markets. Not unlike PricewaterhouseCoopers, which has preferred to speak of an ''E-7'' of the ''seven largest emerging market economies,''[11] Goldman Sachs generates its classificatory scheme mainly on the basis of standard indicators of GDP growth.[12]

Demonstrated commitment to a market economy unfettered by protectionism typically serves as the principal precondition for recognition as a ''BRIC,'' ''E-7,'' or similar ''middle power.'' Crucially, this association tends to be made not simply by investment and accountancy firms with an interest in mapping shifting relations of economic power, but also by elites in those states believed to be the beneficiaries of sound development programs. As early as 2000, for example, one finds a South African finance minister suggesting that involvement in the G-20 would offer his state the ''opportunity to make allies among the middle powers.''[13] Similarly, it is common for leaders of developing states to highlight their dedication to open markets, as when Brazil's Luiz Inácio Lula da Silva emphasizes his allegiance to ''democratic and fair global governance''—to ''the kind of governance that makes our interdependence an inducement for self-interested solidarity.''[14] Sentiments of this sort are shared widely among international lawyers, particularly those prepared to adopt without question the vocabulary of market-oriented ''good governance.''

European expansion was met with resistance throughout the extra-European world, and American power has always had its counterweights. But the frameworks that have been developed to organize international legal relations and that have frequently found a home in non-Western policymaking have by and large facilitated subordination to a fundamentally Euro-American international order, one whose constituent elements may be contested but whose loci and axes of power are unmistakable. This, I submit, should make us not a little suspicious of those who would exaggerate the benefits of ''multipolarity.'' As vitally important as it is to complexify a body of international legal scholarship that has traditionally discounted extra-European experiences, it is no less important to remain skeptical of claims that ''participation'' on the part of non-Western states is an indicator of international law's even-handedness.

European Origins, the Doctrine of the Providential Function of Commerce, and International Law's Embrace of Economic Growth

By Ileana M. Porras[*]

In these remarks I will sketch out one way in which the European origin of international law has left an indelible imprint on twenty-first-century international law. Specifically, I will

[11] *See, e.g.*, John Hawksworth, The World in 2050: How Big Will the Major Emerging Market Economies Get and How Can the OECD Compete? (2006).

[12] Jim O'Neill, Building Better Global Economic BRICs (2001), *at* http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf. For a recent restatement, see Jim O'Neill, The Growth Map: Economic Opportunity in the BRICS and Beyond (2011).

[13] Trevor Manuel, *quoted in* The Group of Twenty, *supra* note 10, at 25.

[14] Luiz Inácio Lula da Silva, *The G-20 Moment*, 27 New Persp. Q. 33, 34 (2010).

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focus on the decisive role that the ''doctrine of the providential function of commerce''[1] has played in shaping international law's choices, and specifically its commitment to the objective of economic growth.

Properly understood, the claim that international law finds its origin in Europe is not controversial. In the first place, origination describes not an event, but a process that unfolded over hundreds of years, culminating in what today we call international law. Furthermore, it is clear that despite its origin, international law has borrowed from and been influenced by ideas and practices from elsewhere.[2] Indeed, international law's foundational conceptions evolved in response to the European encounter with the New World and in an ongoing effort to delineate and manage difference within a universal frame.[3] Thus, far from evolving in splendid isolation within Europe, international law is the result of multiple engagements with the rest of the world. Moreover, international law has gone through many stages or epochs; its substantive content—how it is theorized and practiced—has changed. Furthermore, at no time has there been a single uncontested version of international law or agreement as to its proper direction. In this regard, from at least the mid-nineteenth century some of the most radical contestation arose from the periphery.[4]

Nonetheless, the claim of European origination is important because it serves to emphasize that at its heart international law was and, in some respects, remains a European project. One of the effects of this origination is that to the extent that international law has a very specific geographic, cultural, political, and philosophical center of gravity, we would expect that it would tend to reflect and serve the concerns and interests of its originators. At the very least, the fact that international law has a European origin supports the suspicion that international law is in some way always already biased.[5] Given that one of the deep-seated internal (European-origined) claims about international law is that it must by definition be universal in reach or at least universally valid, this inherent parochial bias may seem to run counter to the deep promise of international law—a promise that encompasses something like community, equality, and justice.

In my remarks, I will focus on one way in which the European origin of international law has left its imprint on the present moment. In particular, I wish to trace the ways in which the set of ideas and attitudes towards commerce, encapsulated by the term ''the providential function of commerce,'' became an integral component of international law. I will argue

[1] The term was coined by economist Jacob Viner. JACOB VINER, THE ROLE OF DIVINE PROVIDENCE IN THE SOCIAL ORDER: AN ESSAY IN INTELLECTUAL HISTORY 32 (1972). For a discussion of the central role played by the doctrine in the discovery of a right to hospitality and the role of commerce in both Francisco de Vitoria's *De Indis* and Hugo Grotius' *De Iure Praedae*, see Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' De Iure Praedae—The Law of Prize and Booty, or ''On How to Distinguish Merchants from Pirates,''* 31 BROOKLYN J. INT'L L. 741, 756 et seq. (2006) [hereinafter *Constructing International Law*]. For a discussion of Immanuel Kant's use of the doctrine, see Ileana M. Porras, *Liberal Cosmopolitanism or Cosmopolitan Liberalism? Notes from International Law*, *in* PAROCHIALISM, COSMOPOLITANISM, AND THE FOUNDATIONS OF INTERNATIONAL LAW 136 (Mortimer Sellers ed., 2011) [hereinafter *Liberal Cosmopolitanism*].

[2] For instances of non-European influences, see, e.g., Umut Özsu, *The Politics of ''Multipolarity,'' supra* at 371.

[3] *See e.g.,* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

[4] *See, e.g.,* Liliana Obregon, *Noted for Dissent: The International Life of Alejandro Alvarez,* 19 LEIDEN J. INT'L L. 983 (2006); Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT'L L.J. 475 (2010); James Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 LEIDEN J. INT'L L. 318 (2008).

[5] TWAIL (Third World Approaches to International Law) scholars in particular have explored the ways in which international law has been predisposed to serve the evolving interests of the West, emphasizing the economic relations it sets up and the persistence of unequal distributional effects on Third World peoples. *See, e.g.,* THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., 2003).

that the providential function of commerce was embedded in international law from the beginning and has contributed in no small way to the conviction, now seemingly unassailable, that the ultimate objective of international law should be to support international trade and national economic development. Without elaborating the point in these brief remarks, I posit that the strength of this conviction, built into the very fabric of international law, renders the possibility of shifting gears and pursuing sustainable development almost impossible.

International law in Europe was born in the midst of three distinct, and each in its way novel, conditions: First, it responded to the shock of the European encounter with the New World (and the need to justify the ensuing exploitation and conquest); [6] second, it responded to the clash among Europeans competing for economic opportunities in the distant seas of the East Indies (and the ensuing struggle for influence, land, and access to resources);[7] and third, it responded to the devastating and intractable inter- and intra-European conflicts that characterized the period between the sixteenth and the eighteenth centuries,[8] conflicts by and large colored by inter-denominational religious differences. In other words, international law evolved in an attempt to manage three sets of relationships: intra-European relationships in Europe; inter-European relationships in distant places; and European-to-non-European relationships abroad. The doctrine of the providential function of commerce, I would argue, provided international law with a way of framing these competitive relationships in a positive way—a way that could be imagined as mutually beneficial, in diametric opposition to the way of war with its winners and losers.

According to the doctrine of the providential function of commerce, which Viner traces back to the fourth century A.D.,[9] international commerce was not simply a human activity among others. Instead, international commerce was to be understood as a divinely inspired post-Babel mechanism, designed by God as a means of bringing separated humanity back into friendship. To engage in international commerce was, in other words, to do God's work. According to the doctrine, a central element of God's design was the intentional distribution of different resources and needs or lacks across the various nations. God's objective was to make international commerce not only desirable but necessary. A self-sufficient nation, one that had no needs that it could not fulfill from its internal resources would have no reason to go outside itself, and therefore no need to enter into relationship with other peoples. Contrariwise, a nation that suffered lack would be induced to go in search of other peoples in order to engage in exchange. By virtue of God's design, Nation A would be blessed with abundance in a thing lacked, yet would in turn lack some necessity, which Nation B could supply out of its own abundance. Since exchange served to fill the needs (lack) of one from the other's plenty (surplus), it would be mutually beneficial. Material interdependence would forge bonds of friendship among separate peoples. Under this view, international commerce, willed by God, was inherently virtuous. On the other hand, the entire design depended on ''lack'' at its center. Commerce might be the divinely inspired solution—the means to complete the lack—but until it was filled, the lack was presumably experienced as a pain or hunger. After all, in order for the providential design to work, men had to be driven to seek each other out—the lack had to be urgent.

[6] Anghie, *supra* note 3.

[7] *Constructing International Law*, *supra* note 1.

[8] *See* Emmanuelle Jouannet, Le Droit International Liberal-Providence: Une Histoire du Droit International (2011).

[9] Viner, *supra* note 1.

Other, less positive, attitudes to international commerce were available and familiar to Europeans as they entered the early modern period. However, international law by and large embraced the doctrine of the providential function of commerce. For instance, both Vitoria in *Relectio de Indies* (1557), and Grotius in *De Iure Praedea* (circa 1603, the original context of *De Mare Liberum*) deployed the doctrine.[10] In each case, the author used the doctrine of the providential function of commerce to anchor arguments central to his overall theory of international law. While the two men's use of the doctrine differed in some important respects, they shared key points of convergence. In each case, the author uses strands of the doctrine of the providential function of commerce to discover a right to hospitality: a right to hospitality that must be protected because it is the necessary condition to enable God's design—international commerce—and the concomitant friendship among the Earth's separated nations to flourish. For both authors, the privilege to engage in commerce is subsumed under the right to hospitality. As a counterpart, interference with the privilege to engage in commerce is a violation of the right to hospitality and therefore an injury. Since those seeking to engage in commerce are by providential design seeking to meet the needs or lacks of their own nation, the violation obstructs God's design and inflicts an actual harm to the well-being of the people whose lack cannot be fulfilled.

Vitoria (writing in the context of the Spanish conquest of the New World) and Grotius (writing in the context of the incipient Dutch challenge to Iberian control over the trade routes to the East Indies) both positioned the right of hospitality within a just war equation. Simply put, both men, albeit in slightly different ways, discovered a right, whose inevitable violation provided a cause for just war. Thus, while the right of hospitality was identified as a precondition for the possibility of trade and inter-national friendship, in practice it served to justify war.

Despite this obvious paradox, and despite the fact that the international seaborne trade was known to be marred by violence, conquest, and exploitation, the doctrine of the providential function of commerce continued to play an important function in subsequent developments in international law. It influenced not only the specific doctrines favoring international commerce but, I would argue, it structured the very way in which Europeans imagined international relations.

As Enlightenment rationality replaced the Divine as the ground of international law, the doctrine did not lose any of its force. It was instead, like so much else, naturalized and understood as a requirement of natural reason. Elements of the doctrine continued to appear throughout the international law corpus. A culmination of sorts occurs in Immanuel Kant's influential writings.[11] In a recent article, I trace the multiple ways in which Kant's ''Cosmopolitan right''—the keystone of his project for perpetual peace—is in fact a form of the right to hospitality fed by the doctrine of the providential function of commerce.[12] Like Vitoria and Grotius before him, Kant theorized that a right to hospitality—the right not to be treated as an enemy when arriving at foreign shores, or the right not to be met with violence at the moment of innocent arrival—was a precondition for the possibility for commerce. While not naive about the very real violence and exploitation engendered by commerce, Kant was nonetheless convinced of its inherent virtue. The doctrine's influence can be seen in his

[10] *Constructing International Law*, *supra* note 1.

[11] *See, in particular,* Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose* (1784), *in* Political Writings 41 (Hans Reiss ed., 2d ed. 1991); Immanuel Kant, Perpetual Peace: A Philosophical Sketch 93 (1795); Immanuel Kant, The Metaphysics of Morals 131 (1797).

[12] *Liberal Cosmopolitanism*, *supra* note 1.

endorsement of commerce as the only effective way to bring about international community, organized around mutual interest. In Kant's account, the end of conflict and war would pass through commerce. Indeed, while Kant, unlike Vitoria and Grotius, did not use the right to hospitality and the related privilege to engage in commerce in order to develop a justification for just war, he nevertheless failed to account for the evident contradiction that the interests of commerce and war have more often been conjoined than adverse. To the extent he addressed known instances of the violence of trade, the violence was treated as an unfortunate aberration. This blind spot arises, I would argue, from the compelling nature of the doctrine and its underlying premise that commerce is a virtuous enterprise, that it is both divinely willed and just, and that nations should pursue their economic self-interest through trade.

So far, using a few illustrative examples, I have sought to make the case that international law from its origin carries within it a powerful, while not fully acknowledged, set of assumptions about the virtue of international commerce, its peaceful character, its mutual benefit, and its contribution to friendly international relations that can be traced to the doctrine of the providential nature of commerce. The argument I wish to sketch out in my remaining remarks is that the doctrine has also served to embed the overriding objective of economic growth into what we might term the DNA of international law.

Coming out of the seventeenth and eighteenth centuries, various politico-philosophical traditions in Europe coalesced around a dominant narrative that we would ultimately come to term ''liberal theory.'' The conundrum at the heart of this tradition was the need to theorize the justification for binding otherwise free and autonomous individuals by collective decisionmaking. As is well known, the solution was to posit the free and autonomous individual as existing in a violent and anarchical state of nature who, in his own self-interest, comes together with other individuals in society to protect himself from constant threats of violence. This willing and rational submission of the individual to the collective will under a sovereign (the collective will variously expressed) was, according to liberal theory, the beginning of civil society. The international realm, with its seemingly endless conflicts, had served as the model for the violent and anarchical state of nature. Here, too, there was a need to explain how peace could be achieved among sovereigns. Yet, in the international sphere, rational self-interest and submission to a collective will were thought not to be viable options as they were held to be inimical to sovereignty itself. The doctrine of the providential function of commerce served, in a variety of ways, to fill the gap by offering a vision, a rationale, and a mechanism for achieving friendly relations among peoples who had no other evident ties. Commerce, divinely inspired, worked to bring all nations, regardless of the absence of other ties of kinship or culture, to relate to each other in order to provide mutual benefits by filling inevitable lacks. For this reason, the international legal system would have to be constructed in such a way as to facilitate commerce, or at least not impede it. Commerce was to serve as the glue of international society, not just because it turned potential enemies into friends with mutual interests, but also because it was the means to prosperity for each nation. In an ideal world governed by the design of providence, commerce would fill a nation's lack while providing an outlet for its surplus. The armature of international law was to serve not as an international substitute for the state, but rather to support and enhance the providential design and enable international commerce.

The foregoing is a simplified account and can be countered in many ways. My purpose here, however, is to draw attention to the central role that enabling commerce played in the origin of international law. I have placed the stress on the doctrine of the providential function of commerce in order to highlight the sense in which commerce was understood as something

much greater than an economic activity. By the time Adam Smith introduced the mechanistic idea of the self-regulating market governed by an invisible hand, and David Ricardo explicated the theory of comparative advantage, international law was already deeply structured by a view of commerce as an activity embedded within the divine order. Engaging in commerce under this guise could be seen as a duty of virtuous nations, both because it was a way of participating in God's plan and because the motivating urge driving nations to engage in commerce was the mutually beneficial fulfillment of each other's needs. A nation's lack or need was built into the providential design, and it was clearly the responsibility of the virtuous sovereign to address the need. Of course, in order for the design to work, the need could never be truly fulfilled—like hunger, it can only be temporarily assuaged. New needs must always arise that need to be filled.

Grotius had made necessity and the self-preservation of the nation the fulcrum of his argument in favor of the principle of freedom of the seas. He imagined the nascent Dutch nation as a vulnerable nation of entrepreneurial traders whose well-being depended on not being shut out of trading opportunities around the globe. The very existence of the nation depended on it. While few international law writers were as clear about the intimate relationship between necessity, trade, economic well-being, and the survival of the nation, by the middle of the eighteenth century international law broadly reflected this understanding. By this period, it was well established that a sovereign nation had a duty to pursue economic self-interest and that economic growth was the proper end of the nation-state. That economic growth is the proper end of sovereignty and that international law must support this objective by, inter alia, enabling trade has become such a commonplace idea that we take it as a given. Indeed, that economic growth is the underpinning of sovereignty and that international law must support it may seem both obvious and inevitable. By framing this inquiry within the panel's concern with the Eurocentric character of international law, however, I have sought to emphasize the extent to which this development within international law is traceable to the European context of its origin.

The full story of how international law came to embrace economic growth (and later development) as the duty of states supported by the international system requires a fuller analysis than I can provide in this short commentary. My limited purpose here has been to highlight one strand of the story and to link it to the European origin of international law. In my ongoing work, I hope to show how the doctrine's influence on international law has limited its ability to address the pressing problem of sustainable development.

(Re-)Examination of ''the Eurocentric Story of International Law'' Through the Japanese Experience

By Kinji Akashi[*]

Introduction

The purpose of these remarks is to respond to the request by the organizer of our panel, viz. ''[to] ask whether and to what extent the Eurocentric story of international law has proven wrong and explore the relevance of extra-European experiences to the history of international law.'' I will do this through the succinct examination of the Japanese experience in encountering and accepting the European law of nations, or international law, up to the

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