The unattainable logic of treaty antinomy

La irrealizable lógica de los conflictos de tratados

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Abstract: The general rules on treaty conflict exhibit limitations in promoting international legal consistency. These relate to their incompleteness, reliance on subject-matter distinctions, inapplicability to third parties, and—crucially—the absence of formal and dynamic mechanisms for derogating or annulling conflicting provisions. Such shortcomings are aggravated by the increasing institutionalization and specialization of international law, alongside the lack of effective general organs or procedures capable of addressing conflicts across multiple special regimes. As a result, a strong presumption against the very existence of treaty conflict has become entrenched.

Keywords: rule of law; consistency; treaty conflict; treaty-based regimes; international authority; general international law.

Resumen: Las reglas generales sobre el conflicto de tratados presentan limitaciones para promover la consistencia jurídica internacional. Estas se relacionan con su incompletitud, su dependencia de distinciones sobre la materia, su inaplicabilidad a terceros y —de manera crucial— la ausencia de mecanismos formales y dinámicos para derogar o anular disposiciones en conflicto. Estas deficiencias se ven agravadas por la creciente institucionalización y especialización del derecho internacional, junto con la falta de órganos o procedimientos generales efectivos capaces de abordar conflictos entre múltiples regímenes especiales. Como resultado, se ha arraigado una fuerte presunción en contra de la propia existencia de conflictos de tratados.

Palabras clave: Estado de derecho; consistencia; conflicto de tratados; regímenes basados en tratados; autoridad internacional; derecho internacional general.

I. Where the law stands

1. Over the past five centuries, nation-states have progressively consolidated the domestic architecture of public authority—a process fundamentally driven by the development and refinement of what Hart (1961) termed the 'secondary rules' of legal systems. From a Hartian perspective, a legal system is best understood as a union of primary and secondary rules.[1] Parliaments, governments, and

[1] Primary rules prescribe, prohibit, or permit conduct, while secondary rules confer authority to identify, modify, and enforce primary rules—specifically through rules of recognition, change, and adjudication. In this sense, secondary rules are 'rules about

courts emerged as institutional embodiments of these secondary rules. The protracted quest for *Eunomia* within nation-states advanced with their evolution, accelerating through the modern consolidation of parliamentary democracy, public administration, and judicial systems. These institutions are now, in most cases, constitutionally mandated to uphold the separation of powers, checks and balances, and due process within the integrated operation of state organs.

2. The internal mechanics of secondary rules generate a distinctive dynamic that constitutes the most salient procedural attribute of a legal system: coherence. This quality may be understood as the system's capacity to resolve conflicts that arise between its rules or decisions. For participants—whether at the macro level of society or the micro level of individuals—the immediate consequence of coherence is legal certainty, which stands as a procedural hallmark of any functioning legal system.

3. The refinement of secondary rules in domestic legal systems over recent centuries has marked a significant leap forward for society. In most established constitutional democracies, the relative procedural effectiveness and legitimacy of state legal systems is now largely taken for granted. By contrast, in the international legal sphere there is ongoing and wide-ranging debate concerning both the effectiveness and legitimacy of emerging forms of so-called global governance.[2] A central issue underlying these debates —particularly in the context of international law— is the inability of general secondary rules to ensure procedurally a sufficient degree of international legal consistency, and thus to render coherence an emergent property of international law.

4. The procedural advancement of coherence was not a priority in the so-called postwar rule-based order. The coherence of the international legal fabric was largely absent from the international agenda. In this context, the relationship between the general regime of international law and the special regimes, as well as among special regimes themselves, has increasingly been recognized as a matter of constitutional importance. This relationship goes beyond the operational concerns of intergovernmental functionalism, requiring greater attention by constitutional state organs. The absence of general procedural integration in the postwar design of international law has left limited means for identifying and resolving treaty conflicts, rendering them a constitutional question for the rule of law.

II. Antinomy: what's in a word

5. Antinomies are logical contradictions between normative statements within a normative system. Recognizing the fallibility of rule-making authorities, every legal system establishes criteria and procedures to eliminate such contradictions. The elimination of inconsistencies through pre-established criteria and authoritative procedures is constitutive of a legal system.[3] In this sense, effective provisions and procedures for addressing inconsistencies are a prerequisite for the rule of law; indeed, a rule of law without mechanisms to resolve them would amount to a contradiction in terms, if not an oxymoron. As conflicts arising from incompatible legal provisions, antinomies are a systemic feature not only of domestic legal systems but also of international law. This is particularly evident in the context of treaty law, where treaties often perform functions analogous to domestic legislation.

6. As Arnold McNair observed, a treaty serves as 'the only instrument for doing many of the things which an individual state would do by means of its legislature.'[4] In an increasingly interdependent

rules,' or power-conferring rules, that regulate the operation and evolution of primary rules. See H. L. A. Hart, *The Concept of Law* (Oxford University Press 2012 [1961]), ch.5

[2] See S. Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press, 2011), p.79.

[3] See H. Kelsen, *General Theory of Law and State* (Harvard University Press 1945) (Chapter XI: *The Hierarchy of the Norms*); Alf Ross, *On Law and Justice*, (Stevens & Sons 1958) ('Section XXVI Problems of interpretation: Logic' in Chapter IV: The Legal Method) and H.L.A. Hart, *The Concept of Law* (Oxford University Press 2012) first published 1961 (Chapter VI: Foundations of a Legal System).

[4] A. Mc Nair, *The Law of the Treaties* (Clarendon Press 1961), p.259.

world underpinned by treaties, the resolution of treaty conflicts emerges as a critical issue. To this end, the so-called *general rules on treaty conflicts* provide solutions to determine which provision prevails when two treaties—concluded between the same parties (*subjective identity*) and concerning the same subject matter (*material identity*)—prescribe incompatible conduct within the same spatial and temporal scope.[5] Three phenomena are closely associated with treaty conflict:

1. *Conflicting rules* (conflicts between the provisions of two treaties): antinomies resulting from the application of rules belonging to different treaties (e.g., conflicts between norms of ILO law and rules of WHO law).
2. *Rules vs. decisions* (conflicts between a treaty provision and the decision of a treaty body): contradictions that may arise between treaty provisions and the decisions adopted by a treaty body (e.g., a conflict between a provision of the European Convention on Human Rights and an ICSID arbitral award).
3. *Conflicting decisions* (conflicts between decisions of different treaty bodies): conflicting outcomes arising from adjudicative mechanisms created by different treaties (e.g., a decision of the UNCLOS Tribunal versus a decision of the WTO Appellate Body).

7. Yet, despite the existence of thousands of treaties and the expansive production of international rules and decisions generated by treaty-based regimes, formal conflicts between treaties rarely arise in international legal practice. Paradoxically, amid the increasing specialization and complexity of treaty lawmaking, the formal emergence of international legal antinomies remains remarkably rare—a situation that stands in sharp contrast to domestic legal systems, where such conflicts are regularly resolved by means of derogation and annulment by legislative and judicial authorities, respectively. Because modern international law is predominantly treaty-based, instances of treaty conflict, as Binder observes, 'are an embarrassment to the unity and validity of international law'[6]— a reminder that the regular emergence and resolution of antinomies is intrinsic to any legal order, and that their absence poses legal challenges.

III. General law at stake

8. Every legal system incorporates criteria for resolving contradictions between its rules, such as the hierarchical, chronological, and specialty criteria.[7] The same applies to the *general rules on treaty conflict*, which in Hart's terminology may be understood as general secondary rules of change (G2RC) of international law.[8] Partly codified in the 1969 Vienna Convention on the Law of Treaties (VCLT), these rules were designed to facilitate the use of treaties in the postwar period. Opened for signature on 23 May 1969 and ratified by more than 120 states, Article 30 of the VCLT (*Application of successive treaties relating to the same subject matter*) establishes a set of criteria for addressing treaty antinomy. These general rules are based on three main elements:

1. conflict clauses (*lex superior*),
2. the chronological criterion (*lex posterior*), and
3. the specialty criterion (*lex specialis*).

[5] See in particular H. Aufricht, 'Supersession of Treaties in International law,' 37 *Cornell Law Quarterly* (1952): 682-685; W. Jenks., 'The Conflict of Law-Making Treaties,' 30 *British Yearbook of International Law* (1953): 401-453; W. Karl, 'Conflict between Treaties', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 7 (1984), pp. 468, 472, 473; I. Sinclair, *The Vienna Convention of the Law of the Treaties* (Manchester University Press 1984), pp.94-98; Eric Vranes, '*The Definition of 'Norm Conflict' in International Law and Legal Theory*,' 17 *European Journal of International* Law 2 (2006): 395–418 and J. Klabbers., *Treaty Conflict and the European Union* (Cambridge University Press 2009), pp. 90, 105, 176-230.

[6] G. Binder., 'The Dialectic of Duplicity: Treaty Conflict and Political Contradiction', 34 *Buffalo Law Review* 2 (1985), p.355.

[7] See, particularly, N. Bobbio. *Contribución a la teoría del derecho* (Ediciones Alfons el Magnànim 1990), pp.349-364 (Capítulo XVI. 'Sobre los criterios para resolver las antinomias').

[8] See H.L.A. Hart, *The Concept of Law,* op.cit, ch. V.

9. The VCLT contains provisions relating to the first two,[9] while remaining silent on the latter, which has nonetheless been steadily regarded as part of customary international law in jurisprudence and doctrine.[10] This multilateral convention thus represents a significant rationalization of the general rules on treaty conflict.[11] Prior to its codification in this so-called 'treaty on treaties,'[12] the pre-VCLT situation was described by Schwarzenberger as follows:

> 'Freedom of contract without restriction, or in other words, the absence of any public order on the level of international customary law entails the possibility, if not the likelihood, of conflicts between treaties. Such conflicts can be resolved only by rules which prevent treaty relations from being reduced to a state of creative chaos. International customary law does not entirely lack such rules, but they are overlaid by a remarkable *galaxy of rules* [(emphasis added)].'[13]

10. Today, the resolution of treaty conflicts relies not on a comprehensive set of rules but on a limited set of criteria —hierarchy, temporality, and speciality— within a context where the rules of competence of the international authorities responsible for their application remain predominantly self-referential,[14] thereby perpetuating a measure of indeterminacy from the perspective of general international law. The following sections examine the interrelationship among these criteria and underscore the limitations inherent in the current rules governing treaty antinomy.

IV. The power of conflict clauses

11. In domestic legal systems, the primacy of one source of lawmaking over another is either explicitly predefined or readily inferable.[15] This is not the case, however, in international law. With the sole exception of peremptory norms of general international law,[16] there is no pre-established primacy among the customary sources of international law codified in Article 38 of the Statute of the International Court of Justice (ICJ). The absence of a predetermined hierarchy does not, however, imply the absence of hierarchies.[17] This is particularly true in the case of treaties, as the VCLT recognizes the possibility of establishing formal hierarchies between them in Article 30(2), which regulates so-called 'clauses of conflict':

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[9] Clauses of conflict' and the lex posterior criterion are regulated in Article 30.2 VCLT and Article 30.3 VCLT respectively. For detailed analysis, see International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*–Report of the Study Group, UN Doc. A/CN.4/L.682 (13 April 2006), Section D.2 (p. 128), especially paragraph 252 (on the lex posterior principle and its codification in Article 30 VCLT), and Section D.3 (pp. 135-149), especially paragraphs 267–294 (on conflict clauses and their relationship with general conflict rules)

[10] See i.e. W. Karl, 'Conflict between Treaties', op.cit. p.468.

[11] See the extensive pre-VCLT panoply of criteria compiled by W. Jenks 'The Conflict of Law-Making Treaties', op.cit. pp.401-453.

[12] See R.D. Kearney., and Dalton, R. E., 'The Treaty on Treaties' 64 *American Journal of International Law* (1970): 495–561.

[13] G. Schwarzenberger, *International Law. International Law as Applied by International Courts and Tribunals* (Steven & Son Limited 1957), p.472.

[14] For a general analysis of self-reference see P. Zapatero, 'Self-reference in international law,' *Eunomia* (forthcoming).

[15] N. Bobbio, *Contribución a la Teoría del Derecho* (Fernando Torres 1980), p.353.

[16] See International Law Commission, *Peremptory Norms of General International Law (Jus Cogens): Comments and Observations Received from Governments*, UN Doc. A/CN.4/748, 9 March 2022, pp. 1–30; International Law Commission, *Peremptory norms of general international law (jus cogens): Texts and titles of the draft conclusions and annex adopted by the Drafting Committee on second reading*, UN Doc. A/77/10, ch. V, pp. 13–34 (2022). For a commentary by a former member of the Commission and member of the Drafting Committee on this topic, see Murphy, S. D., 'Peremptory norms of general international law (jus cogens) (revisited) and other topics: The seventy-third session of the International Law Commission,' 117 *American Journal of International Law* 1 (2023): 92–112.

[17] See e.g. E. de Wet, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law', in J. D'Aspremont, S. Besson (dir.), *The Oxford Handbook of the Sources of International Law* (OUP 2017), pp.625-639.

> 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.'

12. In consequence, the relationship between two treaties (treaty X and treaty Y) amounts to one of primacy when such determination is either expressly established in their provisions (*explicit primacy*) or readily inferable through interpretation (*implicit primacy*). In principle, a conflict between two treaties can be resolved with relative ease by a conflict clause (or by two consistent conflict clauses) that establishes a relation of primacy between their respective provisions. In such cases, the criteria of *lex posterior* and *lex specialis* are set aside.[18]

13. Conflict clauses carry significant legal weight,[19] as treaties containing such *self-referential* provisions can determine 'some hierarchical order.'[20] A hierarchical relationship is established by granting primacy to the rules of one treaty over those of another (rule *x* in treaty X versus rule *y* in treaty Y): *"Y takes precedence over X in case of conflict between x and y."* The capacity of these clauses to establish hierarchies has led observers to describe them as having a general "constitutional" character. Among this qualified type of clauses, Article 103 of the UN Charter stands out:

> 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

14. This clause, which establishes the general primacy of the UN Charter across the law of treaties (the so-called 'supremacy clause'),[21] is also reflected in Article 30(1) of the VCLT:

> 'Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.'

15. For this reason, some scholars have described the UN Charter as possessing 'absolute primacy.'[22] The *Encyclopaedia of International Law* formulates the point in the following terms: 'Art. 103 is essential if the Charter is to be recognized as the constitution of the international community, and if this recognition is to be respected in practice. World peace itself may depend on respect for the higher rank and binding force of the Charter as emphasized by Art. 103.'[23]

16. Therefore, treaty negotiators can determine the legal relationship of a given treaty to both existing and future treaties by drafting conflict clauses, provided that such clauses remain compatible with the overarching United Nations Charter. In principle, two basic types of conflict clauses can be distinguished:

[A] ***Conflict clauses granting primacy to the treaty to which they form part:***

(1) Clauses granting primacy to the treaty's own rules over those of earlier treaties.
(2) Clauses granting primacy to the treaty's own rules over those of subsequent treaties.

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[18] See the tables in the following section.

[19] D. Degan, *Sources of International Law* (Martinus Nijhoff 1997), pp.425 y ss.

[20] E. Vierdag, 'The Time of the 'Conclusion', op.cit. p.105

[21] Shelton, 'Normative Hierarchy in International Law,' 100 *American Journal of International Law* 2 (2006), p. 293 and R. Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter', 57 *International and Comparative Law Quarterly* (2008): 583–612.

[22] N. Quoc Dinh / P. Daillier, *Droit International Public* (LGDJ 2022, 9th Edition), p.528 ('primauté absolue de certaines normes conventionnelles').

[23] R. Bernhardt, 'Article 103', in B. Simma (Ed.), *The Charter of the United Nations. A Commentary* (1994) at 1125.

[B] ***Conflict clauses granting primacy to other treaties:***

(3) Clauses granting primacy to the rules of earlier treaties.
(4) Clauses granting primacy to the rules of subsequent treaties.

17. Beyond this basic typology, treaty provisions containing conflict clauses now often include a significant amount of "small print," as the cost and complexity of treaty negotiations have markedly increased in recent decades. Governments rarely operate with fully integrated international agendas. As a result, departments and agencies are highly attentive to how new clauses negotiated by other branches —often pursuing divergent mandates— may affect the policy areas under their administration.[24] The negotiation of such clauses thus frequently becomes a focal point of both domestic and international tension—not only among governmental actors themselves, but also among the various constituencies organized around the public goods and values at stake, such as finance, agriculture, environment, trade, health, and culture.[25]

V. Universe of cases

18. In the absence of conflict clauses, antinomies are resolved by applying the chronological and specialty criteria—*lex posterior* and *lex specialis*. In other words, these criteria come into play only where no clause provides an upfront solution to the treaty conflict. Yet the two criteria do not invariably point to the same outcome. The application of both criteria yields a consistent solution in the case of a conflict between an *earlier general* (EG) treaty and a *later special* (LS) treaty: the primacy of LS. By contrast, no consistent solution emerges in the case of a conflict between an *earlier special* (ES) treaty and a *later general* (LG) treaty: the chronological criterion favours LG, while the specialty criterion favours ES.

19. The general rules on conflict of treaties do not provide a meta-criterion to resolve such cases upfront, since *lex specialis* and *lex posterior* have equal status. There is no general rule determining which criterion should be applied. The problem of conflicting criteria is not confined to international law: legal theory has long considered it, occasionally suggesting that legal systems cannot resolve all antinomies intra-systemically.[26] This situation tends to be referred to in legal theory as a 'conflict of criteria.'[27] In such cases, since the general rules on conflict of treaties do not offer a pre-established solution (incompleteness),[28] additional legal reasoning based on the context of both treaty provisions becomes necessary.[29] Nevertheless, there are further situations in which the general rules of treaty conflict (conflict clauses, *lex posterior*, and *lex specialis*) fail to provide a direct solution to antinomy. Notwithstan-

[24] J. Mus, 'Conflicts Between Treaties in International Law', 45 *Netherlands International Law Review* (1998): 227 and 232.

[25] The negotiation and formulation of conflict clauses in the Cartagena Protocol on Biosafety and the UNESCO Convention on the Diversity of Cultural Expressions are widely recognized as illustrative and paradigmatic examples. For the Cartagena Protocol, see Sabrina Safrin, 'Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements,' 96 *American Journal of International Law* (2002): 606–628 (examining Article 18 and the Protocol's savings clause in relation to WTO obligations) and Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'GMOs and Trade: Issues at Stake in the EC Biotech Dispute,' 13 *Review of European Community & International Environmental Law* (2004): 289–305 (addressing the WTO's approach to the interplay between the Cartagena Protocol and WTO agreements). For the UNESCO Convention, see C. B. Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?,' 9 *Journal of International Economic Law* (2006): 553–574 and 'Tania Voon, 'UNESCO and the WTO: A Clash of Cultures?,' 55 *International & Comparative Law Quarterly* (2007): 635–652 (discussing Article 20's "non-subordination" clause and its tensions with WTO law).

[26] A. Calsamiglia. *Introducción a la Ciencia Jurídica* (Ariel 1996), p.106

[27] N. Bobbio. *Contribución a la teoría del derecho* (Ediciones Alfons el Magnànim 1990), pp.361-364.

[28] See Case 6 (ES attributes ex-post primacy to itself; and LG self-attributes primacy ex-ante) and Case 7 (ES and LG remain silent) in Table A.

[29] See N. MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978); Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Clarendon Press 1989); and Manuel Atienza, *Las razones del Derecho. Teoría de la argumentación jurídica* (Centro de Estudios Constitucionales 1991)

ding that the jurisprudence of the PCIJ and ICJ has appeared to favour *lex specialis*,[30] the universe of cases of treaty antinomy may be summarized as follows:

Table A: ES (Earlier-Special) Treaty vs. LG (Later-General) Treaty

Case 1	ES remains silent; and LG attributes itself ex-ante primacy.	x
Case 2	ES attributes primacy to LG; and LG self-attributes primacy ex-ante.	√
Case 3	ES remains silent; and LG attributes primacy to ES.	√
Case 4	ES attributes ex-post primacy to itself*;* and LG confirms it.	√
Case 5	ES attributes ex-post primacy to itself*;* and LG remains silent.	x
Case 6	ES attributes ex-post primacy to itself; and LG self-attributes primacy ex-ante.	x
Case 7	ES and LG remain silent.	x
Case 8	ES attributes primacy to LG; and LG remains silent.	√

Table B: EG (Earlier-General) Treaty vs. LS (Later-Special) Treaty

Case 9	EG remains silent; and LS attributes itself ex-ante primacy.	x
Case 10	EG attributes primacy to LS; and LS self-attributes primacy ex-ante.	√
Case 11	EG remains silent; and LS attributes primacy to EG.	√
Case 12	EG attributes ex-post primacy to itself*;* and LS confirms it.	√
Case 13	EG attributes ex-post primacy to itself*;* and LS remains silent.	x
Case 14	EG attributes ex-post primacy to itself; and LS self-attributes primacy ex-ante.	x
Case 15	EG and LS remain silent.	x
Case 16	EG attributes primacy to LS; and LS remains silent.	√

20. Logical analysis brings to light inconsistencies in both contradictory assertions and rule conflicts.[31] Part of the universe of treaty antinomy —specifically, those cases marked with a √ in the tables— can be reasonably resolved by jointly applying the criteria of hierarchy, *lex posterior*, and *lex specialis*, and therefore do not require more elaborate legal reasoning. By contrast, the cases marked with an *X* cannot be resolved through the simple application of these criteria. In other words, the three main criteria provide complete solutions only for a subset of treaty conflicts, underscoring that the general rules on treaty conflict remain incomplete.

VI. Blind spots in the law of treaties

21. For decades, deontic logic has demonstrated that the taxonomy of normative conflicts extends beyond mere conflicts of obligations (as illustrated by the deontic square), in contrast to the narrower focus often adopted in international legal scholarship.[32] In any legal system, normative conflicts may arise not only between obligations—for example, where it is logically impossible to fulfill two obligations simultaneously—but also between prohibitions, between permissions, and across the various possible combinations of these normative categories.[33] Such combinations may include, for instance, a

[30] On this case law see W. Czaplinski & G. Danilenko, 'Conflicts of Norms of International Law', op.cit.p.20.

[31] See G. Henrik von Wright, *Norm and Action* (Routledge 1963), pp.130–35 (on deontic logic's role in identifying normative inconsistencies), Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967), p.208 ('The logic of norms is […] a logic of norm-imputation which allows us to determine whether two norms contradict each other.') and Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999), pp.75–78 (framing logic as a tool to expose incompatibilities in practical reasoning).

[32] See i.e. W. Jenks, 'The Conflict of Law-Making, op.cit. p.426 ('a conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its *obligations* under both treaties'.)

[33] See M. Atienza, *Las piezas del derecho. Teoría de los enunciados jurídicos* (Ariel Derecho 1996), pp.91-118.

conflict between an obligation and a prohibition, or between a prohibition and a permission.[34] Although illustrated here with conflicts between norms of conduct, the model applies equally to conflicts between norms of competence (e.g. overlapping jurisdictional clauses).

22. The question of what constitutes a 'conflict' between rules of international law has, as Pauwelyn observes, been largely neglected in the literature; most scholars examining the interplay of rules rarely provide a clear definition.[35] Where it is explicitly defined, however, treaty antinomy is understood in both broad and narrow terms. Among the authoritative voices favouring a more restrictive view of treaty conflict, Jenks distinguished between conflicts *stricto sensu* and mere *divergences*: 'A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties *cannot simultaneously comply with its obligations under both treaties*.' (emphasis added). Even if divergences 'defeat the object of one or both of the divergent instruments,' he did not consider them conflicts, though he acknowledged that such divergences may, for instance, 'prevent a party to both of the divergent instruments from taking advantage of certain provisions of one of them.'[36]

23. Narrow definitions of normative conflict tend to prevail,[37] alongside a presumption against conflict.[38] As a matter of deontic logic, however, adopting a broader definition appears more compelling. Among those opposing the narrow view, Vranes has argued for a wider notion encompassing 'incompatibilities between permissions and obligations, permissions and prohibitions, and obligations and prohibitions.'[39] As this jurist observes, by excluding such 'divergences' from the very notion of conflict, these types of incompatibilities are effectively 'defined away.'[40]

24. Beyond the debate over broad or narrow definitions, the very simplicity of the general rules on treaty conflicts discloses a structural limitation. While these rules may appear comprehensive, their reductive nature casts doubt about their adequacy to address the persistent and multifaceted problems encountered in practice. To paraphrase Sinclair:

> 'Although these rules may appear to be somewhat complicated, their substance is relatively simple. Indeed, it is their very simplicity which may occasion some concern, given the varying types of situations which they are designed to cover.'[41]

This concern is borne out in international legal practice, where several persistent unresolved issues continue to hinder the emergence and effective resolution of treaty conflicts:

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[34] See von G.H.Wright, *Norm and Action* (Routledge 1963), and Chisholm, R., 'Contrary-to-Duty Imperatives and Deontic Logic,' *Analysis* (1963), which extend the discussion of normative conflicts to prohibitions, permissions, and so-called contrary-to-duty obligations. For taxonomies of normative conflicts, see also Ross, A., *On Law and Justice* (University of California Press 1959), pp.128–138, and Alchourrón, C. & Bulygin, E., *Normative Systems* (Springer-Verlag 1971).

[35] See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003), 166, noting that 'the definition of when two norms of international law are in 'conflict' has, surprisingly, attracted little attention. Most authors writing on the topic of interplay or hierarchy of norms do not even provide a definition.'

[36] In fact, Jenks also observes that such a divergence may 'from a practical point of view be as serious as a conflict; it may render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability' See, W. Jenks, 'The Conflict of Law-Making, op.cit. at 426.

[37] See, for example, W. Karl, 'Conflicts between Treaties', in R. Bernhardt (ed.), Encyclopedia of Public International Law, at 936 ('there is a conflict between treaties when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously') or W. Czaplinski and G. Danilenko, 'Conflicts of Norms in International Law', 21 *Netherland Yearbook of International Law* (1990), at 12-13, ('One can speak of the conflict of treaties when one of the treaties obliges party A to take action X, while another stipulates that A should take action Y, and X is incompatible with Y').

[38] See the final section of this article.

[39] E. Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory,' 17 *European Journal of International Law* (2006): 395–418

[40] E. Vranes, 'The Definition of 'Norm Conflict' … op.cit. at 405 and J. Pauwelyn, *Conflict of Norms…* op.cit. at 171.

[41] I. Sinclair, *The Vienna Convention of the Law of the Treaties* (Manchester University Press 1984), p.98 y p.94.

- Issue 1: the incompleteness of the general rules on treaty conflict,
- Issue 2: the distinction of different/same subject-matter,
- Issue 3: the issue of third parties,
- Issue 4: the absence of *general* international organs and procedures to annul (i.e. adjudicative jurisdiction) and derogate (i.e. prescriptive jurisdiction) conflicting treaty provisions (as well as the international rules and decisions emanating from their organs),
- Issue 5: the institutionalization of the international community in selected subject-matter domains (i.e. special treaty-based regimes).

25. Having briefly addressed Issue 1 in the preceding section, it is now appropriate to turn to the remaining issues, beginning with the distinction between 'different' and 'same' subject matter in Article 30 of the Vienna Convention on the Law of Treaties, under the heading *Application of successive treaties relating to the same subject matter*.[42] The issue may be phrased more precisely as follows: does antinomy cease to exist when the contradictory provisions of two treaties are classified as relating to 'different subject matters'? If so, such classification would effectively preclude the application of the general rules on treaty conflict to their provisions, thereby interpreting the antinomy out of existence.[43]

26. By incorporating the notion of *sameness*, the VCLT introduced a challenging distinction that allows antinomies to be sidelined on purely technical grounds, simply by framing them as relating to *different subject matters* in legal reasoning.[44] As Philip Sands observes, however, norms arising in different subject-matter domains can and do in fact touch: they co-mingle and compete.[45]

27. A notable early instance of international legal practitioners substantively engaging with this structural challenge arose in the 1990s, when various constituencies began to address the normative interactions between environmental and trade treaties. Early positions on this interplay fluctuated between: (a) considering the general rules on treaty conflict inoperable for such normative interactions (i.e. conflicts between treaties on different subject matters),[46] (b) resorting to *lex specialis*,[47] or (c) treating any logical inconsistency as sufficient to qualify the provisions as relating to the same subject matter.[48]

28. Recalling Ian Sinclair, the question of 'same subject matter' remains particularly obscure in the general law of treaties.[49] The International Law Commission incorporated the distinction between different and same subject matter only at a late stage in the drafting of the VCLT, and the preparatory work of the Convention sheds little light on this critical term.[50] To argue that no conflict arises simply because two provisions are characterized as regulating 'different' subject matters risks turning the criterion into a device for avoiding antinomies altogether.[51] A *bona fide* interpretation of 'same subject matter' in Article 30 of the VCLT should, if anything, be construed in favor of recognizing sameness rather than

[42] For a useful discussion see G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius 1986), pp.370-372 (discussing when two rules relate to the same subject-matter).

[43] S. Ohlhoff & H. Schloemann, 'Rational Allocation of Disputes and "Constitutionalisation": Forum Choice as an Issue of Competence,' in *Dispute Resolution in the World Trade Organisation* (James Cameron & Karen Campbell eds., 1998) at 316.

[44] See for example H. Aufricht, 'Supersession of Treaties in International Law', 37 *Cornell Law Quarterly* (1952): 655 ('A conflict between an earlier and a later treaty arises if both deal with the same subject matter and if at least one State is party to both treaties').

[45] P. Sands 'Treaty, Custom and the Cross-fertilization of International Law', *Yale Human Rights & Development Law Journal* (1998): 89.

[46] D. Esty, *Greening the GATT* (International Institute for Economics 1994) at 219.

[47] M. Schaefer, 'Non-Identical Yet Twin Challenges for the World Trading System: Further Advancing the Rule of Law and Legitimacy,' XXVI *Proceedings of the Canadian Council on International Law* (1997): 78.

[48] C. Wold. 'Multilateral Environmental Agreements and the GATT', op.cit. p.911.

[49] I. Sinclair, *The Vienna Convention*, op.cit. p.93.

[50] P. Reuter, *Introduction to the Law of the Treaties* (Pinter Publishers 1989), p.102.

[51] This resembles, in effect, the common law practice of *distinguishing* in precedent: it enables adjudicators to reframe conflicts as non-existent. The crucial difference, however, is that here the possibility is built into general treaty law itself, rather than arising from judicial technique.

divergence, so as to preserve the *effet utile* of the provision. In this sense, the notion of sameness in Article 30 arguably requires an extensive interpretation by law-applying bodies, and thus by adjudicators.

29. Beyond these interpretative challenges, the operability of the general rules on treaty conflict is also constrained by structural principles such as *pacta sunt servanda* and, closely related, *pacta tertiis nec nocent nec prosunt* (issue 3, above). The latter embodies the principle that a treaty cannot impose obligations or confer rights upon a state without its consent. Accordingly, a treaty to which a state is not a party cannot deprive it of rights acquired under another treaty to which it is a party. The general rules on treaty conflict therefore apply only to states that are parties to both treaties in conflict.[52] In other words, when State A is bound to State B under Treaty X, and to State C under Treaty Y, the general rules do not apply as between States B and C (AB (X) – AC (Y)).

30. Since few treaties are concluded between a completely identical set of parties, this constitutes a fundamental material limitation on the operation of the general rules governing treaty conflict. In practice, these rules may not always provide straightforward legal solutions but may instead generate complex and at times impractical outcomes regarding international responsibility.[53] Potential claims by affected third states add a further layer of difficulty to the application of the general rules on treaty conflict in international decision-making. The involvement of such third states—whose rights or obligations may be affected by conflicting treaty provisions—not only complicates the application of these rules but also reinforces the prevailing presumption against the existence of treaty conflict in international adjudication.

31. In light of these constraints, a state confronted with two conflicting treaty provisions must pursue at least one of two courses of action to resolve the inconsistency: (a) secure the consent of all parties to modify one of the conflicting treaties, or (b) terminate one of the conflicting treaties. The institutionalization and extensive multilateral reach of many treaties, however, make effective treaty reform particularly difficult. Where neither solution proves viable, the non-compliant state must ultimately decide which treaty provision to infringe, thereby incurring international responsibility vis-à-vis the parties to the treaty it 'chooses' to breach. [54]

32. Having considered the challenges of international responsibility arising from conflicting treaty obligations (issue 3), a distinct set of practical difficulties concerns the application of the general rules on treaty conflict—most notably with respect to derogation and annulment (issue 4). The rules conferring authority to derogate constitute secondary rules of change (i.e. international rules of change), whereas those conferring authority to annul constitute secondary rules of adjudication (i.e. international rules of adjudication). Both types of secondary rules perform the essential function of determining when a norm ceases to be valid within a legal system.

33. *Derogation* typically refers to the determination that a rule has lost its validity as a result of subsequent legislation, whether such determination is made explicitly or implicitly in the later enactments. *Annulment*, by contrast, refers to the determination by an adjudicative body —vested with the relevant authority— that a rule is invalid, thereby removing it from the legal system.

34. With respect to derogation, under a strict application of the law of treaties, the legal authority to modify treaty rules resides collectively in the state parties to the treaty. This authority is exercised

[52] See the formulation on the 'principle of political decision' regarding conflicting treaties involving different parties by J. Klabbers., *Treaty Conflict and the European Union* (Cambridge University Press (2009), pages 90, 105 and 176-230. On strategic uses by states on this situation see S, Ranganathan., *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press 2015).

[53] As Pauwelyn observes, the rules on state responsibility continue to apply in this type of especially problematic conflict, since no conflict rules are available. See J. Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands,' 25 *Michigan Journal of International Law* (2004): 909.

[54] See J. Mus, 'Conflicts Between Treaties in International Law', op.cit. p.227 and W. Karl, 'Conflict between Treaties', op.cit. p.472.

either through the formal amendment procedures established in the treaty itself or through subsequent agreements among the parties designed to produce that legal effect. Because of the considerable costs and complexities associated with renegotiating treaty provisions—particularly in the context of multilateral treaties—states are generally reluctant to embark on such processes except when strictly unavoidable or driven by exceptionally strong political will.[55]

35. With respect to *annulment*, no international tribunal has been explicitly granted adjudicative jurisdiction to annul treaty provisions. This significant limitation applies not only to special adjudicative bodies but also to the general jurisdiction of the International Court of Justice (ICJ): none of these counter-majoritarian institutions have been conferred the power to annul either general or special treaty law. In the limited instances where law-applying bodies have ventured into addressing the existence of an antinomy between treaties, they have merely set aside one of the conflicting provisions. The rule set aside, however, remains formally in force and thus valid.

36. Notably, the VCLT does not address the notion of derogation as a legal consequence of a treaty conflict,[56] nor does the ICJ Statute refer to treaty annulment by judicial determination under such premises. This line of reasoning was most prominently advanced by Hersch Lauterpacht in his 1953 Draft Articles, where he proposed that 'a treaty is void if its performance involves an act which is illegal under international law,' provided that such invalidity is declared by a competent international authority, such as the ICJ.[57] The provision was ultimately abandoned, and this remains a doctrinal proposition only: no examples exist in the practice of the ICJ or other international adjudicative bodies where a treaty has been declared void on this basis. Even Article 53 VCLT, which establishes the invalidity of treaties conflicting with peremptory norms of general international law (*jus cogens*), has never been applied in this sense.[58] In short, the authority to formally derogate from or annul conflicting treaties rests exclusively with the group of states that enacted them; no external institution is vested with such power.

37. Since no straightforward mechanism exists for the formal resolution of treaty antinomies through collective re-negotiation, conflicting rules are often simply *set aside*.[59] Layers of potentially

[55] A notable example is the World Trade Organization's (WTO) adoption of the 2005 Protocol Amending the TRIPS Agreement (WTO Doc. WT/L/641, 6 December 2005), which introduced Article 31bis as a carefully negotiated mechanism to facilitate access to medicines in situations of public health need. This amendment, effective since 23 January 2017 (after receiving the required ratifications from two-thirds of WTO members), permits member states to issue compulsory licenses for producing and exporting generic pharmaceuticals to countries lacking manufacturing capacity, overriding the original Article 31(f) restriction limiting production "predominantly for the domestic market." The change formalizes the 2003 "Paragraph 6 System" waiver (WTO Doc. WT/L/540), enabling low-cost medicine exports to address public health crises in eligible countries. See *Protocol Amending the TRIPS Agreement* (WTO Doc. WT/L/641, 6 December 2005), *Extension of Acceptance Period* (WTO Doc. WT/L/1180, 2022) and the *2003 "Paragraph 6 System" Waiver* (WTO Doc. WT/L/540, 30 August 2003).

[56] The VCLT does not establish a general derogation mechanism for treaty conflicts, nor does it treat derogation as a standard legal consequence when two treaties are in conflict. Instead, the Convention addresses invalidity, termination, and suspension of treaties (Arts. 42–64), and provides conflict-solving criteria such as *lex specialis* and *lex posterior*. The notion of *'derogation'* found in certain specialized regimes—most prominently in human rights treaties (e.g., Art. 15 ECHR; Art. 4 ICCPR)—refers to the temporary suspension of obligations in situations of emergency, and is thus conceptually distinct from derogation in standard legal theory and practice.

[57] See H. Lauterpacht, 'First Report on the Law of Treaties,' 24 March 1953, [1953] II YBILC 90, at 155 (Draft Article 14: 'A treaty is void if its performance involves an act which is illegal under international law') and at 156 (commentary suggesting that such invalidity should be declared by a competent international authority, such as the ICJ), UN Doc. A/CN.4/63.

[58] Article 53 VCLT provides: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' For discussion, see K. Schmalenbach, 'Article 53: Treaties conflicting with a peremptory norm of general international law (*jus cogens*),' in O. Dörr & K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018), at 898 and 925, noting that the practical effect of *jus cogens* on the invalidation of treaties has seldom been tested and that the procedures envisaged for asserting such invalidity have remained largely irrelevant in practice.

[59] Note how the ILC Fragmentation Report deploys the notion of 'setting aside' in its broader examination of institutional practices regarding conflicting norms.

inconsistent treaty law may thus persist, operating as a form of dysfunctional 'dead code' within the broader operative system of international law. In the absence of international adjudicative jurisdiction to annul treaty provisions, the very identification of treaty antinomy poses a significant challenge for the authority of these counter-majoritarian bodies. In this respect, the emergence of antinomy represents a critical stress test for international adjudication. Unlike the routine resolution of antinomies through annulment in domestic judicial systems, international adjudicators frequently treat them as merely apparent and interpret them away. By employing techniques of harmonizing interpretation, they circumvent the need to compel states to renegotiate or amend conflicting treaties, thereby avoiding direct pressure to eliminate inconsistent provisions.

VII. At odds with institutional dimensions

38. Having examined selected conceptual and practical challenges of treaty conflict resolution, attention must now turn to the additional complexities arising from the institutional dimensions of international law. These dimensions further complicate the effective application of the general rules on treaty conflict, which were designed to govern conflicts between treaties themselves rather than the rules and decisions emanated by treaty organs (issue 5). The VCLT acknowledges the relative autonomy of treaty-based regimes constituting formal international organizations vis-à-vis the general law of treaties. This is made explicit in Article 5 of the VCLT (*Treaties constituting international organizations and treaties adopted within an international organization*), which provides that its provisions apply 'without prejudice to any rule of the organization' (emphasis added).

39. In this respect, it is understandable that contradictions between constituent treaties and other treaties are often described as 'conflicts between treaties of different levels,'[60] suggesting implicit hierarchies between constituent treaties and those elaborated within their institutional framework.[61] The difficulty certainly does not arise when treaties are expressly connected through relevant clauses and thus form part of an integrated treaty framework. The real difficulty arises when treaties that establish institutional organs, which in turn generate rules and decisions, come into tension with other treaties, whether or not these possess comparable institutional structures.

40. Unsurprisingly, the entry 'Conflict between treaties' in the *Encyclopaedia of Public International Law* characterizes treaty conflicts as a 'special legal problem.' According to Wolfram Karl, the jurist commissioned for the entry, these cases represent a serious new dimension of the problem of antinomies.[62] As noted, the institutionalization of treaties not only hampers the application of the general rules on treaty conflict but also challenges their very rationale under the current institutional architecture of international law. In this sense, the general rules on treaty conflict fall short of addressing the systemic legal needs arising from special treaty-based regimes.[63]

41. Treaty-based regimes not only establish rules that interact with other special regimes of international law; they also constitute entities that engage directly with other regimes and serve as fora for the exercise of prescriptive and adjudicative jurisdiction, through which governments collaborate in adopting subsequent international rules and decisions. From an analytical standpoint, therefore, three variables must be addressed in order to advance international legal consistency:

[60] H. Aufricht, 'Supersession of Treaties in International law', 37 *Cornell Law Quarterly* (1952): 682-685.

[61] W. Jenks, 'The Conflict of Law-Making Treaties', op.cit.p.440.

[62] W. Karl, 'Conflict between Treaties', op.cit.p.473.

[63] D. Mac Rae, 'The contribution of International Trade Law to the Development of International Law', *Recueil des Cours-Académie de Droit International,* Tome 260, 1996, p.177.

Table 3: basic patterns of treaty interaction.

ISSUE **A**	**Rule**	® (normative interaction)	: *normative* dimension
ISSUE **B**	**Entity**	® (institutional interaction)	*: institutional* dimension
ISSUE **C**	**Forum**	® (jurisdictional interaction)	: *jurisdictional* dimension

42. Treaty-based regimes thus exercise international authority within their respective functional areas along three dimensions —rules, entities, and *fora*— yet there is no effective general procedural integration among them. Put differently, the general regime of international law lacks the procedural and institutional architecture required to integrate special regimes across these dimensions.

43. A clear illustration of this unresolved problem lies in conflicts of international jurisdiction (Issue C), whether prescriptive or adjudicative. Focusing on the latter, conflicts of adjudicative jurisdiction constitute a distinct subcategory of treaty conflicts, since the decisions of international adjudicative bodies are direct legal outcomes of the treaties that establish them. These conflicts may arise as:

– conflicts between the decisions of different treaty bodies,
– conflicts between such decisions and the case law of other bodies, or
– conflicts between the case law of treaty bodies themselves.

44. Addressing this general authority deficit requires comprehensive legal and institutional reform. As Michel Virally observed, such transformation must concern the secondary rules of international law, and to a lesser extent its primary rules.[64] In practice, effective reform would entail clarifying and completing the general secondary rules of change (G2RC) and of adjudication (G2RA), alongside certain general primary rules (G1Rs). Only then could the general regime and its special treaty-based regimes be procedurally integrated into a coherent legal construct—capable of identifying and resolving conflicts between treaty rules and decisions in the ordinary course.

45. Notably, the wording of Article 5 of the Vienna Convention on the Law of Treaties implicitly points to the desirability of general international legislation in this area. Because the Convention provides that the general law of treaties applies "without prejudice to any rule of the organization" (i.e. rules of international institutional law), the potential for overlapping rules and decisions of treaty-based regimes highlights the importance of inter-institutional procedures to ensure consistency in international law.[65]

46. By explicitly providing that its own provisions apply without prejudice to any rule of the organization, the VCLT effectively reinforces functionalism in the form of *regime autonomy*. Since autonomy does not equate to self-containment,[66] it is both reasonable and prudent to advocate the establishment of higher, impartial, and independent international organs and procedures to ensure consistency in the integration of rules and decisions from special regimes with those of the general regime.

47. This is far from an abstract concern. The international legislator—whether conceived as the collective will of sovereign states, the outcome of intergovernmental negotiating processes, or the nor-

[64] M. Virally, 'A propos de la lex ferenda', *Mélanges offerts à Paul Reuter: Le droit international. Unité et diversité* (Pedone 1981), pp. 519-533.

[65] The ILC Study Group on Fragmentation decided to set these issues aside. See ILC Fragmentation Report, op. cit., para. 245, p. 177: 'At the outset, the Commission recognized that fragmentation raises both institutional and substantive problems. The former has to do with the jurisdiction and competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The Commission has decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves.'

[66] The problem with the relationship between the general regime and the special regimes is not whether it exists, but how robust it can be when it lacks general integrated procedures. As Abi-Saab observes, '[h]owever autonomous and particular these may be, there cannot be a totally self-contained regime within the legal order. If the special regime is to remain part of the legal order, some relationship, however tenuous, must subsist between the two. G. Abi-Saab, 'Fragmentation or Unification', op.cit. p.926. See also *ILC Fragmentation Report*, op.cit.

mative output of international organizations—remains inherently fallible. The steady and expanding use of treatymaking has rendered inconsistencies simply inevitable; to suggest otherwise would be difficult to sustain.

48. Nonetheless, formal treaty antinomies seldom emerge explicitly. Paradoxically, they are largely effaced from international decision-making, as state representatives, international officials, and adjudicators within treaty-based regimes employ interpretative techniques to reframe —or interpret away— such conflicts as merely 'apparent,' thereby avoiding the need to confront underlying contradictions directly.

49. State representatives, international officials, and adjudicators tend to be risk-averse when it comes to framing inter-regime issues in adversarial legal terms. Fundamentally, there is neither the political will nor the technocratic incentive to 'uncork that bottle,' particularly given the absence of general international bodies and procedures endowed with the mandate and the institutional capacity to resolve such conflicts. In other words, no general secondary rules of international law establish bodies or procedures with jurisdiction (i.e. prescriptive and/or adjudicative jurisdiction) to address conflicts of rules and/or decisions arising from the institutionalization of the international community.

50. In this procedural void, it is unrealistic to expect treaty-based regimes to identify and resolve conflicts of international rules or decisions[67]—still less to do so in an objective and impartial manner. This situation persists because general international legislation does not provide for bodies or procedures with jurisdiction (i.e. prescriptive and/or adjudicative) to address conflicts of rules and decisions arising from the institutionalization of the international community

51. The absence of procedures to resolve conflicts of jurisdiction between international regimes constitutes a systemic weakness, aggravated by the exclusive authority of international organizations to interpret their constitutive treaties. As Joseph Gold, former General Counsel of the International Monetary Fund, observed: 'If there are few overt disputes about jurisdiction between international organizations, the explanation may be that they consciously forbear from express interpretations of jurisdiction so as to avoid disputes with other organizations.'[68]

52. Inevitably, this institutional configuration is hardly conducive for state representatives, international officials, or adjudicators within treaty-based regimes to engage openly in arguments over legal antinomy. Regime practitioners and experts therefore tend to avoid framing issues as inter-regime legal contradictions and, in analytical terms, refrain from explicitly articulating three fundamental types of conflicts:

1) conflicts between the special primary rules of international law administered by those regimes,
2) conflicts between the output of their special secondary rules of adjudication (decisions), and
3) conflicts between the former and latter.

53. In consequence, any antinomy in public discourse is typically recast as a merely apparent conflict—reframed as divergence, friction, or tension through interpretative techniques—and, if necessary, relegated to the managerial domain of technocratic inter-institutional coordination. As Binder observes, 'international legal institutions have been reluctant to confront the problem of treaty conflict because it raises profound questions about their own legitimacy.'[69] This institutional hesitancy has, in practice, entrenched a pervasive presumption against treaty antinomies—an assumption that has come to underpin key aspects of the architecture of international law, shaping both its practical operation and its doctrinal evolution.

[67] See, e.g., P. Zapatero, in this issue.
[68] See J. Gold, *Interpretation: The IMF and International Law* (Kluwer Law International 1996), pp. 507–508.
[69] See G. Binder, 'The Dialectic of Duplicity', op.cit.p.385.

VIII. A resulting presumption against treaty conflict

54. The emergence and procedural resolution of conflicts between treaty-based regimes —and the multiple international rules and decisions their bodies adopt— should not be regarded as a mere technicality of formalist legal reasoning. Rather, in an increasingly interdependent world, the identification and resolution of international legal inconsistencies represent an essential step, as the coherence of international law is integral to the preservation of the rule of law. However, international legal practice has largely relied on the consolidation of a presumption against treaty conflict, based on the assumption that states, acting in good faith, are not to be regarded as having undertaken mutually incompatible commitments.[70]

55. Against this backdrop, the structural presumption against antinomy in the institutional practice of international law may be understood as a form of technocratic accommodation. Applied across regimes in response to the institutional and procedural fragility of the general regime of international law, it strains the overall consistency of international authority and, by extension, the systemic integrity of international law itself. This situation may carry domestic implications, since international legal rules and decisions are, in principle,[71] incorporated into their legal systems, where they are applied by public administrations and adjudicated by domestic courts and tribunals.

56. In practice, the absence of adequate institutions and procedures for addressing such conflicts reinforces this presumption against antinomy, which in turn diminishes the incentive for states to confront the underlying constitutional deficiency at the global level. Over time, this recursive dynamic risks eroding the consistency of international law and, by extension, may affect the functioning of domestic legal systems through the process of incorporation. At the international level, the tendency to avoid conflicts through interpretation may reduce opportunities for a more explicit balancing of these goods and values, which in some cases could require political decision as well as legal change or reform.

57. More broadly, like any legal system, international law is concerned not only with the settlement of disputes but also with providing a procedural framework to address normative inconsistencies and balance the diverse public goods and values embodied in its international primary rules. In practice, however, such choices remain largely out of reach in the current institutional architecture. Beyond limited practices of inter-institutional coordination, effective mechanisms to achieve these results are lacking, and no general procedural integration operates across treaty-based regimes. Each operates primarily as an intergovernmental, function-oriented proxy within a narrowly defined subject-matter domain, typically designed, composed, and administered by governmental departments whose mandates and sectoral priorities are inherently limited. As a result, international law often remains ill-equipped to ensure a coherent and rational balancing of the global public goods and values it recognizes across its multiple special regimes.

[70] See e.g. C. Rousseau, 'De la compatibilité des normes juridiques contradictoires dans l'ordre international,' 39 *Revue Générale de Droit International Public* (1932): 153; Hersch Lauterpacht, *Second Report on the Law of Treaties* (A/CN.4/87), in *YILC* (1954) Vol. II: 123, at 137-8; H. Aufricht, "Supersession of Treaties, op.cit, p.657; W. Jenks, 'The Conflict of Law-Making, op.cit. pp. 427–429; W. Karl, 'Conflicts, op.cit. pp. 467–470; Christopher Borgen, 'Resolving Treaty Conflicts,' 37 *George Washington International Law Review* 37 (2005): 605 and 635 and Joost Pauwelyn, 'Fragmentation of International Law', *Max Planck Encyclopedia of Public International Law*, para. 37.

[71] Under international law, the manner in which a state gives effect to its obligations is a matter of domestic concern; yet a state may not invoke internal law as justification for non-performance (Article 27 VCLT). Increasingly detailed treaty provisions and subsequent institutional decisions, however, narrow the discretion states retain in giving effect to such obligations.