to become parties to treaties on telecommunications or navigation [and] . . . [i]nternational organizations may wish to adhere to universal or regional conventions on human rights”).

134. *See* SANDS & KLEIN, *supra* note 118, at 484.

135. *Id.* at 482 (concerning international organizations); Churchill & Ulfstein, *supra* note 116, at 649 (finding institutions of multilateral environment agreements possess international legal personality and the capacity to conclude agreements in the form of treaties instead of their states parties or the secretariat of the international organization hosting such institutions). Whether legal responsibility would rest with all extra-national actors would require further study. For example, it is unclear whether the ICTFY and ICTR are legally responsible for their agreements or if responsibility would reside with the United Nations whose Security Council authorized their creation.

136. SANDS & KLEIN, *supra* note 118, at 482.

states to accept their participation. Until changes occur in both these areas, the treaty-making capacity of extra-national actors will remain limited.

2. *Extra-National Interpretation, Application, and Modification of Treaty Obligations*

Extra-national actors play a second and more significant role in the treaty process. In looking at who is authorized to apply, interpret, or even modify treaty obligations, we find that extra-national actors represent new authorities in addition to sovereign states. They may serve as a solution to the traditional state-based autointerpretation framework, where those who make the treaty authorize one or more extra-national actors to apply or interpret it definitively, rather than leaving each state to do so for itself.¹³⁷ States parties to a treaty may even empower extra-national actors to define and amend treaty obligations.¹³⁸

States have a long history of using treaties not only to set out legal norms, but also to authorize extra-national actors to interpret and apply treaties in specific cases involving specific parties. The 1794 Jay Treaty, under which the United States committed to pay the British for outstanding debts following the Revolutionary War, established a binational arbitral commission to ascertain the amount of losses and damages to British subjects.¹³⁹ Similarly, the 1909 U.S.-Canada Boundary Waters Treaty established an International Joint Commission responsible for making binding determinations about the uses, obstructions, and diversions of boundary waters on one side of the border that affect the natural level or flow of boundary waters on the other side.¹⁴⁰

The Permanent Court of International Justice and the International Court of Justice that succeeded it represent examples of extra-national actors to whom states may designate the authority to interpret treaties in specific cases.¹⁴¹ That

137. In some sense, this may also take place with respect to supranational actors, as least in so far as applying, interpreting, or modifying member state treaty relationships *inter se*. Thus, in establishing the EU, the Member States created a structure that includes mechanisms (for example, the ECJ) that can authoritatively pronounce for the Member States the scope and extent of their EC Treaty commitments as between themselves.

138. Of course, states have an equally lengthy and more frequent practice of authorizing extra-national actors to play less formal roles with respect to treaties. For example, extra-national actors may be authorized to make recommendations to states with respect to the application or interpretation of treaty provisions, which lack direct legal force for the parties to those treaties. *See, e.g.*, Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, U.S.-Costa Rica, arts. 1, 2, 1 U.S.T. 230, 232-38, 80 U.N.T.S. 3, 4, 6, 8, 10 (authorizing the Commission to make recommendations on catch limits and other methods for maintaining and increasing the populations of fish covered by the Convention); Churchill & Ulfstein, *supra* note 116, at 642 (discussing “soft law” measures taken by autonomous institutions set up under various multilateral environmental agreements).

139. Treaty of Amity, Commerce and Navigation Between the United States of America and the United Kingdom, Nov. 19, 1794, U.S.-U.K., art. 6, 8 Stat. 116, 119-21.

140. Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, Jan. 11, 1909, U.S.-U.K., art. III, 36 Stat. 2448, 2449-50.

141. *See, e.g.*, ICJ Statute, *supra* note 13, art. 36(2)(a), 59 Stat. at 1060.

trend continues today with more recent creations such as the WTO Dispute Settlement Panels and Appellate Body, NAFTA Panels, and the International Law of the Sea Tribunal (ITLOS).¹⁴² Many multilateral environmental agreements take a slightly different approach, establishing “compliance mechanisms” by which an extra-national actor has the authority to review questions of non-compliance with treaty obligations by individual parties and the treatment accorded to such parties.¹⁴³ Of course, no recitation of extra-national authority in interpreting and applying treaty provisions is complete without mentioning the United Nations Security Council and its authority to delineate what constitutes a threat to international peace and security under the U.N. Charter and to decide upon responsive actions to redress such situations.¹⁴⁴

Nor is this phenomenon limited to cases where the extra-national actor applies a treaty norm to a specific case involving specific parties. States parties to a treaty may also authorize extra-national actors to actually refine or even define treaty norms. How does this occur? Generally, contracting states retain the right to consent individually to amendments to the basic treaty text. In some cases, however, the contracting states will create an extra-national actor and authorize it to modify or amend certain parts of the treaty, such as its annexes.¹⁴⁵

Most treaties that create extra-national actors and empower them with the affirmative ability to refine and define treaty norms provide dissenting states an “opt out” clause by which dissenting states can avoid being bound by the extra-

142. See Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, *supra* note 79, Annex 2, 33 I.L.M. 1226 (1994); North American Free Trade Agreement, Dec. 8, 11, 14 and 17, 1992, ch. 20, 32 I.L.M. 289, 298-99 (1993); UNCLOS, *supra* note 76, Pt. XV, Annex VI, 1833 U.N.T.S. at 508-16, 561-70.

143. This authority may be granted by the treaty itself or the extra-national actor may assert such authority based on its constituent instrument. See, e.g., Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 8, 1522 U.N.T.S. 29, 35 [hereinafter Montreal Protocol]; U.N. ESCOR, Econ. Comm’n for Eur., Executive Body for the Convention on Long-Range Transboundary Air Pollution, 15th Sess., Annex 3, at 28, U.N. Doc. ECE/EB.AIR/53 (1998), available at <http://www.unece.org/env/documents/1998/ece/eb/ece.eb.air.53.e.pdf> (last visited Jan. 27, 2005) (establishing an Implementation Committee to review parties’ compliance with their obligations under the LRTAP Convention and its Protocols). In some cases, moreover, the treaty only authorizes recommendations by the extra-national actor with respect to cases of potential non-compliance. See, e.g., Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, art. XI(3), 27 U.S.T. 1087, 1104-05, 993 U.N.T.S. 243, 251 [hereinafter CITES]; FCCC, *supra* note 106, art. 13, S. TREATY DOC. 102-38, at 20, 31 I.L.M. at 867; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, art. 18, 37 I.L.M. 22, 40 [hereinafter Kyoto Protocol]. A number of MEAs are still in the process of drafting non-compliance procedures. See *Non-Compliance Regimes in Multilateral Environmental Agreements, Note by the Secretariat*, U.N. Env’t Programme, Intergovernmental Negotiating Comm. for an Int’l Legally Binding Instrument for Implementing Int’l Action on Certain Persistent Organic Pollutants, 7th Sess., Agenda Item 5, at 2, U.N. Doc. UNEP/POPS/INC.7/22 (2003), available at http://www.pops.int/documents/meetings/inc7/en/K0360754_7_22.pdf, at 2 (last visited Jan. 27, 2005) (reviewing existing and draft non-compliance mechanisms).

144. See U.N. CHARTER arts. 39-51.

145. See generally Churchill & Ulfstein, *supra* note 116, at 638-641. States may do this, for example, because of a shared interest in creating a more dynamic treaty regime that can be changed even if not all of the states parties consent to a specific change.

national actor's amendments. The International Whaling Convention illustrates how such an "opt out" provision operates. The Convention creates an International Whaling Commission (IWC) that is authorized to amend, by a three-fourths majority vote, the Convention Schedule that contains obligations with respect to the conservation and utilization of whale resources.¹⁴⁶ These amendments are effective for all parties except where a state objects within ninety days. In that case, all parties that then object within 180 days are not bound by the challenged amendment.¹⁴⁷ The International Maritime Organization has followed a similar approach; amendments are adopted by a two-thirds vote and bind all parties except those who indicate they will not accept the amendment within one year of its adoption.¹⁴⁸

Modern multilateral environmental agreements replicate these procedures for amendments to annexes.¹⁴⁹ For example, under the London Dumping Convention, the annexes listing the substances that may not be dumped and those that may be dumped only with a permit are subject to amendment by a two-thirds majority vote that binds all parties 100 days after adoption. The amendments do not bind states that indicate their objection to the amendment within the 100-day period.¹⁵⁰ Amendments to the rest of the London Dumping Con-

146. International Convention for the Regulation of Whaling, Dec. 2, 1946, arts. III, V, 62 Stat. 1716, 1717-18, 1718-19, 161 U.N.T.S. 72, 76, 78, 80, 82.

147. *Id.*, art. V(3), 62 Stat. at 1719, 161 U.N.T.S. at 80, 82.

148. Convention of the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, art. 52, 9 U.S.T. 621, 635, 289 U.N.T.S. 3, 72. The Intergovernmental Maritime Organization Assembly may also, by a two-thirds vote, determine that a particular amendment is of such a nature that states not accepting it will cease to be party to the Convention within twelve months of the Amendment's adoption. *Id.*

149. *See, e.g.*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, art. 18, 1673 U.N.T.S. 126, 144-45 (requiring a three-fourths majority vote to amend an annex, with such amendments being binding on all states that do not object within 180 days of adoption); Vienna Ozone Convention, *supra* note 106, art. 10, T.I.A.S. No. 11,097, at 12-13, 1513 U.N.T.S. at 330-31 (requiring a three-fourths majority vote to amend the annex, binding on all states that do not object within six months of circulation of the amendment); FCCC, *supra* note 106, art. 16, 31 I.L.M. at 869, S. TREATY DOC. 102-38 at 22-23 (same); CBD, *supra* note 105, art. 30, 1760 U.N.T.S. at 161 (requiring two-thirds majority vote to amend annexes, binding all states that do not object within one year of the notification of adoption); CITES, *supra* note 143, arts. XV-XVI, 27 U.S.T. at 1110-14, 993 U.N.T.S. at 254-56 (requiring two-thirds majority vote to amend certain annexes binding all states that do not object within 90 days of adoption); Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, arts. 21-22, 40 I.L.M. 532, 548-49 [hereinafter Stockholm POPs Convention] (requiring three-fourths majority vote to amend annexes and binding all states except (a) those who object within one year of adoption and (b) those states which, upon ratification, indicated they would only accept such amendments expressly); Kyoto Protocol, *supra* note 143, art. 20(4), 37 I.L.M. at 41 (requiring three-fourths majority vote to pass a proposed annex or amendment to an annex—other than Annex A or B—and making such annex or amendment to an annex binding on all states that do not object within six months of circulation of the amendment to all parties).

150. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, art. XV(2), 26 U.S.T. 2403, 2413, 1046 U.N.T.S. 137, 144-45 [hereinafter London Dumping Convention]. Article 22 of the 1996 Protocol to the London Dumping Convention follows the same procedure. 1996 Protocol to the London Convention 1972, Nov. 7, 1996, art. 22, 36 I.L.M. 1, 17-18.

vention are adopted by a supermajority vote but, upon entry into force, only bind those states that consented to be bound by the amendment.¹⁵¹

The “opt out” approach also has precedents outside of the environmental context. ICAO is authorized to promulgate “international standards” in relation to matters such as communications systems, rules of the air, and air traffic control practices that become part of a state party’s obligations under the 1944 Chicago Convention.¹⁵² A state that is unwilling to comply with the international standard has sixty days to notify ICAO of how its own national practice will differ from the standard.¹⁵³ Similarly, the World Health Organization has the authority to adopt regulations on various health matters that bind all members except for those that notify their rejection of, or reservations to, the regulations within a set period of time.¹⁵⁴

Some treaties will not incorporate any “opt out” provision and actually authorize an extra-national actor to amend certain treaty obligations for all parties without exception.¹⁵⁵ This may involve cases where the extra-national actors’ authority depends on achieving consensus among its members; certain annex amendments to the POPs and PIC Conventions operate in this fashion.¹⁵⁶ Such consensus requirements make it unclear whether the amendments are truly the product of extra-national authority or simply cases where the states parties use the extra-national entity as a forum in which to conclude the amendments in

151. London Dumping Convention, *supra*, note 150, art. XV(1), 26 U.S.T. at 2413, 1046 U.N.T.S. at 144.

152. Chicago Convention on International Civil Aviation, Dec. 7, 1944, arts. 37, 54, 90, 61 Stat. 1180, 1190-91, 1186-97, 1205, 3 Bevens 944, 953-54, 958-59, 967.

153. *Id.*, art. 38, 61 Stat. at 1191, 3 Bevens at 954.

154. Constitution of the World Health Organization, July 22, 1946, arts. 21-22, 62 Stat. 2679, 2685, 4 Bevens 119, 125.

155. Although the results are similar, such cases should be distinguished from cases where by virtue of the operation of the treaty itself (rather than the action of an extra-national actor in the form of an international organization, standing conference of the parties, etc.) an amendment comes into force for all parties through the consent of some supermajority of states parties. *See, e.g.*, U.N. CHARTER art. 108 (declaring that amendments enter into force for all members upon ratification by two-thirds of the members, including all permanent members of the Security Council); UNCLOS, *supra* note 76, art. 316(5), 1833 U.N.T.S. at 521 (stating that amendments concerning the Area or the International Law of the Sea Tribunal come into force for all states parties upon ratification or accession by three-fourths of the states parties); Statute of the International Atomic Energy Agency, Oct. 23, 1956, art. XVIII, 8 U.S.T. 1093, 1110-11, 276 U.N.T.S. 3, 34, 36 (declaring that amendments come into force for all parties when two thirds of the members have deposited instruments of acceptance of an adopted amendment).

156. Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, art. 22(5)(b), 38 I.L.M. 1 [hereinafter PIC Convention]; Stockholm POPs Convention, *supra* note 149, art. 22(5), 40 I.L.M. at 549. The 2000 U.S.-Russia Polar Bear Agreement would operate in the same vein, albeit on a bilateral basis. It will establish a bi-national Polar Bear Commission consisting of representatives of both governments that will establish, by consensus, limitations on the quantity and methods used with respect to killing the shared polar bear population. Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population, Oct. 16, 2000, U.S.-Russ., art. 8, S. TREATY DOC. No. 107-10, at 7-8 (2002).

question.

In other cases, however, the extra-national actor is clearly authorized to act independently from the unanimous views of its members. The most well-known example of this approach is found in the Montreal Protocol on Substances that Deplete the Ozone Layer. That treaty authorizes a supermajority vote of the Meeting of the Parties ("MOP") to adjust for all parties control measures with respect to the consumption and production of ozone depleting substances covered by the treaty.¹⁵⁷ The Chemical Weapons Convention and the Comprehensive Nuclear Test Ban Treaty also contemplate supermajority votes of their respective Conference of the Parties ("COP") to change certain annexes for all parties.¹⁵⁸

Another recent example making the case for extra-national actor autonomy involves the debate over Iceland's attempt to rejoin the International Whaling Convention.¹⁵⁹ In that case, Iceland sought to condition its participation in the Convention on a reservation to the commercial whaling moratorium adopted by the IWC as part of the Convention's Schedule.¹⁶⁰ A number of states, including the United States, opposed the reservation and objected to Iceland's attempt to avoid accepting the moratorium obligation.¹⁶¹ Nevertheless, states ultimately recognized that the question of the acceptability of the reservation was for the IWC itself, not individual member states. After two hotly contested IWC decisions to reject the reservation in July 2001 and May 2002, the IWC decided in October 2002 that Iceland's reservation was acceptable.¹⁶² As a result of extra-national action, therefore, Iceland became a party to the Convention, albeit without any moratorium obligations.

Generally, the treaty that creates the extra-national actor explicitly authorizes it to obligate member states to some course of conduct.¹⁶³ In some cases,

157. Montreal Protocol, *supra* note 143, art. 2, 1522 U.N.T.S. at 31-33. By contrast, expansion of the Protocol to cover new ozone depleting substances requires an amendment to the Treaty, where individual states cannot be bound absent their consent. It should be noted, however, that consensus has formed the basis for such decisions to date and the supermajority provisions have gone unused. Indeed, the use of consensus is widespread in the MEA context. *See, e.g.*, Churchill & Ulfstein, *supra* note 116, at 642-43.

158. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, arts. VIII(B)(18), XV(4)-(5), 1974 U.N.T.S. 45, 334-35, 351-52 (noting that the Executive Council recommends certain annex amendments, such as listing of chemicals, subject to reporting and verification obligations that are adopted within 90 days unless a party objects, in which case a two thirds majority vote of the Conference of the Parties is required to amend the annex, binding all parties 180 days after adoption); Comprehensive Nuclear Test Ban Treaty, Sept. 10, 1996, art. VII, 35 I.L.M. 1439, 1455-56 (same).

159. Sean D. Murphy, *Blocking of Iceland's Effort to Join the Whaling Convention*, 96 AM J. INT'L L. 712 (2002).

160. *Id.* at 713.

161. *Id.*

162. *Id.*; Chris Wold, *Implementation of Reservations Law in International Environmental Treaties: The Cases of Cuba and Iceland*, 14 COLO. J. INT'L ENV'TL L. & POL'Y 53, 57 (2003).

163. *See* SCHERMERS & BLOKKER, *supra* note 34, at 813 ("As a general rule of modern international institutional law . . . international organizations cannot take binding external decisions

however, an extra-national actor may exercise such authority without an explicit treaty basis. Take, for example, the London Dumping Convention. The extra-national actor that it creates, the Consultative Meeting of the Parties (“CMP”), expanded the definition of “dumping” under the Convention to include the disposal of waste into or under the seabed from the sea but not the disposal of waste from land by tunneling.¹⁶⁴ Although the resulting definition may be considered authoritative for states party to the treaty, it is unclear whether it derives its authoritative status from the collective action of the contracting parties or by virtue of some implied power of the CMP.¹⁶⁵ Another possibility involves extra-national actors using existing authority to address specific cases in ways that actually set out general standards that are effectively equivalent to treaty obligations. For example, U.N. Security Council Resolution 1373, relying on Chapter VII authorities, represents a new form of Security Council decision that does not deal with the behavior of states in the context of a specific crisis or with respect to a specific country. Rather, it sets out general standards of behavior for states to follow in addressing terrorist financing.¹⁶⁶

States may, however, resist what they consider unauthorized activity by extra-national actors. For example, certain states objected to the decision of the Basel Convention Conference of the Parties (COP) to ban OECD exports of hazardous wastes to developing countries as beyond the COPs’ authority under that Convention.¹⁶⁷ The COP decision was later revised into an amendment between the states parties.¹⁶⁸ In the Iceland case, two states, Mexico and Italy, challenged the IWC’s decision on Iceland’s status as a party on the grounds that the IWC improperly allowed Iceland to participate in the votes to decide whether its reservation was acceptable. In a number of controversial cases, losing states have objected to the manner in which the ICJ exercised its authority to interpret and apply various treaties.¹⁶⁹ States may even challenge an extra-national actor’s assumption of authority in a given situation by arguing that the

unless their constitutions expressly so provide.”).

164. See Churchill & Ulfstein, *supra* note 116, at 641 (also citing example of interpretations advanced by the CITES Conference of the Parties for entry into force of amendments and the criteria for amending the appendices).

165. See *id.* (considering the amended London Convention definition authoritative, but noting different rationales for reaching such a conclusion).

166. See U.N. SCOR, 56th Sess., 438th mtg., U.N. Doc. S/RES/1373 (2001).

167. *Report of the Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, U.N. Env’t Programme, 2d Sess., Decision II/12, at 19-20, U.N. Doc. UNEP/CHW.2/30 (1994), available at <http://www.basel.int/meetings/cop/cop1-4/cop2repe.pdf> (last visited Jan. 27, 2005); Churchill & Ulfstein, *supra* note 116, at 639.

168. Churchill & Ulfstein, *supra* note 116, at 639.

169. See, e.g., Press Release, Embassy of the Federal Republic of Nigeria, Washington, D.C., Nigeria’s Reaction to the Judgement of the International Court of Justice at The Hague (Nigeria, Cameroon with Equatorial Guinea Intervening) (Nov. 7, 2002), available at http://www.nigeriaembassyusa.org/110802_1.shtml (last visited Jan. 27, 2005); *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ*, 85 U.S. DEP’T ST. BULL., Mar. 1985, at 64.

authority actually rests with another extra-national actor. At the WTO, for example, member states objected to Appellate Body attempts to authorize NGOs to participate in dispute settlement proceedings as *amicus curiae* on the grounds that only the WTO General Council could authorize such participation.¹⁷⁰

What do these examples say about extra-national actors as “new” actors in international law in addition to sovereign states? On the one hand, the case can be made that extra-national actors that can apply, interpret, or even amend treaties constitute new “authorities” in international law that are truly autonomous from the states that created them. From the Jay Treaty’s Commissioners to ITLOS, states may afford extra-national actors the authority to definitively interpret or apply treaty obligations in ways that are unavailable to any single sovereign state. Examples such as the IWC and the Montreal Protocol MOP demonstrate that extra-national authorities may interpret or amend the very treaty obligations assumed by states even for states that would otherwise oppose such interpretations or amendments.

On the other hand, state consent often continues to have relevance to exercises of extra-national authority in ways that limit an extra-national actor’s claim to full autonomy. “Opt-out” clauses deprive extra-national actors of the ability to modify states’ obligations against their will. Moreover, in practice, extra-national actors have not actually amended treaty obligations for objecting states, even in the absence of “opt-out” clauses. For example, all adjustments to the Montreal Protocol to date have proceeded on a consensus basis rather than the supermajority vote provided for in the Protocol.¹⁷¹ States have also demonstrated a willingness to challenge extra-national activity that they view as *ultra vires* or otherwise beyond what the states creating the extra-national actor expected it to do.

Thus, states have clearly invested certain extra-national actors with a level of autonomy in the context of interpreting, applying, and even modifying treaty obligations. As a result, they operate to an extent as independent actors in the treaty context. At the same time, however, the states that create these extra-national actors have placed real limits on the scope of this independence, preventing one from considering these actors without any reference to the states that created them. Such state action suggests that states prefer to rely not only on the original grant of authority to an extra-national actor but also seek to establish contemporaneous consent to the exercise of that authority.¹⁷² Of course,

170. See Hollis, *supra* note 8, at 252-253.

171. See *supra* note 157 and accompanying text.

172. The use of the term “contemporaneous consent” should not, however, be confused with notions of voluntarism where state sovereignty is cited as a basis for dismissing international legal commitments as a matter of right. Instead, it should be viewed as the concept of accountability, or what Jose Alvarez suggested might be some form of international administrative law, where states may insist that extra-national actors do not exceed the authorities delegated to them, implicitly or explicitly, by the states that created the actor. See, e.g., Alvarez, *supra* note 30, at 232-33. Of course, absent state consent to some method to definitively review the propriety of an extra-national

the very fact that states require opt-out clauses, seek consensus decision-making, and resort to claims of *ultra vires* action demonstrates that states accept that extra-national actors may, if authorized, function independently of states and in ways that bind states to particular interpretations, applications, or amendments of their treaty obligations.

CONCLUSION

Writing in 1923, the PCIJ's *Wimbeldon* judgment characterized the right of entering into international agreements as "an attribute of State sovereignty."¹⁷³ It remains an attribute of state sovereignty today. States have shown a clear preference to enact legal rules by treaty in lieu of other accepted sources of law under Article 38.

What is no longer clear, however, is whether the treaty-making power constitutes an attribute exclusive to state sovereignty. Sub-state, supranational, and extra-national actors have all demonstrated a capacity to negotiate and conclude treaties in their own names. Extra-national actors may also serve as vehicles for interpreting, applying, and defining treaty obligations separate and apart from the views of individual sovereign states.

At the same time, these actors are not yet entirely free of the states with which they are associated. Questions remain about the need for sovereign state authorization of sub-state agreements and the notion that it is the state, not the sub-state actor, which bears legal responsibility for a sub-state actor's treaty commitments. Although the EC and extra-national actors have demonstrated the capacity to conclude treaties for which they alone bear legal responsibility, even they are not able to do so entirely free from the views of the states that created them. The EC, in practice, shares legal responsibility in many "mixed" agreements where it continues to split competence with its Member States; extra-national actors are limited to treaties that fulfill the powers states expressly or impliedly conferred upon them. In all three cases, moreover, the views of other treaty partners matter. Even when a state or group of states grant treaty-making authority to a non-state actor, that authority has little meaning absent agreement or acquiescence by other state actors to the exercise of such authority.

What do these developments in treaty-making authority say about the changing sources of international law? Despite Fitzmaurice's accurate observation that treaties only create specific obligations for parties rather than general rules of law, evidence of formal participation by non-state actors in treaty-

actors' exercise of authority, the problem of autointerpretation remains. One state's insistence that an extra-national actor's application of its treaty obligation constitutes an improper delegation of authority might be countered by another state's viewing the same action as an entirely appropriate exercise of the extra-national actor's delegated authorities.

173. The S.S. *Wimbeldon*, 1923 P.C.I.J. (ser. A) No. 1, at 25 (June 28).

making still has utility in evaluating who makes international law.¹⁷⁴ Even if, as a matter of treaty law, treaties only bind states parties, the reality of modern treaty-making is that treaties serve as the primary vehicle through which general rules of law are now elaborated (or, in the case of customary international law, codified). As such, if sub-state, supranational, and extra-national actors can make such treaties, would not their views and practices have relevance to the content of customary international law and “recognized” general principles of international law as well? The current role non-state actors play in the treaty process may thus reflect the beginning of a shift in the international legal order from a community of sovereign states making the law to one where states and other non-state actors with varying levels of authority make the law.

That conclusion is not free from doubt, however, so long as state consent to non-state actor treaty participation still matters. The fact that these non-state actors are creatures of state consent, and may in many cases require their continuing consent to operate, suggests that it is premature to disregard the old state-centric paradigm. In the end, the issue may ultimately turn on how one views the concept of continuing state consent to non-state actor participation in law-making. Is it no more than a sociological commentary on the law’s efficacy or does it reflect a legal principle that it is states who continue, through their consent, to dictate who forms the law, who interprets it and who applies it?

Returning to the question of the sources of international law, this article has sought to move beyond the traditional questions of what the basis of obligation in international law is and what sources one looks at to see it expressed. The questions raised by non-state actor participation in treaties demonstrate that international lawyers need to devote more attention to the distribution of authority in international law rather than debating only what the law “is.” An authority-based perspective calls attention to the possibility that, even if they have not yet done so, states could, by their own consent, change which actors make international law. Therefore, maligned as the doctrine may be, international law needs more scholarship, not less, on the doctrine of consent as a basis of obligation in international law, looking at who is consenting, on whose behalf, and to whom such consent is being given.

This may not unlock all of the stalemates in sources doctrine; scholars will still debate issues such as the legal force of soft law principles and whether other methods beyond state consent create international law. But, by focusing on authority—on who it is that makes the law—international lawyers may gain a fresh perspective on the way the international legal order is presently structured. From this perspective, we can see the increasing importance of non-state actor participation in treaties along with the continuing efforts by states to oversee and control such participation. At present, despite the heightened influence of non-state actors, states have had success in continuing to require that the formal crea-

174. See *supra* note 15 and accompanying text.

tion and application of treaties turn on the presence of state consent.

An authority-based perspective also offers an opportunity to appreciate how the system could change—how states could, by their own consent, authorize non-state actors to stand alongside states in the creation and application of international law. We can use this authority-based perspective, therefore, to assess the impact globalization is having on the international legal order; to predict under what conditions non-state actors would have sufficient independence to truly constitute new law-makers in addition to sovereign states. In the same way, we can use this approach to assess whether and when a single actor's consent could trump the consent of all other actors such that we would need to revise the theory of general state consent making international law to a more hegemonic perspective. In looking at “who” is making international law, moreover, we inevitably also gain valuable knowledge about “what” states and other actors are actually consenting to. This information, in turn, offers a compelling image of the international legal order in operation, an image that can counteract those followers of *realpolitik* who would paint a picture of international law as more theory than practice.

Finally, in offering a new look at who makes international law, an authority-based approach offers hope for a reinvigoration of the doctrine of sources more generally. Without a better understanding of international law as “law” and who has the authority to create and apply it, analyses of compliance and the law's effectiveness may lack a firm foundation. We need to know why states and other actors view law as binding and what they consider to constitute law to provide the necessary baseline for evaluating whether the law generates different patterns of compliance or has greater effectiveness than norms that do not qualify as law. Rather than burying the questions inherent in defining international law, we should take those questions, warts and all, and address them hand in hand with post-ontological inquiries into the law's fairness and effectiveness. In an age of terrorism, hegemony, globalization, and proliferating non-state actors, international lawyers will surely need both approaches to discuss and, it is hoped, develop and defend an international rule of law that is comprehensible, fair, and effective for meeting the challenges of the years to come.